



# SILENCING THE GUNS IN AFRICA

**On the human rights and peace and  
security nexus with a special focus  
on Women, Peace and Security**

THE SWEDISH FOUNDATION  
FOR HUMAN RIGHTS

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with a special focus on Women, Peace and Security

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## GLOSSARY

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Commission on Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
AGA	African Governance Architecture
AMIB	African Union Mission in Burundi
APF	African Peace Facility
APSA	African Peace and Security Architecture
ASF	African Standby Force
AU	African Union
AUC	African Union Commission
AUCISS	African Union Commission of Inquiry on South Sudan
CEWS	Continental Early Warning System
CSO	Civil Society Organization
COMESA	Common Market for Eastern and Southern Africa
DPA	Department of Political Affairs, African Union Commission
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
HCSS	Hybrid Court for South Sudan
ICC	International Criminal Court
IDP	Internally Displaced Person
IGAD	Intergovernmental Authority for Development
LRA	Lord's Resistance Army
OAU	Organisation of African Unity
PSC	African Union Peace and Security Council
PSD	Peace and Security Department, African Union Commission
PSO	Peace and Security Operation
RECs	Regional Economic Communities
RM	Regional Mechanisms
SADC	Southern African Development Community
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights
WPS	Women, Peace and Security

## CONTENT

<b>Glossary</b> .....	4
<b>Executive summary</b> .....	8
<b>Introduction</b> .....	11
<b>Method and delimitations</b> .....	13
Method.....	13
Delimitations.....	13
<b>African Union</b> .....	14
African Peace and Security Architecture .....	14
African Governance Architecture .....	21
Women Peace and Security Agenda .....	22
Transitional Justice .....	26
<b>Legal framework</b> .....	28
African Charter on Human and Peoples' Rights.....	28
Maputo Protocol and the Solemn Declaration.....	30
African Charter on the Rights and Welfare of the Child.....	37
Conclusion.....	38
<b>Role played by the African Human Rights System</b> .....	40
African Commission on Human and Peoples' Rights.....	40
African Court on Human and Peoples' Rights.....	51
African Committee of Experts on the Rights and Welfare of the Child .....	57
Comparison of the Regional Human Rights Bodies.....	65
<b>Investigations of Human Rights Situations from a WPS Perspective</b> ...	70
Case Study: Burundi .....	71
<b>Concluding analysis and recommendations</b> .....	78
What role does the African regional human rights system play for peace and security today?.....	79
Could and should the African human rights system play a more important role? .....	85
Recommendations.....	87
<b>References</b> .....	90

*”The Peace and Security Council shall seek close cooperation with the African Commission on Human and Peoples’ Rights in all matters relevant to its objectives and mandates. The Commission on Human and Peoples’ Rights shall bring to the attention of the Peace and Security Council any information relevant to the objectives and mandate of the Peace and Security Council.”*

Protocol Establishing the African Union Peace and Security Council, article 19

## EXECUTIVE SUMMARY

The present study elaborates on the nexus between human rights and peace and security, departing from the role played by the regional human rights systems. A special focus is devoted to the Women, Peace and Security (WPS) Agenda. The report, studying the African human rights system, is the first in a series to come, examining the role of the different regional human rights systems in relation to the nexus between human rights and peace and security. The next system up for examination will be the Inter-American.

Examining the regional normative framework, the study finds well-grounded normative foundations both for peace and security in general and for the WPS Agenda. In fact, both the African Charter on Human and Peoples' Rights and its Protocol on the Rights of Women in Africa (Maputo Protocol) provide for the right to peace. Additionally, the Maputo Protocol is well aligned with and supportive of the WPS Agenda. As for the African Charter on the Rights and Welfare of the Child (Children's Charter), no explicit right to peace is provided, instead the Children's Charter is focusing on the right for children not to participate in armed conflict and the protection of children in armed conflict, tension and strife. The normative framework in various respects is more advanced concerning rights in armed conflict than the United Nations (UN) human rights instruments.

The regional human rights system counts a wide array of tools for contributing to peace and security in Africa. Over the years, quite a few contributions have been made, including judgements by the African Court on Human and Peoples' Rights (the Court), decisions regarding complaints on behalf of the African Commission on Human and Peoples' Rights (ACHPR) and the Committee of Experts on the Rights and Welfare of the Child (ACERWC) as well as country-specific and thematic recommendations and urgent appeals. Additionally, the three bodies have also produced policy advice and studies such as the ACHPR "Addressing human rights in conflict situations" and the "Study on transitional justice

and human and peoples' rights in Africa" as well as the ACERWC "Continental study on the impact of conflict and crises on children in Africa", among others.

However, the regional human rights system faces challenges when it comes to financial resources, adequate staffing and permanent premises, seriously affecting its reach and performance. In recent years the system has also suffered attacks by African Union (AU) Member States, infringing upon the independence and autonomy of its institutions. Added to this is the chronic and utterly low level of State compliance with regional instruments, reporting procedures and implementation of recommendations and decisions. For the system to work it needs State support and compliance – political will must be shown in practice beyond documents and declarations. The overall implementation rate of AU decisions must skyrocket.

The regional human rights system has also work to do in institutionalising cooperation between its three bodies, working as *one system*. Beyond the system itself, cooperation with other parts of the AU, such as the Peace and Security Council (PSC), would be important to develop further in order to make use of the system's potential to contribute to peace and security at all stages. There are efforts in this direction which also are supported normatively as the Protocol establishing the PSC in its article 19 calls on the PSC to work closely with the ACHPR. The Protocol also underscores the nexus between peace and security and human rights. The powers of the PSC include the role to anticipate and prevent disputes and conflicts, as well as policies that may lead to genocide and crimes against humanity; to make recommendations to the AU Assembly on the possible intervention in respect of grave circumstances (war crimes, genocide and crimes against humanity); follow-up on – as a measure of conflict prevention – the progress on democratic practices, good governance, rule of law and protection of human rights and international humanitarian law. Here, coordination between the PSC and the regional human rights system would contribute to efficiency as there is a certain overlap in mandates.

The effective use of the regional human rights system as an expert resource in relation to AU work on peace and security would be welcome.

The system could also, through the use of the Maputo Protocol, work in favour of the implementation of the WPS Agenda. More and more States count with national WPS implementation plans but as shown in the 2016 “Implementation of the Women, Peace and Security Agenda in Africa” by the Office of the Special Envoy on Women, Peace and Security, implementation is slow and insufficient.

The study finds a considerable potential in making practice of the nexus between human rights and peace and security through the effective coordination between the different AU institutions and the effective use of the regional human rights system in the quest for peace and security. However, crucial for this to happen and for having a real and effective impact on the ground throughout the continent, is the political support and commitment by Member States. A series of recommendations directed at different stakeholders is made with a view to break down silos, encourage the African Union to work as *one system* and support the nexus between human rights and peace and security.

## INTRODUCTION

The nexus between human rights and peace and security occupies a central position in the work of the Swedish Foundation for Human Rights (SFHR) as one of its pillars is the redress for grave human rights violations and transitional justice. In line with this mandate, the SFHR in 2018 conducted a study on the nexus between human rights and peace and security in Swedish development cooperation – examining policy documents and strategies.<sup>1</sup> Following many years of interaction with the regional systems for human rights in Africa and the Americas, a publication explaining the central characteristics of the two systems was published in 2017. The present study is a continuation of this work – taking stock of accumulated experience – combining the role of human rights for peace and security and the role of regional human rights systems. This is the first of a series of studies to come, examining the role of the different regional human rights systems for peace and security. The next to be studied is the Inter-American system.

Focusing on the African regional human rights system and the African Union (AU) in 2020 is timely for a number of reasons. The AU theme of the year is “Silencing the guns”. This as unfortunately the original campaign “Silencing the guns by 2020” at least partly failed and an extra effort is done to boost the agenda. 2020 is also the last year of a number of other related initiatives including the AU Women’s Decade, the AU Gender Peace and Security Programme (2015-2020) and the African Peace and Security Architecture Roadmap (2015-2020). Additionally, 2020 marks the 30<sup>th</sup> anniversary of the Children’s Charter.

At the global level it coincides with the UN Peacebuilding Architecture Review which will be submitted to the General Assembly and the Security Council in 2020. This while 2020 also is set to be an important year for gender equality as it marks the 20<sup>th</sup> anniversary of the adoption of the United Nations Security Council Resolution 1325 (UNSCR 1325) which champions women’s involvement in peace and security. It also marks the

25<sup>th</sup> anniversary of the Beijing platform for action – a major breakthrough for gender equality. These events set a framework for the evaluation of State’s performance and put gender equality and the Women, Peace and Security Agenda in the spotlight. Also, as a positive development, in 2019 the Global Alliance of Regional Women Mediator Networks, was launched at the UN General Assembly. Additionally, in May 2020, the UN Secretary General will report on the progress made by UN Member States, regional organisations, civil society and youth-led organisations, on increasing youth inclusion in peacebuilding.

In a wider perspective the Agenda 2030 through its Sustainable Development Goal 16 “Peace, justice and strong institutions” makes for a clear nexus between human rights and peace and security. Also, looking at the AU sister-instrument – Agenda 2063 “The Africa we want” – in its Goals of its Aspirations three, four and six, makes the nexus between human rights, justice, rule of law, peace and security and gender equality.

Hopefully this study brings some important contributions to breaking the silos between human rights and peace and security that can be found in Africa – looking at solutions and best practice that can be found in the continent as well as the challenges faced.

The full enjoyment of human rights without peace is as unthinkable as the full enjoyment of peace without human rights.

## METHOD AND DELIMITATIONS

### Method

The study was undertaken by means of analysing primary and secondary written sources on the subject matter. A first range of interviews with relevant stakeholders were made as a second step to further orient the study – these interviews were made by phone. After this, the major part of writing took place. As a last step, before the final drafting of the report and its conclusions, interviews with relevant stakeholders were made face-to-face in Addis Ababa. For a complete list of interviewees please refer to the list of sources.

### Delimitations

The mandate of the AU on peace and security as well as human rights, is shared with the UN. While the two institutions generally collaborate in their responses to conflict situations in Africa, the UN bears the primary responsibility for the maintenance of international peace and security. This relationship is relevant to the report matter. However, due to the necessity of delimiting the study to a doable approach, the intersection between the UN and the AU is not studied in detail. This also goes for the role of the Regional Economic Commissions (RECs) and the Regional Mechanisms (RMs) which are important building blocks for peace and security efforts at the sub-regional level as well as the follow-up on and implementation of any AU instrument or decision.

## AFRICAN UNION

In the present chapter, the different mechanisms, policy documents and norms making up the AU peace and security “ecosystem” will be presented. This in order for the reader and for the study to map and understand the structure in which the regional system for human rights has to operate for its contributions to peace and security on the continent.

### **African Peace and Security Architecture**

The African Peace and Security Architecture (APSA) is the umbrella term for the key AU mechanisms for promoting peace, security and stability in the African continent. The centrepiece of APSA is the African Union Peace and Security Council (PSC). The PSC is supported by the African Union Commission (AUC), the Panel of the Wise, the Continental Early Warning System (CEWS), the African Standby Force (ASF) and the Peace Fund. These institutions are mandated under the PSC Protocol and are APSA pillars. Additional components of APSA are the Military Staff Committee, a subsidiary body of the PSC, and the Regional Mechanisms for Conflict Prevention, Management and Resolution.

Collaboration between the AU and the Regional Economic Communities (RECs) and Regional Mechanisms (RMs) on peace and security matters is guided by the Memorandum of Understanding (MoU) on Cooperation in the Area of Peace and Security between the AU and RECs signed in 2008.

### ***Peace and Security Council***

The African Union Peace and Security Council is a standing decision-making body of the African Union for the prevention, management and resolution of conflicts as well as an early warning mechanism intended to facilitate timely and efficient responses to conflict and crisis in Africa. The protocol for the establishment of the PSC entered into force in December 2003 and the PSC became fully operational in early 2004. The PSC Protocol and Rules of Procedure together with the AU Constitutive Act and the conclusions from PSC retreats provides the framework for operational guidance.

Under article 7 of the PSC Protocol, the powers of the PSC, in conjunction with the Chairperson of the Commission, include to:

- Anticipate and prevent disputes and conflicts, as well as policies, which may lead to genocide and crimes against humanity.
- Undertake peacebuilding and peacebuilding functions to resolve conflicts where they have occurred.
- Authorise the mounting and deployment of peace support missions, and lay down general guidelines for the conduct of such missions including their mandate.
- Recommend to the Assembly, pursuant to article 4(h) of the AU Constitutive Act, intervention, on behalf of the Union, in a Member State in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity as defined in relevant international instruments.
- Institute sanctions whenever an unconstitutional change of government takes place in a Member State.
- Promote harmonisation and coordination of efforts between the regional mechanisms and the AU in the promotion of peace, security and stability in Africa.
- Follow-up promotion of democratic practices, good governance, the rule of law, protection of human rights and fundamental freedoms, and respect for the sanctity of human life and international humanitarian law.
- Support and facilitate humanitarian action in situations of armed conflicts or major natural disasters.

The PSC has fifteen members with equal voting powers. All members are elected by the AU Executive Council and endorsed by the AU Assembly during its ordinary sessions. Ten members are elected to serve for two-year terms while five members are elected to serve for three-year terms in order to ensure continuity. While there are no permanent members, the PSC Protocol does not prevent any PSC Member State from seeking immediate re-election. In electing members of the

PSC, the AU Assembly applies the principle of equitable regional representation.

The PSC meets in continuous session and all members are required to keep a permanent presence at AU Headquarters. Meetings can be held at three levels: permanent representatives, ministers or Heads of State and Government. The PSC Secretariat provides technical and operational support to the PSC, and is housed within the Peace and Security Department at the AU Headquarters.

PSC decisions are adopted using the principle of consensus. Where consensus is not possible, decisions on procedural matters are taken by a simple majority, and on substantive matters by a two-thirds majority. Any Member State that is party to a conflict or situation under consideration by the PSC may be invited to attend a PSC meeting but does not participate in the discussion and decision-making process relating to that particular conflict or situation.

The PSC's provisional agenda is determined by the chairperson of the month on the basis of proposals from the Chairperson of the AU Commission and Member States. The Chairperson of the Commission may bring to the PSC's attention any matter that may threaten peace, security and stability on the continent, and may request briefings from PSC committees and other AU organs and institutions. The inclusion of any item on the provisional agenda may not be opposed by any Member State.

There is currently one so called High Level Panel active – the AU High-Level Implementation Panel for Sudan and South Sudan – which was established in 2009. The panel is mandated to facilitate negotiations relating to South Sudan's independence from Sudan including security, citizenship, assets and the common border.

### ***Panel of the Wise***

Article 11 of the Protocol establishing the PSC set up a five-person

panel of “highly respected African personalities from various segments of society who have made outstanding contributions to the cause of peace, security and development on the continent” with the task “to support the efforts of the PSC and those of the Chairperson of the Commission, particularly in the area of conflict prevention”. The five members are appointed by the AU assembly on the recommendation of the Chairperson of the Commission. The mandate of the panel is to:

- Support and advise the Chairperson of the Commission and the PSC in the area of conflict prevention.
- Advise the Commission and the AU Executive Council on issues such as impunity, justice and reconciliation, and the impact on women, children, and the most vulnerable in armed conflict.
- Use its good offices to carry out conflict mediation and broker peace agreements between warring parties.
- Help the Commission in mapping out threats to peace and security by providing regular advice and analysis, and the impact on women, children, and the most vulnerable in armed conflict.

The Panel has over the years focused on preventive diplomacy missions, in particular to countries undergoing election processes. In these missions, Panel members provide advice, open channels of communication, carry out fact-finding missions, undertake shuttle diplomacy and promote the adoption of confidence-building measures, among others. The RECs have developed corresponding structures to the AU Panel of the Wise.

### ***Pan-African Network of the Wise***

The Pan-African Network of the Wise (PanWise) was established through a decision of the AU Assembly in 2013. The umbrella network brings together mediation actors and mechanisms with complementary responsibilities, such as the Panel of the Wise, AU High-Level Representatives and Special Envoys, Friends of the Panel of the Wise, Common Market for Eastern and Southern Africa

(COMESA) Committee of Elders, Economic Community of West African States (ECOWAS) Panel of the Elders, Southern African Development Community (SADC) Panel of the Wise, Regional Economic Communities' mechanisms, insiders' mediators and African and international mediators working in Africa.

### ***Network of African Women in Conflict Prevention and Mediation – FemWise Africa***

FemWise Africa is a network of African women in conflict prevention and mediation. It was officially established by AU Assembly decision in 2017. The network brings together women with various backgrounds, professional experiences and expertise from Africa who are or have been engaged in Track 1, 2 and/or 3 (official, unofficial and individual) mediation, conflict prevention and activities to enhance social cohesion on the continent. The network provides a platform for strategic advocacy, capacity building and networking aimed at actualising the commitment of women's inclusion in peacebuilding in Africa. It encourages the promotion of women in conflict resolution, from a leadership to grassroots level, and aims to contribute to gender-sensitive and inclusive approaches to mediation and conflict prevention. The network is located within APSA and is a subsidiary mechanism of the Panel of the Wise. The Secretariat is located within the Peace and Security Department. A steering committee provides strategic guidance to the Secretariat, provides reflection on the activities of the network, and reviews and approves membership accreditation applications. In 2018, the network launched a call for applications from African women on the continent and from the diaspora, and accredited more than 100 African women as new members.

### ***Continental Early Warning System***

The Continental Early Warning System (CEWS) was established in line with the PSC Protocol, article 12, as one of the pillars of APSA. The main objective of CEWS is to anticipate and prevent conflicts

on the continent, and to provide timely information about evolving violent conflicts. CEWS consists of the Situation Room, located in the Peace and Security Department and Observation and Monitoring Centres of the Regional Economic Communities.

The Situation Room, which is the hub of CEWS, operates 24/7. Its main task is information monitoring and data collection on simmering, potential, actual and post-conflict initiatives and activities in Africa. The Situation Room monitors and reports information in order to facilitate timely and informed decision-making.

The PSC Protocol, article 12, also provides for coordination and collaboration with international organisations, research centres, academic institutions and non-governmental organisations (NGOs) to facilitate the functioning of CEWS. The Framework for the Operationalisation of CEWS, adopted by the Executive Council in 2007, stresses the importance of collaboration with civil society organisations (CSOs) and conflict prevention as a prerequisite to achieving peace, security and stability in Africa. The CEWS is fuelled by the reports of about 500 data collectors across the continent.

### ***Peace Support Operations***

The Protocol Relating to the Establishment of the Peace and Security Council provides for Peace Support Operations (PSOs) to be a function and tool of the Council. The AU Commission's Peace Support Operations Division (PSOD), also referred to as the African Standby Force Continental Planning Element, is based within the Commission's Peace and Security Department. Nine AU-mandated PSOs have been deployed since 2003, as well as four AU-authorized missions.

Peace Support Operations	Mandate
AU Mission in Somalia (AMISOM)	2007 -
AU/UN Mission in Darfur (UNAMID)	2007 -
Regional Cooperation Initiative for the Elimination of the Lord's Resistance Army (RCI-LRA)	2011 -
AU Deployed Human rights Observers and Military Experts in Burundi	2015 -
Multinational Joint Task Force against Boko Haram	2015 -
G5 Sahel Joint Force	2017 -
International Support Mission in Central African Republic (MISCA) <sup>2</sup>	2013 - 2014
International Support Mission in Mali (AFISMA) <sup>3</sup>	2013 - 2013
AU Electoral and Security Assistance Mission to the Comoros (MAES)	2007 - 2008
AU Mission for Support to the Elections in Comoros (AMISEC)	2006 - 2006
AU Mission Democracy in Comoros	2008 - 2008
AU Mission in Sudan (AMIS) <sup>4</sup>	2004 - 2007
AU Mission in Burundi (AMIB) <sup>5</sup>	2003 - 2004

### ***African Capacity for Immediate Response to Crisis***

In 2013, pending the African Standby Force (ASF) becoming fully operational, the AU Assembly established the African Capacity for Immediate Response to Crises (ACIRC) as an interim mechanism for immediate response to crises. ACIRC is made up of two brigade-size forces. The purpose of ACIRC is to provide the AU with a flexible and robust force, voluntarily provided by Member States, to effectively respond to emergency situations within the African Peace and Security Architecture framework. This force's rapid deployment can be authorised by the PSC on request by an AU Member State, and is self-reliant in terms of sustainment.

### ***APSA Roadmap 2015–2020***

The APSA Roadmap 2015–2020 is a continuation of previous roadmaps, laying out the strategic direction for the period. While the Roadmap includes human rights and WPS as “cross-cutting” issues, they tend to play

a marginal role in the document. In the Foreword, the AU Commissioner for Peace and Security highlights the importance of the “nexus between peace, security and development” while leaving out human rights and mentioning gender-mainstreaming as a cross-cutting issue<sup>6</sup>. The importance of the cross-cutters is mentioned in the different sections of the document but no mention is made of the regional human rights bodies. This might be natural – considering that they are not a formal part of the APSA – but still noteworthy as they are key human rights actors and AU organs.

### ***Evaluation of APSA Impact***

The yearly “APSA Impact Report” published by the Institute for Peace and Security of the Addis Ababa University found that in 2017 out of the fifty-two violent conflicts at the time, the AU and the RECs had intervened in twenty-seven. They were more likely to intervene in high-intensity conflicts and focused on conflict-management rather than preventive diplomacy and mediation. In other words, its approach was more of fire-fighting than conflict prevention and addressing the underlying drivers of insecurity. The report holds that “There is need to demonstrate greater urgency and readiness to undertake practical conflict prevention through quick action, dedicated resources and engagement focused on addressing the structural causes of violence in Africa.”<sup>8</sup>

### ***African Governance Architecture***

The African Governance Architecture (AGA) is to support the functioning of the APSA. The AGA functions as the normative and institutional framework for advancing democracy, good governance and human rights. The AU Commission established AGA as a platform for dialogue between the various stakeholders who are mandated to promote good governance and strengthen democracy in Africa, in addition to translating the objectives of the legal and policy pronouncements in the “AU Shared Values.”<sup>9</sup>

AGA was created primarily to coordinate efforts and ensure synergy between various initiatives aimed at deepening a culture of democratic governance, respect of human rights and effective humanitarian assistance. In this regard, AGA works through members of its platform consisting of AU organs and RECs with a mandate on governance, democracy, human rights and humanitarian affairs and harmonise shared values instruments. Among the members of the platform are the African Commission on Human and Peoples' Rights (ACHPR), the African Court on Human and Peoples' Rights (the Court) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) as well as the Regional Economic Communities and the PSC.

The AGA complements its sister architecture, the APSA, considering that without peace, much of the efforts to establish democratic governance will fail, and vice versa. AGA thus seeks to facilitate joint engagement and deepen its coordination with APSA. Particular areas of convergence include the areas of preventive diplomacy, conflict prevention and post-conflict as well as reconstruction and development.<sup>10</sup> A coming development in this area which might be conducive for cooperation between the two "Architectures" on peace and security and governance (APSA and AGA) is the planned merging of the AU Peace and Security Department and the Department of Political Affairs.

### **Women Peace and Security Agenda**

African feminist organisations were deeply involved in pushing for the first Women, Peace and Security (WPS) resolution – resolution 1325 – introducing African regional perspectives and placing the issues onto the agenda of the UN Security Council. Also within the framework of the AU, the WPS agenda has been the focus of various initiatives including the Sixth African Development Forum in 2008, the African Women's Decade 2010-2020, the AU Gender Policy and the adoption of the Maputo Protocol (2003) and the AU Solemn Declaration on Gender Equality in Africa (2004).

In addition to this, civil society has also organised various advocacy campaigns. An important example being the Gender is My Agenda Campaign – a network of over fifty-five civil society organisations promoting gender equality and accountability for women's rights. It was established during the transformation of OAU to ensure women were part of, and benefited from, the transformation process. Since it was officially launched in 2002 the network holds bi-annual CSOs meeting at the margins of the AU Summit of Head of States and Governments to engage AU Member States on African women rights, issues, and concerns. The network further monitors Member States commitments as outlined in relevant legal instruments with a particular reference to the Solemn Declaration on Gender Equality in Africa by closely working with the AU.

Although the AU does not have a formal WPS regional action plan, the AU Gender Policy is considered the default regional action plan as it sets out the continental agenda. Since 2002 the Women Gender and Development Directorate works to integrate, support, implement and develop mechanisms to mainstream gender awareness across AU structures. The PSC itself has also instituted a practice of an annual open session on the WPS agenda. Additionally, the creation of the AU Special Envoy for WPS is crucial for the follow-up on the agenda. The Special Envoy provides support in the institutionalisation of the WPS agenda within and outside the AU. The Special Envoy monitors progress on the implementation of the agenda with a focus on AU structures, Member States, RECs and RMs, including support to the development of national- and regional action plans. The Special Envoy also engages directly at the national- and regional levels including supporting participation efforts. One example of this is the case of the Central African Republic where she supported women's participation in peace-making, peace-building and reconstruction.

While national action plans constitute a tool and incentive for the implementation of the WPS agenda, most observers would agree that

they themselves are not enough to solve for example the persistent problem of conflict-related sexual violence – a focus area for AU WPS practice. AU has in fact been criticised for not having a comprehensive conduct and discipline policy for its own peacekeeping forces and for not having an independent investigative mechanism in these cases. In various cases, members of AU peacekeeping missions have been found to engage in sexual exploitation and abuse, including in Somalia (AMISOM) and the Central African Republic (MISCA). It is also worth noting that recruiting women into military ranks is still at a low level and that the all women police units deployed by the UN do not have an AU equivalent.<sup>11</sup>

### ***Study on the implementation of the WPS agenda in Africa***

In 2016 the AU launched a regional study on the implementation of the WPS agenda, prepared by the office of the Special Envoy. The initiative emanated from a decision of the PSC 476<sup>th</sup> meeting in December 2014 urging the Special Envoy to elaborate a Continental Results Framework to monitor the implementation of WPS in Africa. The process coincided with the 15<sup>th</sup> anniversary of the UNSCR 1325 in 2015 and the launch of the High Level Review and Global Study on the Implementation of 1325. This was also a period when the UN Security Council adopted UNSCR 2242 which underlines the important role of regional organisations in driving the WPS agenda. Among the Regional Economic Communities and Regional Mechanisms in Africa, ECOWAS, IGAD and EAC have adopted 1325 regional action plans.

The study concluded that even though progress had been registered, the bulk of progress had been made in terms of process, while implementation, impact and monitoring had been weak. The report highlights the low level of State compliance, as only three States had reported on the Maputo protocol, drawing the conclusion that increased accountability is essential for enhanced implementation. Although this figure was up to thirteen in 2019, it still means that seventy-eighth percent of State Parties to the Maputo Protocol are still to submit their initial report.<sup>12</sup>

Looking at the African Union itself, the study found that at the time of research, in terms of participation, only one out of twenty Special Representatives and Envoys was a woman – the one on WPS. This while four out of eleven heads of AU country offices/missions were women. In contrast, the composition of the Panel of the Wise showed a favourable three out of five women share at the time. The report also lists a number of initiatives to boost participation, prevention and protection within the realm of the AU, among them the inclusion of WPS in the AU Commissions of Inquiry. However, when moving on to analysing the challenges to implementation, focus is on challenges met at the country level – not so much at the AU or regional levels. Among the opportunities identified are the peace and security partnership between the UN and the AU and also the Agenda 2063 and Silencing the Guns by 2020. This while also highlighting the AU Commission Gender, Peace and Security Program (2015-2020) supporting gender mainstreaming across the APSA through a network of gender focal points. It further supports the elaboration of gender-sensitive economic recovery strategies for post-conflict countries as well as the engagement of women in dialogue processes and women's networks.<sup>13</sup>

The study concludes that the gains made in member States are predominantly linked to legal and institutional measures with some progress in practice and impact for women. There has been a significant push to ensure gender-sensitive constitutions and gender equality provisions in national law and policy. However, the situation on the ground shows persisting high rates of violence against women and girls in conflict situations and post-conflict settings as well as poor access to justice, extremely low rates of women's participation in peace processes and political settlements as well as weak support in favour of women's economic recovery and empowerment.<sup>14</sup>

### ***PSC declarations in favour of the WPS-agenda***

Apart from inciting the continental study and results framework on WPS, the PSC has pronounced strong support in favour of the WPS agenda and State responsibility. Here an example of these pronouncements:

*“Council noted with concern the continuing violence against women and girls in conflict and crisis situations, as well as in post-conflict settings and inadequate access to justice. Council further noted the low levels of participation of women in a variety of official roles in formal peace processes and political settlements, weak support to women’s economic recovery and empowerment in post-conflict settings, and called on AU Member States to redouble their efforts to ensure that their national laws match the provisions of UNSC Resolution 1325, AU and other international instruments that protect the rights of women and children. [...] Council stressed the need to ensure that post-conflict reconstruction and peace-building efforts include well-resourced gender programming which focuses on psycho-social recovery, as well as women’s economic empowerment. Council called for the implementation of the international commitment to ensure that 15 percent of peace-building funds go to projects that promote gender equality. Council urged all Member States, that have not yet done so, to sign and ratify, without any further delay, the relevant AU instruments”.*<sup>15</sup>

### **Transitional Justice**

While it is probably safe to argue that the African regional human rights system has not been as marked by transitional justice as compared to the Inter-American system, there is certainly no lack of opportunities and needs for transitional justice on the continent. And many processes, including within the regional system, ad-hoc tribunals and truth commissions add valuable experience to the field. In 2019, the AU Commission adopted a Transitional Justice Policy, while in the same year the ACHPR published a study on Transitional Justice.

The Transitional Justice Policy is a rather flexible instrument, laying out the conventional transitional justice mechanisms as well as the ones applied in different processes in Africa, making emphasis on the adaptation of the transitional justice framework to the specific context. When it comes to the role of the regional human rights system, the three bodies are mentioned as “Key AU organs and institutions to provide leadership

in the implementation”.<sup>16</sup> However, no further analysis of their role is provided. Throughout the document though, provisions of the central regional human rights instruments are a central ingredient. As for its relation to WPS, the Policy includes women and girls as a cross-cutting issue in the design of and implementation of transitional justice processes. It makes normative references to the Maputo Protocol, but does not mention the WPS agenda, although throughout the document the pillars of the latter are well covered.

The study made by the ACHPR is a comprehensive study on the history of transitional justice in Africa, the normative framework – including the Maputo Protocol, the mechanisms at disposal of the regional system, contributions made by the regional system, and a suggestion for a systematic approach of the ACHPR to transitional justice. In its suggestion it takes an African Charter-based approach to transitional justice and outlines how to integrate transitional justice across all ACHPR work streams. The report also includes an analysis on gender and transitional justice, making reference to past experiences on the continent, the Maputo Protocol and UNSCR 1325. In conjunction with their study “Addressing human rights issues in conflict situations” – analysed below – it makes for an important contribution as to the role that can be played by the regional human rights system in the quest for peace and security.<sup>17</sup>

## LEGAL FRAMEWORK

The African Charter on Human and Peoples' Rights and its Protocol on the Rights of Women in Africa – the Maputo Protocol – are the only international human rights treaties to recognise the right to peace. In the following, a short analysis of four of the most important regional human rights instruments for peace and security and for the Women, Peace and Security Agenda: the African Charter on Human and Peoples Rights, the Protocol on the Rights of Women in Africa, the Solemn Declaration on Gender Equality in Africa, and the African Charter on the Rights and Welfare of the Child.

### **African Charter on Human and Peoples' Rights**

Adopted in 1981, the African Charter on Human and Peoples' Rights (the Charter) provides a coherent framework for human rights on the African continent. It entered into force in 1986 and has been ratified by all 55 Member States except Morocco.<sup>18</sup> Its legally binding provisions have proven a vital catalyst for enforcement and dissemination of human rights. States are required to report to the ACHPR every two years on their efforts on implementing the Charter. However, in practice, reporting is not adhered to – as per February 2020, twelve States are late by one or two reports, thirty-two States are late by three or more reports and six States never reported – leaving four States being up-to-date on reporting.<sup>19</sup> The average number of years the State Parties are late in submitting their periodic reports to the ACHPR is around eleven years.<sup>20</sup> In the following, we will discuss how the African Charter responds to peace and security and in particular Women, Peace and Security.

The African Charter's articles on gender equality on from a vast number of international documents on women's rights. The Charter of the United Nations, adopted in 1945, stipulates in article 55 that the UN shall promote universal respect for human rights without distinction as to sex. Accordingly, article 2 of the UN's Universal Declaration of Human Rights, adopted in 1948, demands that everyone is granted the rights

and freedoms enshrined in the declaration, regardless of sex. Likewise, article 2 of the 1966 human rights treaties, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, prohibit gender discrimination.

Using these documents as a springboard, the UN embraced the period from 1976 to 1985 as the UN Decade for Women, with a focus on equality, development, and peace. The international community drafted several women's rights documents during this period. Most notably, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) was adopted in 1979, which significantly contributed to the advancement of women's rights globally.

Around the same time as the CEDAW, the African Charter was drawn out. At the 1979 Assembly of Heads of State and Government, the predecessor to the African Union (Organisation of African Unity) decided to set up a committee of experts tasked with drafting a human rights document for the African continent. The findings of the committee were presented at the 1981 Assembly, and its draft was unanimously approved. The Charter led to the creation of the African Commission on Human and Peoples' Rights in 1987 and the African Court on Human and Peoples' Rights in 2004, which both safeguard the articles of the Charter.

According to article 2, parties must make sure that all individuals enjoy the rights and freedoms of the Charter. Discrimination of any kind is strictly prohibited, and the Charter specifically disallows gender-based discrimination. All provisions of the Charter must be interpreted in a gender-sensitive manner, and the parties to the Charter shall take into consideration women's particular predicaments concerning every right and freedom.

The prohibition of discrimination is further strengthened in article 3, which stipulates that men and women must be equal before the law. Additionally, article 18 on family matters obligates States to ensure the

elimination of every act of discrimination against women as stipulated in international declarations and conventions.

The Charter declares in article 4 that all human life is inviolable, and each person has a right to life. In continuation, article 5 bestows all humans with an inherent dignity. These two provisions disallow arbitrary violations of human rights and all forms of degrading treatment, such as slavery, torture, and cruel punishments.

Under article 6, all individuals must have the right to liberty and security of person. States must make sure that no one is deprived of freedom unless provided for by a legitimate legal procedure. This article applies vertically in the relationship between the State and its subjects, as well as horizontally in the relationship between individuals.

According to article 23, the parties to the Charter must uphold all peoples' right to a peaceful existence. Supporting peace entails abiding by the principles of solidarity and friendly relations, as articulated in the legal framework of the United Nations and the African Union. The article speaks of both national and international peace, thereby indicating that it applies both to intra- and interstate conflicts.

## **Maputo Protocol and the Solemn Declaration**

### ***Maputo Protocol***

The official document is titled "Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" and was adopted by the AU Assembly in 2003. It entered into force in 2005, after the minimum fifteen of the AU Member States had ratified it. A number of initiatives proper to and outside the AU have worked in order to achieve universal ratification, including the Solemn Declaration in which States committed to ratify by the end of 2004 and the African Women's Decade (2010-2020) where States agreed on universal ratification, domestication

and implementation of the Protocol. As of October 2019, forty-two out of fifty-five Member States had acceded to the Protocol,<sup>21</sup> six of them with reservations.<sup>22</sup> States are required to report every two years within the report rendered to the ACHPR on the African Charter.

As shown in the previous chapter, there was a framework for women's rights in Africa even before the Maputo Protocol was drafted. One can convincingly argue that the African Charter, analysed in tandem with global women's rights documents such as the CEDAW, appropriately addresses women's unique predicaments. However, before the Protocol, African women's rights advocates noted that regional human rights institutions did not direct sufficient attention to women's rights, nor did the institutions provide adequate resources to counteract violations of women's rights.

With that in mind, African civil society mobilised and forced the political leadership to adopt a special instrument centred on the rights of women. The Maputo Protocol was approved as a protocol to the African Charter, according to the procedure regulated in article 66. The adoption of a treaty on women's rights was a landmark victory for African women and the Protocol is innovative since it pushes rights beyond the provisions of the initial Charter.

Similar to the African Charter, the Maputo Protocol regulates political, civil, cultural, and socio-economic rights. In the following, a brief introduction to some of the central rights of the WPS agenda will be provided.

Discrimination is perhaps the most blatant example of gender inequality. Article 1(f) of the Maputo 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".

Based on that definition of discrimination, article 2 obligates State parties to ensure that national legislation embodies the principle of gender equality. The provision entails a strict obligation to reform gender-biased laws already in place, as well as a requirement not to pass discriminating laws in the future. Laws that are de jure discriminating, with an explicit purpose to mistreat women, constitute, of course, a violation of the protocol. Furthermore, laws that are de facto discriminating, with no intent to harm women but which nevertheless have a discriminatory effect, are also impermissible.

However, the provision should not be interpreted as if all laws must be gender-neutral. Article 2 allows for affirmative action to promote gender equality in areas where inequalities persist. In light of the historical oppression of women, the protocol enables policymakers to actively promote women's rights and level the playing field by taking special temporary measures. For example, the Protocol's article 9 encourages State parties to ensure female political representation through affirmative action.

Furthermore, article 2 recognises that women suffer not only from legal discrimination but also from social and cultural bias. State parties have therefore accepted an obligation to modify practices that reproduce gender stereotypes and the idea that women are inferior to men.

Concerning the WPS agenda, article 2 obligates State parties to promote equal participation in peace processes. Legal obstacles must be dismantled, hidden gender biases must be uncovered, and patriarchal stereotypes must be challenged. Affirmative action could be a relevant strategy. Public information, education, and national communication strategies, as suggested by the Protocol, are also appropriate tools when promoting the WPS agenda.

Article 3 of the Protocol enshrines a woman's right to dignity. This right rests on the assumption that every human being has a right to a dignified life, and that women also are human beings. According to the

protocol, women have to be respected as persons in their own right, and women must be allowed to develop their personalities freely. Exploitation and degrading treatment of women must be punished. State parties are especially obligated to protect women against sexual violence.

Consequently, State parties must, firstly, abstain from inflicting harm on women and, secondly, effectively respond to violence against women. State parties cannot be negligent in their response to violence against women. Women are disproportionately subjected to abuse, and there must be mechanisms in place to adequately deal with the particular suffering of women.

In the WPS context, State parties must make sure that State agents do not violate women's dignity. There must be a level of command and control that prohibits, for example, military personnel from disrespecting women's rights. Moreover, State parties must seriously consider any accusation of violence against women and prevent any impunity concerning violence against women. Any negotiated amnesties must be gender-sensitive, and the process of transitional justice must address women's suffering. This stipulation partly relates to the Protocol's articles on effective remedies, but it is, first and foremost, a matter of dignity.

A related right, enshrined in article 4, is the right to life, integrity, and security. The State parties are obliged to guarantee the safety of women, which is a fundamental prerequisite to enjoy any human rights at all. The Protocol lists a plethora of measures that State parties shall take to prevent, punish, and eradicate violence against women.

From a WPS perspective, article 4 builds on article 3 and further stipulates how women must be protected. Legislative action to punish violations of women is an essential part of article 4. Still, the provision goes beyond the question of effective remedies and additionally requires that State parties take initiatives proactively. State parties must identify the causes and consequences of violence against women and actively promote

peace education. These actions are expected to eradicate stereotypes that exacerbate the societal tolerance of violence against women. To comply with article 4, State parties must allocate sufficient funding for programs that aim to counter violence against women.

Article 8 of the Protocol concludes that men and women must be equal before the law. As mentioned earlier in this chapter, several sections have, in broad terms, made references to access to justice. However, it is article 8 that specifies what this right encompasses. Women must be protected by the law and granted access to judicial- and legal services, including legal aid. State parties must establish gender-sensitive structures and make sure that law enforcement organs are competent to uphold women's rights. The article also stipulates that women should be equally represented in the judiciary and law enforcement organs.

This article underlines essential aspects of the WPS agenda. Women have a right to be heard and respected, both as victims and as officials of the justice system. State parties must take a gender-inclusive approach when adjudicating violations, and every actor involved in the justice system should be conscious of women's rights.

The right to participation is embedded in the prohibition of discrimination and in the right to access to justice. In line with those rights, article 9 obligates State parties to implement participative governance and to encourage women's political participation through affirmative action. This obligation relates to all levels of government: local, regional, and national. Furthermore, it refers to all stages of policymaking: development of legislation, decisions on the law, and implementation of legislation. This article is highly relevant for institutions involved in peacebuilding. Women must participate in peace processes on equal terms as men, and this could require State parties to take affirmative action. Women must have a seat at the table when discussing potential solutions to ongoing conflicts, and State parties could, for example, set up quotas for women in peace delegations. Moreover, if a peace agreement involves judicial or

quasi-judicial bodies, women must be able to equally participate in their capacity as victims, prosecutors, defence lawyers, law enforcement, judges, journalists, etc.

Article 10 states that women have a right to a peaceful existence. State parties must construct a gender-sensitive peace architecture that duly allows women to participate in the promotion and monitoring of peace. The Protocol requires State parties to promote women's participation in educational efforts, conflict prevention measures, in decision making on all levels, and in refugee management. Additionally, article 10 urges State parties to reduce military expenditure in favour of investments in social development and women's development.

Undoubtedly, article 10 reaffirms the State parties' commitment to the ideas driving the WPS agenda. It relates to the right to participation and recognises women's potential as peacebuilders. Going beyond international standards, it instructs policymakers to prioritise the social welfare of women over military spending.

Article 11 reiterates the obligation of State parties to respect international humanitarian law. State parties must protect civilians, and it does not matter to what population the civilians belong. The article grants women, children, and refugees special protection. State parties are required to enact legislation that labels violence, rape, and other forms of sexual exploitation as a war crime. Moreover, State parties must take the necessary steps to bring perpetrators of sexual violence to justice.

This article strengthens the adjudicative aspect of the WPS agenda. It complements existing norms on the conduct of hostilities and directs attention towards how women disproportionately suffer from warfare.

### ***Solemn Declaration on Gender Equality in Africa***

The Solemn Declaration on Gender Equality in Africa (the Declaration) was adopted by the AU Assembly in 2004 – one year after its adoption of

the Maputo Protocol and one year previous to the point in time when the Maputo Protocol came into effect. One of its provisions was for States to sign and ratify the Maputo Protocol by the end of 2004 to ensure its entry into force in 2005.

The Declaration makes reference to all major international instruments on women's rights including UNSCR 1325. It also reaffirms the decision by the AU, taken at its inaugural session in 2002, to apply gender parity for posts within the AU. The Declaration further expresses concern that "while women and children bear the brunt of conflicts and internal displacement, including rapes and killings, they are largely excluded from conflict prevention, peace-negotiation, and peace-building processes in spite of African women's experience in peace-building". This while also expressing that "low levels of women's representation in social, economic and political decision-making structures and feminisation of poverty impact negatively on women's ability to derive full benefit from the economies of their countries and the democratization process".

The agreement includes to ensure "the full and effective participation and representation of women in peace process including the prevention, resolution, management of conflicts and post-conflict reconstruction in Africa as stipulated in UN Resolution 1325 (2000) and to also appoint women as Special Envoys and Special Representatives of the African Union". Further it provided for the launch of campaigns for systematic prohibition of the recruitment of child soldiers and abuse of girl children as wives and sex slaves and public campaigns against gender based violence as well as the problem of trafficking in women and girls.

Finally, the Declaration commits States to report annually on progress made in relation to its provisions and for the chairperson of the AU Commission to submit a yearly report to the Assembly on the matter. This agreement has proven important as it means an annual follow-up on the achievements made at the national and regional levels – spotlighting women's rights and making up for the less adhered to reporting requirements of the Maputo Protocol.

### **African Charter on the Rights and Welfare of the Child**

The African Charter on the Rights and Welfare of the Child was adopted in 1990 and entered into force in 1999. The Charter has been ratified by forty-nine AU Member States, four of which have done so with reservations.<sup>23</sup> States are required to report implementation of the Charter every four years. Nine States have not submitted their initial report to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), and thirty-seven State parties have not submitted their first periodic report.<sup>24</sup> Even though not satisfactory, the reporting situation is better compared to reporting on the African Charter on Human and Peoples' Rights and on the Maputo Protocol.

Article 22 of the Charter handles armed conflicts and includes the provision for States to "respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child". It furthermore obliges State parties to "take all necessary measures to ensure that no child shall take direct part in hostilities and refrain in particular, from recruiting any child." Lastly, Article 22 also refers to States' obligations under international humanitarian law to protect the civilian population in armed conflicts while it stretches this obligation to include children affected by "internal armed conflicts, tension and strife". The ACERWC is currently drafting a General Comment on article 22 which also will elaborate on the meaning of "tension and strife".<sup>25</sup>

In its article 23, the Charter obliges States to provide protection and humanitarian assistance "in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties". This also goes for internally displaced children.

Article 3 of the Charter handles the right to the enjoyment of the rights and freedoms guaranteed in the Charter regardless of its status, including sex.

Article 5 handles the inherent right to life and the States' obligation to ensure "to the maximum extent possible, the survival, protection and development of the child".

Articles 7-9 provides for the entitlement of the freedoms of expression, association and thought and Articles 27-29 regulate the right to freedom from sexual exploitation, drug abuse and sale, trafficking and abduction. This while Article 16 obliges States to protect the child from abuse and torture.

The Charter, in contrast to the African Charter and the Maputo Protocol does not explicitly develop on the right to peace. It takes a more protective role – elaborating on the rights of children in conflict and the right of children not to take part in armed conflict. Compared to the UN Child Rights Convention (CRC) it sets the age of the child to all persons under eighteen years of age, while in the CRC age is partly negotiable. As for taking part in hostilities, the CRC allows for a minimum age of fifteen, while the Charter sticks to eighteen years as the limit. CRC's optional protocol on the involvement of children in armed conflict raises the age of recruitment into armed forces to eighteen years.

### **Conclusion**

Both the African Charter and the Maputo Protocol grant the right to live in peace for every human being – linking peace and security to human rights and taking a rights-based approach to peace. The African Charter, the Maputo Protocol and the Solemn Declaration on Gender Equality in Africa also harmonise well with international documents on women's rights in armed conflict. The instruments provide institutional support for the Women, Peace, and Security Agenda and are mutually reinforcing. The rights outlined in the African Charter are expounded in the Maputo Protocol and given a more precise meaning concerning women and girls.

The instruments are vital in the promotion of women's rights in war-torn societies. Equal rights for women and men are called for, and this is highly relevant for communities transiting from conflict to peace. Any act of conflict prevention, any peace negotiation, any mechanism of transitional justice and any process of peacebuilding must incorporate the values of the Charter and the Protocol and contribute to the strife towards gender equality.

While the African Charter on the Rights and Wellbeing of the Child does not explicitly handle the right to peace, it gives important provisions for the right of children not to take part in armed conflict and it provides for a wider interpretation of conflict also handling "tension and strife".

Although the instruments are inspiring and far reaching, lack of implementation is a serious issue. In the next section we will move on to analyse what resources are at hand to ensure State compliance.

## ROLE PLAYED BY THE AFRICAN HUMAN RIGHTS SYSTEM

The African regional human rights system consists of three bodies: the African Commission on Human and Peoples' Rights (ACHPR), the African Court on Human and Peoples' Rights (the Court) and the African Expert Committee on the Rights and Welfare of the Child (ACERWC). Of the three, the ACHPR and the ACERWC are the two best equipped in terms of mandate and toolbox to respond to peace and security albeit the fact that the only of the three that carry the advantage of delivering binding decisions for States, is the Court.

### **African Commission on Human and Peoples' Rights**

The African Commission on Human and Peoples' Rights was established by virtue of article 30 of the African Charter as a quasi-judicial body. The ACHPR is composed of eleven members serving in their personal and independent capacity at a part-time basis. They are nominated by State parties to the Charter.

The ACHPR was officially inaugurated in November 1987 in Addis Ababa, Ethiopia, and moved to Banjul, the Gambia in 1989. The ACHPR holds two ordinary sessions in a year, in April/May and October/November. The venue of the ordinary sessions alternates, in so far as possible, between Banjul and another African city. In recent years, the ACHPR has established a practice of holding two extra-ordinary sessions every year, in February and August. The commissioners serve as country rapporteurs in respect of the countries they have been allocated. Additionally, the ACHPR has established special mechanisms to focus on specific thematic issues. There are currently twelve ACHPR special mechanisms in the form of special rapporteurs, committees and working groups.

The ACHPR is headed by a bureau composed of a chairperson and a vice-chairperson who are elected by the commissioners from amongst

themselves. The bureau is responsible for coordinating the activities of the ACHPR, taking decisions on matters of emergency when the ACHPR is not in session, and supervising the work of the ACHPR secretariat. The ACHPR secretariat is headed by a secretary and performs the daily technical and administrative functions of the ACHPR. The detailed functioning of the ACHPR is regulated by a set of Rules of Procedure.

Article 45 of the Charter enumerates the functions of the ACHPR to be the promotion and protection of human and peoples' rights, the interpretation of the provisions of the Charter, and any other task assigned to it.

The promotional function of the ACHPR is explained in article 45 (1) of the Charter. The main essence of this function is to sensitise the population and disseminate information on human and peoples' rights in Africa

To achieve this, the ACHPR is mandated under article 45 (1) to "collect document, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to governments".

Article 45 (1b) of the Charter also requires the ACHPR to "formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation". It is also mandated under article 45 (1c) to co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

The second principal function assigned to the ACHPR by the African Charter is stipulated in article 45 (2) as: "to ensure the protection of human and peoples' rights under conditions laid down in the present Charter". The protective mandate, requires the ACHPR to take measures

to ensure that the citizens enjoy the rights contained in the Charter. This entails ensuring that the States do not violate these rights and if they do, that the victims are reinstated in their rights.

To achieve this, the Charter provides for a *communications procedure*. This procedure is a complaints system through which an individual, NGO or group of individuals who feel that their right or those of others have been or are being violated, can complain to the ACHPR about these violations.

A communication can also be made by a State party to the Charter which reasonably believes that another State party has violated any of the provisions in the Charter. The Communication will be studied by the ACHPR and if it meets the criteria set out in article 56 of the Charter, it will be formally accepted for consideration. The State concerned will then be informed of the allegations and invited to submit its comments on the same. Where more information is required from the complainant, the latter will be informed. After carefully studying the arguments advanced by both parties, the ACHPR decides whether there has been a violation and makes recommendations to the State and to the AU Assembly on what the State should do, including how to remedy the victim.

The ACHPR can also, and has on various occasions, initiated friendly settlements, where the complainant and the accused State enter into negotiations to settle the dispute amicably. It has also sent missions to several State parties to investigate allegations of massive and serious human rights violations. At the end of such a mission, the ACHPR makes recommendations to the States concerned on how to improve the human rights situation.

In emergency situations – that is, where the life of the victim is in imminent danger – the ACHPR might invoke provisional measures under rule 111 of its Rules of Procedure, requesting the State to delay any action pending its final decision on the matter.

As part of its protective mandate, the ACHPR also receives and considers periodic reports submitted by State parties in conformity with article 62 of the Charter. State parties are required to submit reports to the ACHPR every two years, on the legislative or other measures they have taken to give effect to the rights and freedoms recognised in the Charter. The ACHPR studies these reports and at the session engages in dialogue with representatives from the States, and make recommendations to States.

Article 45 (3) of the Charter also mandates the ACHPR to interpret the provisions of the Charter at the request of a State party, an institution of the AU or an African organisation recognised by the AU. To date, neither the AU nor a State party to the Charter has approached the ACHPR for an interpretation of any of the provisions of the Charter. However, some NGOs have sought and obtained through draft resolutions, the interpretation of some of the provisions in the Charter. Through this method, the ACHPR has adopted many resolutions which give clarity and a broader interpretation to some of the ambiguous provisions in the Charter.

Under article 45 (4), the ACHPR can perform any other task which may be entrusted to it by the Assembly of Heads of State and Government. The AU Assembly has also not entrusted the ACHPR with any other task apart from those specifically conferred to it in the Charter.

### ***Toolbox for working peace and security***

The African Charter in its Articles 45 (2) and 46 mandates the ACHPR to undertake fact-finding missions as part of its actions to protect human rights. This mandate includes investigations in the context of conflict situations. Fact-finding missions related to conflict situations are further elaborated on below.

Article 45(1) provides a promotional and interpretative mandate within which the ACHPR elaborated different normative instruments including the Maputo Protocol, guidelines on human rights protection while countering terrorism, general comments on the right to life, and studies

on sexual violence against women in conflict situations, on transitional justice and on human rights in conflict situations.

The ACHPR special mechanisms is another tool for the engagement in the protection of human rights in conflict situations. The special mechanisms can initiate resolutions, issue press statements and letters of appeal as well as be given the responsibility to develop normative instruments for adoption of the Commission. An example of the latter is the Guidelines on Combatting Sexual Violence and its Consequences in Africa, adopted in 2017. These include a section on the investigation and prosecution of crimes of sexual violence in conflict situations.

Yet another avenue is the adoption of country-specific and thematic resolutions. Resolutions have been adopted for a wide range of countries including, Burundi, Niger, Central African Republic, Democratic Republic of Congo, Libya, Rwanda, Nigeria, Sudan, Somalia and South Sudan.

Article 58 mandates the ACHPR to refer situations of serious or massive violations of human rights to the AU Assembly. Upon receipt of such a notification, the AU Assembly may request an in-depth study of the situation to be conducted by the ACHPR. In this respect, the ACHPR 2010 Rules of Procedure in its rule 80 states that the ACHPR shall draw the attention of both the AU Assembly and the PSC of situations of emergency while the Executive Council and the chair of the AU Commission shall be informed of the notification.

### ***Thematic- and country-specific resolutions***

The adoption of country-specific resolutions is the most common means by which the ACHPR has been responding to human rights violations conducted in the framework of conflict and crisis situations. A number of such resolutions have been adopted in a wide range of conflict and crisis situations including genocide, election violence, attacks on civilians, unconstitutional changes of government, implementation of peace

agreements and the situation of internally displaced persons and refugees. However, the timing of such resolutions are often late and their effects hard to evaluate. Amnesty International, in a statistical analysis of the timing of country-specific resolutions and statements revealed that the resolutions are often adopted too late. The positive side shown is that the ACHPR dedicate more efforts to countries facing severe conditions but on the other hand that the resolutions arrive too late to contribute to conflict prevention. While the statements of ACHPR on the deterioration of the human rights situation in a country may serve as an early warning signal, since the ACHPR, according to this study, is most active when the conflict already escalated into violence, the preventive effect can be missed out. One factor affecting timing is the fact that resolutions are only adopted during ACHPR sessions.

The ACHPR has also adopted thematic resolutions related to conflict situations. Resolution 7 calls on States to domestication of the promotion and provisions of International Humanitarian Law. Resolution 111 concerns WPS as it elaborates on the right to remedy and reparation for women and girls victims of sexual violence, highlighting as worrying the high level of impunity for crimes of sexual violence committed in the framework of armed conflict. Resolution 17 deals with the concept of the responsibility to protect in Africa – especially calling on the protection of civilians in Sudan and Somalia. Lastly, resolution 332 on human rights in conflict situations, gave rise to the recent study on the same subject by the ACHPR and the ambition to contribute to peace and security and human rights in a peace and security perspective as well as to engage with other organs of the AU to work for a human rights-based approach to conflict prevention, management and resolution in Africa.<sup>27</sup>

### ***Fact-finding missions and investigations in loco***

Along its thirty plus years of existence the ACHPR has only conducted a limited number of fact-finding missions and investigations in loco. A primary reason for this is that States rarely have given the necessary consent for them to take place. In recent years, the ACHPR has shifted

focus to the less offensive “promotion missions” which are focused on the awareness raising of its mandate and the different regional human rights treaties.

Unfortunately, the common fate of mission reports is that they often have been published too late, adopted too late by the AU decision-making bodies and not effectively included into decision-making processes.<sup>28</sup>

### *Communications procedure*

A limited number of complaints considered by the ACHPR has been related to conflict- and post-conflict situations. However, the ones decided on have given the opportunity to contribute some jurisprudence on the right to peace and the applicability of the African Charter in conflict situations. In cases against Chad and Sudan, States were found having failed to protect its citizens against forced disappearances, extrajudicial killings and torture.<sup>29</sup> In its only interstate case, the ACHPR found Burundi, Rwanda and Uganda as occupying parts of the DRC to be inflicting on people’s right to peace and also recommended the States to pay reparations to human rights violations perpetrated by their respective armies.<sup>30</sup> By its nature, the communications procedure is reactive and while generating jurisprudence, the non-binding nature of decisions and low implementation level by States, makes for a questionable real impact on peace and security as well as the protection of human rights in conflict- and post-conflict situations.

### *Article 58 referral*

Article 58 of the African Charter provides the ACHPR the possibility to respond to conflict-related human rights violations by means of informing the Assembly of Heads of States and Government or the PSC, on specific situations related to serious or massive human rights violations and emergency situations. The decisions shall be taken by the ACHPR if in session but can also be taken by the bureau during off-session periods. The possibility has been very sparsely used by the ACHPR – a fact that has spurred some critics. Answering to critics, the ACHPR means that it

has not stopped use this tool albeit being used sparingly and on an ad-hoc basis.<sup>31</sup>

### *Cooperation with other parts of the APSA*

While the African Charter Article 23 provides that “All peoples shall have the right to national and international peace and security”, Article 45 mandates the ACHPR to promote and protect human and peoples’ rights while also to “Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights.” Combining the two articles, makes for a strong role of the ACHPR for working in cooperation with the AU-institutions to ensure peace and security on the continent. This also harmonises with Article 19 of the Protocol relating to the establishment of the PSC which reads: “The Peace and Security Council shall seek close cooperation with the African Commission on Human and Peoples’ Rights in all matters relevant to its objectives and mandate. The Commission on Human and Peoples’ Rights shall bring to the attention of the Peace and Security Council any information relevant to the objectives and mandate of the Peace and Security Council.” Additionally, the Rules of Procedure of the ACHPR stipulates that it may refer situations falling under Article 58 of the Charter to the PSC.

There is a certain overlap in the mandates of the ACHPR and the PSC that calls for a closer working relationship. According to the PSC Protocol, the PSC is powered to decide on sanctions whenever there is an unconstitutional change of Government in a member State and to follow up on the promotion and respect for democracy, good governance, rule of law, human rights and fundamental freedoms and international humanitarian law by member States. In addition, the PSC is powered to anticipate and prevent policies that may lead to genocide and crimes against humanity and to recommend the AU Assembly to intervene in a member State due to grave circumstances. This part of the PSC mandate falls within the boundaries of the mandate of the ACHPR, even if the powers of the two institutions differs greatly.<sup>32</sup>

Looking at the current state of cooperation between the ACHPR and AU-institutions, things are happening, even though the interviews indicate a need for more cooperation and coordination between different parts of the AU and other actors in order to effectively work for peace and security.

The relationship between the ACHPR and the PSC has been on an ad-hoc basis and interaction has in particular taken place with respect to investigation of human rights issues in conflict or crisis situations including in Cote d'Ivoire, Darfur, the Republic of Guinea, Mali, Somalia and Burundi. However, the only investigation report of the ones mentioned that has been submitted and considered by the PSC is the one on Burundi. Thus, there is also a gap in terms of effective use of the input produced by the ACHPR. The ACHPR has also been a member of the AU Commission of Inquiry for South Sudan established by the PSC for investigating gross human rights violations taking place in South Sudan during its internal armed conflict.

It was not until August 2019 that the official coordination mechanism between the two institutions, decided on by the PSC in 2007, came into practice. It calls for the PSC to at least once a year invite the ACHPR to brief the PSC on the human rights situation in conflict areas.

As a result of the meeting between the two, the PSC adopted a Communiqué<sup>33</sup> on the cooperation. Among other provisions it “Underscores the importance of mainstreaming human rights in all phases of the conflict cycle from prevention to post-conflict”.

The PSC also calls for the ACHPR to continue elaborating relevant normative instruments such as its “Guidelines to combat sexual violence and its consequences in Africa” and the “Study on Transitional Justice and human and people’s rights in Africa”.

Further, the PSC “undertakes to extend full support to the ACHPR for

getting access to the country where the PSC requested investigation to be undertaken” and “Underscores the need for the ACHPR to provide early warning briefings on the state of human rights in Africa to the PSC” and “In this regard, requests the AU Commission and the ACHPR Secretariat to propose a modality for the establishment of a coordinated early warning mechanism on human rights related issues on the Continent between the two Organs”. The PSC also encourages the ACHPR to “extend regular invitation to the PSC for participation in the ordinary sessions of the ACHPR”. As we can see there are some structures at hand that enable a cooperation between the ACHPR and the PSC that would be important to build on and to further elaborate.

As for other parts of the APSA, the ACHPR through its focal person for human rights in conflict situations, has assisted in undertaking an assessment mission and preparing a report on the experience of AU Peace Support Operations compliance with human rights, international humanitarian law, and conduct and discipline.

### ***Relationship with AU policy organs***

When it comes to relevant policy organs these include the Assembly of Heads of States and Government, the Executive Council and the Permanent Representatives Council. According to Article 58 of the Charter, the Assembly has the power to enforce the decisions and recommendations of the ACHPR – i.e. converting the non-binding decisions of the ACHPR in their capacity as a quasi-judicial body – into binding decisions for the State in respect. However, so far the Assembly and the Executive Council have refrained from taking any steps in this direction apart from general statements requiring all States to comply with ACHPR decisions. Thus, at least partly, the potential of the ACHPR to play a greater role in the protection of human rights in conflict situations lies in the hands of the Assembly. The working relation is also, according to the ACHPR, one of tensions. One such tension has to do with the policy organs in the past having corrected the ACHPR when they deemed that its work caused political inconvenience. On the other

hand, in some cases, the Executive Council has requested the ACHPR to undertake fact-finding missions in member States.

According to the ACHPR, the main challenge for cooperation is the lack of political will of the policy organs, this while the lack of working relationships and established mechanisms add to the picture.<sup>34</sup>

### ***Relationship with the United Nations***

The UN and the AU in 2017 agreed on a Joint UN-AU Framework for Enhancing Partnership on Peace and Security<sup>35</sup> aiming at a closer cooperation on peace and security. The Framework opens up for collaboration also between the ACHPR and different parts of the UN including early warning, conflict prevention, peace building and peace operations. The ACHPR might also get involved in the different joint operations between the UN and the AU including the Darfur operation (UNAMID) and the Somalia mission (AMISOM).<sup>36</sup>

### ***Relationship with Regional Economic Communities***

The Regional Economic Communities (RECs) play an important role in the African Peace and Security Architecture, including the prevention of conflict, peace building and post-conflict processes. One example is the central role played by ECOWAS in the peaceful resolution of the political crisis in The Gambia in 2016-2017. Others include the involvement of IGAD in South Sudan and of EAC in Burundi. However, the interaction between the ACHPR and the RECs has been minimal. Again the ACHPR sees a potential for an increased interaction with the RECs including in early warning and the strengthening of human rights-based approach in the interventions of RECs.<sup>37</sup>

### ***Relationship with civil society***

The most developed arena for interaction with civil society is the ACHPR Sessions, including the adjacent NGO-Forum where the five hundred-plus NGOs with observer status have the possibility to engage with the ACHPR. Others are the different country visits and fact-finding

missions. However, the ACHPR remain fairly unknown to the general public throughout Africa and there is a potential for greater interaction with civil society.<sup>38</sup>

### ***Challenges identified by the ACHPR***

The recent ACHPR report “Addressing Human Rights Issues in Conflict Situations”, highlights five main challenges regarding the role of the ACHPR in addressing human rights in conflict situations.<sup>39</sup>

**Protection:** The protection challenge concerns the question of how to seize events of violations and make sure that conflicting parties refrain from violence. This includes the monitoring, investigation and reporting of violations.

**Promotion:** This entails the input to pave the way for the full consideration and integration of human rights into peace processes, including preventing and resolving conflicts.

**Remedy:** The challenge of coming to terms with conflict-related violations.

**Prevention:** The work of addressing root causes, triggering factors and institution of necessary democratic- and socio-economic reforms.

**Coordination and synergy:** The work on improving coordination and synergies with other AU institutions.

### ***African Court on Human and Peoples’ Rights***

The African Court on Human and Peoples’ Rights was 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 (Court’s Protocol). In 1998, the 34<sup>th</sup> Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity (now the African Union), adopted the Court’s Protocol. This Protocol entered into force in 2004, paving the way for the operationalisation of the Court.

The Court's mission is to complement and reinforce the functions of the ACHPR in promoting and protecting human and peoples' rights, freedoms and duties in AU Member States. The ACHPR, being a quasi-judicial body can only make recommendations while the Court makes binding decisions.

The Court is composed of eleven Judges, nationals of Member States of the AU elected in an individual capacity. The Judges are elected by the Assembly of Heads of State and Government of the African Union for a period of six years and may be re-elected only once. All Judges except the President perform their functions on a part-time basis. The Court meets four times a year in Ordinary Sessions lasting two weeks each and in Extra-Ordinary Sessions as necessary.

The Court officially started its operations in Addis Ababa, Ethiopia in November 2006, and in August 2007 it moved to its seat in Arusha, Tanzania. Between 2006 and 2008, the Court dealt principally with operational and administrative issues, including the development of the structure of the Court's Registry, preparation of its budget and drafting of its Interim Rules of Procedure. In June 2010, the Court adopted its Final Rules of Court.

The Court may receive cases filed by the ACHPR, State Parties to the Protocol or African Intergovernmental Organisations. NGOs with observer status before the ACHPR and individuals can also institute cases directly before the Court as long as the State against which they are complaining has deposited the Article 34(6) declaration recognising the jurisdiction of the Court to accept cases from individuals and NGOs.

As of February 2020, only eight of the thirty States Parties to the Protocol<sup>40</sup> have made the declaration recognizing the competence of the Court to receive cases from NGOs and individuals. The eight States are; Benin, Burkina Faso, Côte d'Ivoire, Gambia, Ghana, Mali, Malawi and Tunisia. Rwanda withdrew its declaration in 2016 and Tanzania did the same as late as November 2019.

**Advisory jurisdiction:** The Court may, at the request of a Member State of the AU, any of the organs of the AU, or any African organisation recognised by the AU, provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the ACHPR.

**Contentious Jurisdiction:** The Court can deal with all cases and disputes submitted to it concerning interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned.

**Amicable settlements:** The Court also has jurisdiction to promote amicable settlement in cases pending before it in accordance with the provisions of the Charter.

When the Court finds that there has been a violation of human and peoples' rights, it will issue appropriate orders to remedy the violation, including the payment of fair compensation or reparation. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court can adopt provisional measures as necessary.

Pursuant to Article 2 of the Protocol, the Court is established to *complement* the protective mandate of the ACHPR. The ACHPR can bring cases to the Court for the latter's consideration. In certain circumstances, the Court may also refer cases to the ACHPR, and may request the opinion of the latter when dealing with the admissibility of a case.

The Court and the ACHPR have met and harmonised their respective rules of procedure, and institutionalised their relationship. In terms of their Rules, the ACHPR and the Court shall meet at least once a year, to discuss questions relating to their relationship.

As of now, the Court has no jurisdiction to deal with crimes such as

genocide, crimes against humanity, war crimes, etc. But there is a project to have a full African Court with extended jurisdiction. In fact, the Constitutive Act of the African Union provides for the establishment of a Court of Justice of the African Union as a principal judicial organ of the AU to settle disputes over the interpretation of AU treaties. A protocol to set up this Court was adopted in 2003 and entered into force in 2009. The Court was however never operationalised since the AU Assembly decided that it should be merged with the African Court on Human and Peoples' Rights to form the African Court of Justice and Human Rights (ACJHR). Underlying this decision was the concern of the growing number of AU institutions, which the AU could not afford to support.

Therefore, the Protocol of the Court of Justice was merged with the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples Rights, to establish the Statute of the African Court of Justice and Human Rights. The latter was adopted in 2008. The court would have jurisdiction to cover crimes under international law as well as transnational crimes, including war crimes, crimes against humanity and genocide. As of June 2019, only seven AU Member States had ratified the Protocol (Benin, Burkina Faso, Congo, Gambia, Liberia, Libya and Mali).<sup>41</sup>

However, even if the ACJHR would come into operation, its possibilities in terms of contributing to peace and security on the African continent is far from granted. Critics have questioned its possibilities, citing the immunity clause – giving immunity to sitting heads of State and senior State officials, possible limited resources, limited access to the court and the unclear relationship to the International Criminal Court (ICC) as worrying factors.<sup>42</sup>

In the meantime, in February 2009, the Assembly of Heads of State and Government of the African Union requested the AU Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, to

assess the implications of extending the jurisdiction of the Court to try international crimes such as genocide, crimes against humanity and war crimes. In that regard, a study was done and a draft Protocol to establish an African Court of Justice and Human Rights with extended jurisdiction is currently under consideration by Policy Organs of the African Union.

### *Toolbox for working peace and security*

The African Court on Human and Peoples' Rights enjoys a very limited mandate to respond to conflict- and post-conflict situations. Unless cases relating to human rights violations committed in the context of conflict are filed before the Court, it has no means of intervening to stop such violations. However, if handling a case it can also adopt provisional measures in order to avoid irreparable harm to individuals.

The Court may also, at the request of an AU Member State, any of the organs of the AU, or any African organisation recognised by the AU, provide an advisory opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the ACHPR. This mandate would for example make it possible for the PSC to seek advisory opinion on whether a specific country situation amounts to grave circumstances (war crimes, genocide and crimes against humanity) as requested for as a prerequisite for the AU to intervene in a Member State, according to Article 4(h) of the AU Constitutive Act. This has yet to happen and would prove if the Court has the sufficient resources to respond to such a request in a timely manner.

### *Case related to peace and security – Libya*

In 2011 the ACHPR instituted proceedings at the African Court on Human and Peoples' Rights against Libya for serious and massive human rights violations committed in the context of the conflict. This was the first case ever referred from the ACHPR to the Court. The Court issued an order for provisional measures against Libya in response to the situation of great gravity and urgency. Libya failed to comply with these provisional measures.

This while the ACHPR was not able to gather the relevant evidence to enable it to respond to the submissions lodged by Libya, since it could not safely enter the country to collect evidence. Since the ACHPR failed to respond to communications from the Court, the case was struck out for lack of diligent prosecution in 2013.<sup>43</sup>

The case highlights the challenges of the ACHPR in undertaking investigations in conflict zones and making use of its possibility to refer cases to the Court. This situation negatively influences the possibilities for the ACHPR and the Court to contribute to peace and security in the region.

#### ***Relationship and coordination with the ACHPR***

The relationship between the Court and the ACHPR is stipulated in Article 2 of the Court Protocol and further elaborated in the Rules of Procedure of the two bodies. The principle is the one of complementarity meaning that the Court is given the task to complement and reinforce the protection mandate of the ACHPR by means of legally binding decisions on part of the Court – this since the decisions and recommendations of the ACHPR are not legally binding. In fact, the majority of ACHPR decisions are not implemented by States. This makes for the ACHPR potentially being an even more important player as the ACHPR can refer cases to the Court, boosting legally binding decisions. However, the complementarity of the Court in terms of legally binding decisions is hampered by the fact that as of February 2020, only eight States have agreed to allow individuals and NGOs direct access to the Court. In practice referral has only been done in three cases. According to the ACHPR there are a number of reasons for this. A first reason is the lack of clear rules and procedures for the identification of such cases. Closely related is the lack of capacity within the ACHPR for the preparation of files and follow-up on cases. The ACHPR recommends the AU to provide the necessary resources in order to set up a litigation unit within the ACHPR.

There are also some legal challenges in the referral of cases that risk leading

to waste of resources, frustration for the parties and undue legal uncertainty. Additionally, there is a challenge in the interpretation as the referral of cases on basis of the gravity of violations or jurisprudential importance, would, from the ACHPR's point of view mean that the ACHPR would be dealing with less important cases which would be contrary to the complementary role of the Court. Despite regular meetings between the two, these challenges have not been resolved. The ongoing process of revising the Rules of Procedure of the ACHPR hopefully can address some of the challenges related to the referral of cases.<sup>44</sup>

#### **African Committee of Experts on the Rights and Welfare of the Child**

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) draws its mandate from articles 32-46 of the African Charter on the Rights and Welfare of the Child. Its first members were elected in 2001 after the coming into force of the Charter in 1999.

The ACERWC's functions, as set out in article 42 of the Charter, include to:

- Promote and protect the rights enshrined in the Charter.
- Monitor the implementation of and ensure protection of the rights enshrined in the Charter.
- Interpret the provisions of the Charter at the request of a State Party, an AU institution or any other person or institution recognised by the AU.
- Perform other tasks as entrusted by the Assembly.

In June 2018, the AU Executive Council decided that Lesotho would host the ACERWC Secretariat – relocation is foreseen to take place in 2020. The ordinary sessions of the ACERWC are held twice a year, mainly during the months of March/April and November. Most of the ACERWC sessions have thus far been held at its current seat in Addis Ababa. Under its Rules of Procedure, the ACERWC may establish special mechanisms similar to those of the ACHPR. The ACERWC has so far

established ten special mechanisms. The members of the ACERWC are also country rapporteurs for a select number of countries.

The 11 members serve part-time in their personal capacities. They are elected by the AU Assembly in a secret ballot from a list of people nominated by State Parties to the Charter.

State Parties to the Charter shall submit to the ACERWC, reports on the measures they have adopted which give effect to the provisions of the Charter and on the progress made in the enjoyment of these rights every three years.

The ACERWC may receive communications, from any person, group or NGO recognised by the AU, by a Member State, or the UN, relating to any matter covered by the Charter.

The ACERWC may resort to any appropriate method of investigating any matter falling within the ambit of the Charter, request from the States Parties any information relevant to the implementation of the Charter and may also resort to any appropriate method of investigating the measures the State Party has adopted to implement the Charter.

In 2017, the ACERWC appointed a Special Rapporteur on Children and Armed Conflict. The mandate of the Special Rapporteur includes to:

- Seek, receive, examine and act upon information on the situation of children in armed conflict with the view of identifying legislative and administrative gaps in the protection and promotion of the rights of welfare of children in situations of armed conflict in Africa.
- Submit reports on national practices, emerging trends and challenges.
- Bring to the attention of the ACERWC grave violations and situations of serious concern and call upon the ACERWC, States and other stakeholders to take necessary measures.
- Undertake investigative and fact-finding missions.

- Cooperate and engage in dialogue for action with Member States, National Human Rights Institutions, other AU Organs, in particular the Peace and Security Council, relevant intergovernmental organisations, international and regional mechanisms, United Nations bodies, Offices and mechanisms such as UNICEF and the Special Representative of the Secretary General on Children and Armed Conflict, CSOs and other stakeholders.
- Take the lead in the development of the ACERWC's documents, including General Comments and resolutions, related to children and armed conflict.
- Set standards and develop effective strategies to better protect the rights and welfare of the child in situations of armed conflict in Africa.
- Conduct activities to raise awareness on challenges in the protection of children in armed conflict and best practices in the area.

#### *Toolbox for working peace and security*

The toolbox at hand for the ACERWC is similar to the one at disposal of the ACHPR. It can work through its complaints procedure – given that the communications received are dealing with peace and security matters. It can also undertake investigative missions and advocacy visits to countries in conflict and post-conflict. Added to this it can interpret the provisions of the Charter at the request of a State party, an AU institution or an institution recognized by the AU. Finally it can also use the State report process as a resource for giving recommendations to States in conflict- or post-conflict as well as adopt country- and thematic resolutions.

One difference compared to the mandate of the ACHPR is the ACHPR's possibility to refer situations of serious or massive violations of human rights to the AU Assembly according to Article 58 of the African Charter. There is no corresponding mandate set out in the Children's Charter but being a human rights treaty body of similar kind, the interpretation made by the ACERWC is that the ACERWC might well make use of a corresponding procedure.

Yet another difference compared to the ACHPR is that it is not listed under the African Court Protocol as one of the actors that may directly submit cases to the Court. This anomaly has been considered by the Court in an advisory opinion in which it recommends the ACERWC to be given the same faculty. This recommendation is currently under review by the relevant AU policy organs.<sup>45</sup>

### ***Study: Impact of Conflict and Crises on Children in Africa***

In addition to preparing country-specific reports, the ACERWC in 2017 published a Continental Study on the Impact of Conflict and Crises on Children in Africa. The study originates from a decision by the African Union Executive Council which requested the PSC to take into account the rights of the child in its agenda and cooperate with the ACERWC. As a follow-up on this the ACERWC and the PSC held an open session in 2014 where it was decided that the ACERWC would undertake a continental study on children in armed conflict. The study documents violations of children's rights in seven countries experiencing "active" conflict (Burundi, CAR, Kenya, Libya, Nigeria, Somalia, and South Sudan) and six countries experiencing "fragile post-conflict situations" or in a "major humanitarian crisis" (DRC, Guinea-Bissau, Liberia, Mali, Sierra Leone, and Sudan).

The report assesses the impact that armed conflict has for the fulfilment of children's rights including education, health, nutrition and protection. It further highlights the role of children as victims and witnesses to gross violations of human rights and the State mechanisms in place to respond to the challenges of especially vulnerable children, including girls and separated children.<sup>46</sup>

Beyond the documentation of the plight of children in conflict situations, the ACERWC in its conclusions and recommendations, brings forward the analysis of State responses to the situation of children, which differ between countries, but all face challenges. Governments are called upon to mainstream a rights-based approach as the bulk

of the problem is a failure to implement human rights frameworks.

The report does however not elaborate on the role of the ACERWC and the regional human rights system further beyond calling upon States to ratify the Charter and to comply with reporting requisites in order for the ACERWC to be able to make recommendations to States. In relation to ratification it concludes that the States in armed conflict are still lacking ratification, a reason for this might well be that the Charter is stricter in terms of child involvement in armed conflict than the UN Child Rights Convention (CRC) as the Charter prohibits such involvement to eighteen years of age while the CRC opens for States to allow such involvement from the age of fifteen.

In its recommendations, the report addresses the AU and calls upon the AU to urge States to adopt the necessary laws, policies, mechanisms and judicial systems in order to hold perpetrators to account. It also directs itself to the APSA – calling for its institutions to serve as a tool for conflict prevention and management and peace-building. Addressing the PSC in its mandate to prevent, manage and resolve conflicts, the report asks this institution to "spell out proactive measures to be undertaken by States to reduce the impact of conflict. This would include preventing children from being recruited into armed forces and armed groups; ensure prosecution of grave violations of children's rights; and end impunity for crimes committed against children in armed conflict situations in collaboration with States, pursuant to relevant international human rights and humanitarian law standards."<sup>47</sup>

The report also encourages the PSC in a specific crisis situation to convene formal consultations or open meetings with civil society with specific expertise on the matter in order to give a better understanding of the situation – and better grounds for decisions. It furthermore encourages the PSC to work with women's groups for better addressing sexual and gender-based violence. Initiatives should focus

on preventing abuse, protection, support to survivors, persecution of perpetrators and strengthening the rights of girls. Lastly, the report urges the initiation of operations of the African Standby Force and the protection of children as a core function.<sup>48</sup>

The report's evaluation of State performance is harsh: "The ACERWC has worked tirelessly to raise awareness among African governments on the continuing plight of African children in conflict situations, against the backdrop of near inaction by these governments." This while also criticizing government inaction when it comes to accountability. "Accountability extends to States, which have not been effective in preventing, stopping or managing conflicts and crisis situations in a manner sufficient to reduce their impact on children. No lessons seem to have been learned from earlier conflicts; the same violations continue and States remain aloof to the plight of their children."<sup>49</sup>

This while also remembering that violations take place in spite of the existence of the APSA – in place to prevent, manage and resolve conflicts on the continent. "The institutionalization of its five pillars [...] remains incomplete and its response to grave crises shaky and deficient. The African Standby Force, the military and police arm, has yet to become fully operational, and the Peace Fund is underused."<sup>50</sup>

Regarding the role of the ACERWC, the report refers to State reporting, concluding that "the reporting landscape is grim, with many governments not fulfilling their obligations. This study shows that States Parties to the ACRWC are either not complying with the recommendations [...] or are slow in addressing its recommendations relative to armed conflicts and children."<sup>51</sup> And on what is needed, the report turns to the need for political commitment stating that "States must therefore muster more political will to both end conflicts and prevent the exacerbation of their impacts, working in synergy with all relevant actors for a holistic and effective response.

This requires real political commitment from within Africa itself. This is still lacking in the face of burgeoning crises on the continent that are affecting children more than ever before."<sup>52</sup>

### ***Country visits***

The ACERWC undertook advocacy missions to Central African Republic and South Sudan in 2014, to assess the impact of the conflict in the two countries on children. In both countries, numerous violations committed against children were documented, including killings, rape and sexual violence, forced displacement, denial of socio-economic rights, and recruitment by armed groups. Although the ACERWC identified a wide range of violations in both countries, it did not call for perpetrators of the crimes to be investigated and prosecuted and did not make specific recommendations to the PSC.<sup>53</sup>

### ***Complaints procedure***

The ACERWC considered a complaint on violations of children's rights in a conflict setting in Uganda. In the case of *Michelo Hansungule & Others v Uganda*, the complainants asked the ACERWC to find Uganda to be in violation of the African Children's Charter for violations against children during the twenty year old conflict (1986-2006) between the State and the LRA in the northern part of Uganda. The violations included recruitment of children into armed conflict, sexual violence, killing and maiming, abduction, and attacks on schools and hospitals. The ACERWC only found a violation in relation to the recruitment of children into the conflict and recommended that Uganda should through its penal code criminalise the use of children in armed conflict.<sup>54</sup>

### ***Relationship and coordination with the ACHPR***

The ACERWC and the ACHPR have similar mandates and both serve as regional human rights treaty-monitoring bodies under the umbrella of the AU. The difference being that the ACERWC is concerned with a special group and focus on the monitoring,

promotion and protection of provisions in the African Charter on the Rights and Welfare of the Child.

A 2009 ACHPR resolution establishes a formal relation with the ACERWC aiming at the enhancement of cooperation between the two. The ACHPR also appointed the Special Rapporteur on the Rights of Women as the focal point for cooperation with the ACERWC. The ACHPR deems “there is a huge potential for joint action in addressing human rights issues in conflict and crisis situations”.<sup>55</sup> So far some joint actions have been elaborated including a joint general comment on ending child marriage and a joint letter of urgent appeal to the Government of Tanzania for the right to education for pregnant girls and teen mothers. The ACHPR sees the potential to expand joint actions to also include fact-finding missions, resolutions and referring cases to AU political organs. Such joint initiatives might also have a greater impact than if working individually. However, despite these ad-hoc collaborations, there is still no formalised relation and cooperation between the two institutions.

The ACERWC faces the same challenges as the ACHPR when it comes to State implementation of its decisions. A cooperation also in this sphere might help both institutions in advancing State implementation of decisions.<sup>56</sup>

## Comparison of the Regional Human Rights Bodies

ACHPR	ACERWC	Court
Inaugurated in 1987	Inaugurated in 2002	Inaugurated in 2006
Quasi-judicial mechanism	Quasi-judicial mechanism	Judicial mechanism
Mandated to promote and protect human rights	Mandated to promote and protect children’s rights	Complements the protective mandate of the ACHPR
Determines complaints, examines State reports, makes country visits, and issues country-specific and thematic resolutions, urgent appeals and protective measures	Determines complaints, examines State reports, makes country visits, and issues country-specific and thematic resolutions, urgent appeals and protective measures	Issues judicially binding judgements as well as advisory opinions and provisional measures
Receives State reports regarding the African Charter on Human and Peoples’ Rights & its Protocol on the Rights of Women in Africa	Receives State reports regarding the African Charter on the Rights and Welfare of the Child	
11 part-time members	11 part-time members	11 judges - the President on full-time basis
Special rapporteur on the rights of women (among others)	Special rapporteur on children and armed conflict (among others)	
Holds 2 ordinary sessions/year	Holds 2 ordinary sessions/year	Holds 4 ordinary sessions/year
Based in Banjul, the Gambia	Relocating to Maseru, Lesotho, in 2020	Based in Arusha, Tanzania

### *Effectiveness of Regional Bodies*

In terms of performance, the human rights bodies varies a bit regarding their track-record. Both the ACHPR and the Court have accumulated a considerable case backlog. By June 2019, the ACHPR had 240 cases pending before it – a steep increase from the seventy-three it had ten

years earlier. This while in the period between January 2018 and June 2019 it resolved thirty-one communications presented before it. Of these, only three cases were decided on merits while three were withdrawn, four declared inadmissible and twenty-one struck out for failure to diligently prosecute or pursue communications. Unfortunately, the implementation rate of recommendations emanating from the communications procedure is low. The ACHPR is expected to receive information from States as to what measures they have taken in relation to recommendations but also reporting on this is missing. In fact, since the adoption of the Rules of Procedure in 2010, stating this obligation, the ACHPR has not received any State report on compliance with recommendations derived from the communications procedure.<sup>57</sup>

When established, the Court was hoped to overcome the challenge of a slow communications procedure of the ACHPR, leading to delays in finalising communications. To ensure speedy determination of cases by the Court, Article 28(1) of the African Court Protocol provides that it should deliver its judgment within ninety days of concluding its deliberations in a case. But the reality has been starkly different from this vision. Like the ACHPR, the Court finds itself caught in a spiral of rapidly expanding backlog of cases. By the end of June 2019, the total number of cases received by the Court from its inception had grown to 205 while the backlog of pending cases had equally increased to 143 cases compared to ninety at the end of 2016.

During the period January 2018 to June 2019, the Court issued twenty-five judgments: eighteen on merits, five on admissibility, one on reparations and one order on provisional measures. Regarding State compliance with judgements, of the twenty-eight judgements on merits handed down from its inception to June 2018, only one country (Burkina Faso) had fully complied with the judgement. One country (Tanzania) had partly complied and four countries had not complied at all (Cote d'Ivoire, Kenya, Libya and Rwanda).<sup>58</sup>

In contrast, the communications procedure of the ACERWC is grossly under-utilised. Since its inception in 2001, it only received a total of eleven communications and the longest time it has taken to handling a communication down to final decision has been just under three years. Some of the decisions by the ACERWC have also been applauded for having important impact on the protection of children's rights on the country level.<sup>59</sup>

When it comes to other mechanisms, the ACHPR between January 2018 and June 2019, adopted sixteen country-specific resolutions and six thematic resolutions. One of the thematic resolutions was on women human rights defenders, and of the country-specific resolutions, four were on armed conflict while two on WPS and several others on conflict- and election related matters.

This while within the Urgent Appeals and Provisional Measures, the ACHPR in the period between January 2018 and July 2019 issued eighty-three Urgent Appeals and five Provisional Measures. More than seventy percent of the Urgent Appeals were concerned with human rights defenders. Several of the countries facing violent conflict were among the ones receiving most Appeals, including DRC (eleven), Burundi (seven), Cameroon (six), Uganda (five) and Sudan (five). Within the same window, the ACERWC issued three Urgent Appeals. Only in thirty-one percent of Urgent Appeals, the ACHPR received reply from State Parties. This while the Court issued two orders of Provisional Measures during the same period – both regarding holding the execution of penalty sentences.

As for country visits, the ACHPR in the period January 2018 to July 2019 requested a total of twenty-seven visits. Only thirteen countries responded to their request, authorising the visit in principle, but approvals in many cases were followed by bureaucratic procedures leading nowhere. At the end, five country visits were completed. Also the ACERWC concluded five visits during the same period. The Court conducted three visits to raise awareness of its mandate and encourage

States to make the necessary declaration to allow individuals and NGOs to access the Court.

### ***Restrictions on resources and mandate***

The independence of the regional human rights bodies has been a matter of concern during the last few years. In particular the ACHPR experienced a serious blow to its independence and threats of reducing its mandate as the AU Executive Council in 2015 ordered the ACHPR to withdraw the observer status granted to the Coalition of African Lesbians. The ACHPR explained that it could not do so since the status had been properly granted. However, the Executive Council repeated its request and additional to this adopted decisions which threatened the mandate of the ACHPR. These included to review the interpretative and protective mandate of the ACHPR and the instruction to review its guidelines for granting observer status to NGOs. As a result to the political pressure presented, the ACHPR withdrew the observer status, potentially setting a dangerous precedent and violating the right to non-discrimination.<sup>60</sup>

Also the Court experienced some backlash as two countries (Rwanda and Tanzania) withdrew from the declaration allowing individuals and NGOs to file cases before the Court. In the case of Rwanda, the critique continued and the Court was also questioned for receiving grants from foreign donors, which, according to Rwanda would work against its independence. This restriction on foreign funding would, if not replaced by adequate funding through the AU budget, risk being a major blow to the functioning of the regional human rights system. Strangling the system through insufficient resource allocation might be as efficient as restrictions on its mandates. On the positive side, the relationship with the Chairperson of the AU Commission seems to be one of support to the system.

Even though the budget for the regional human rights bodies has seen an increase over the years, the system is operating with insufficient financial and human resources and lack of permanent premises. Due to

delays in recruitment, ACHPR has operated on a deficit of about forty percent compared to its approved organisational structure. The delays are primarily a consequence of the fact that recruitments are not handled by the ACHPR itself but the AU Commission. The ACERWC in 2019 operated on a total of eleven staff members. Being scheduled to relocate to Lesotho in 2020, the long-term impact of this new reality in terms of resources is hard to tell. As for the Court, it was operating at a level thirty percent below its approved organisation structure in 2019. In contrast to the ACHPR though, the Court enjoys autonomy in recruiting secretariat staff. Despite the long existence of the regional bodies, host governments have not provided permanent premises and this is why they are operating in premises not suited for their activities. The process for constructing the ACHPR premises in Banjul started in 1992 and has never been finished. The situation of the Court is similar.<sup>61</sup>

## INVESTIGATIONS OF HUMAN RIGHTS SITUATIONS FROM A WPS PERSPECTIVE

This section is dedicated to a case-study analysis of the inclusion of the Women, Peace and Security Agenda in the investigation of the human rights situation in different conflict areas, performed by the ACHPR. The analysis is made using the four WPS-pillars: 1) participation and representation; 2) prevention; 3) protection; and 4) relief and recovery. The description of each pillar below is adopted from a Sida policy brief on WPS.<sup>62</sup> Due to time-constraints only one investigation process has been analysed.

**Participation:** “Aims to ensure women’s equal participation and influence with men and the promotion of gender equality in peace and security decision-making processes at national, local and international levels. It includes the appointment of more women, including negotiators, mediators, peacekeepers, police and humanitarian personnel, as well as support for local women’s peace initiatives.”

**Protection:** “A political concept that is used and interpreted differently by different actors. Protection ensures that women and girls’ rights are protected and promoted in conflict-affected situations or other humanitarian crisis including protection from gender-based violence (GBV) in general and sexual violence in particular. The specific protection needs of refugees or internally displaced women and girls that can occur during the various stages of displacement is particularly emphasized. ‘Protection’ is not the same as ‘security’, although often associated with it. Women and men experience security differently and focus should be on determining what women and girls need in order to safely participate in society.”

**Prevention:** “This pillar focuses on ‘prevention of conflict and all forms of violence against women and girls in conflict and post-conflict situations’ and is the one that has received least attention. It includes integrating gender considerations into conflict early warning systems and involving

women and their specific needs in conflict prevention and disarmament activities. It also includes measures to prevent GBV by fighting impunity and increasing prosecutions for perpetrators of conflict-related sexual violence. Other GBV prevention strategies focus on challenging discriminatory gender norms, attitudes and behaviour and working with men and boys, not only as perpetrators, but also victims of violence and agents of change.”

**Relief and recovery:** “Aims to ensure that women and girls’ specific relief needs are met, for example in repatriation and resettlement, disarmament, demobilisation and reintegration programmes (DDR), the design of refugee camps, support to internally displaced persons (IDPs) and in the delivery of humanitarian assistance. This pillar also promotes the reinforcement of women’s capacities to act as agents in relief and recovery processes in conflict and post-conflict.”

### Case study: Burundi<sup>63</sup>

The most recent investigation taken on by the ACHPR is the one on Burundi. The PSC requested the ACHPR to undertake this investigation which was presented to the PSC in April 2016. The analysis of the report is done according to its main elements taking account of the four pillars presented above.

### Terms of reference

The decision requesting the ACHPR to undertake the mission was taken by the PSC in October 2015 and phrased as “an in-depth investigation on the violations of human rights and other abuses against civilian populations in Burundi, for the purposes of enabling Council to take additional measures.”<sup>64</sup>

The objectives of the study includes the investigation of all forms of human rights violations and other abuses committed since the beginning of the crisis in April 2015. Additionally, to specify and classify human rights violations and other abuses and to make recommendations to the

PSC on measures to put an end to human rights violations, to address impunity and impose necessary institutional reforms. The objectives do not however include a pronounced WPS perspective.

### ***Composition of the delegation***

Three out of four commissioners participating in the delegation to Burundi were women and one out of four of the staff of the Secretariat accompanying the mission was a woman.

### ***Stakeholders consulted***

When it comes to the stakeholders consulted during the in-loco investigation, there is no account of the composition of interviewees participating in the different meetings. However, among the non-state actors the list includes “women’s associations”.

### ***Historic background analysis***

The historic analysis relates to the different causes and triggers of the crisis in Burundi, beginning in the precolonial period, handling the genocidal violence in 1972 and the twelve-year civil war beginning in 1993, the Arusha Peace and Reconciliation Agreement, the following elections and debate regarding a third term of the President, which incited the unrest in 2015. The historic background does not contain an analysis of any of the WPS-related elements. Not in the terms of participation and representation, prevention, protection, relief and recovery.

### ***Account of human rights violations***

The chapter on human rights violations also accounts for some violations against women including the murders of two political activists on each side of the political spectra. It also refers to the UN High Commissioner for Human Rights (UNHCHR), reporting thirteen cases of sexual violence in the course of search and arrest operations on part of Government forces in the aftermath to the 11<sup>th</sup> of December escalation of violence – including rape and gang rape. However, the report does not mention the continuity of sexual violence after mid-December as highlighted in the

same UNHCHR statement, including the reported rape of five women in a single house during a search operation in Bujumbura Mairie province.<sup>65</sup>

There is also a note on the generation of refugee flows pouring into neighbouring countries, stemming from the fears of ethnic violence in 2015 – a great deal of which were children. In this case, the prevention, protection, relief and recovery concerning girls and women refugees is not addressed by the report.

### ***Analysis and findings of the Commission***

The analysis include ten chapters of different rights and freedoms – some of them grouped together in the same chapter as they relate to one another. The analysis of these rights and freedoms do not present a WPS perspective. It is only when it comes to the analysis of sexual violence that WPS comes into the picture, but then merely as being the subject of the chapter. The report states that “While this crisis involved a wide range of violations, sexual violence was not a prominent feature of the acts of violence documented in this report. However, the crisis has not also been free from incidents of sexual violence targeting women.” The report then goes on to describe a case and practices of sexual violence targeting women.<sup>66</sup> Any further analysis is not made. It is also notable that this section does not mention the sexual violence targeting men under arrest in prisons, which is mentioned in other parts of the document, although it is analysed in the sub-chapter of “The right to protection against torture and cruel, inhuman and degrading treatment”. Finally, the wording in describing the sexual violence which had a surge around the 11 December events is questionable from a WPS and women’s rights perspective as it reads “These involve cases in which some security forces conducting search and arrest operations forcefully had sexual intercourse with women.”<sup>67</sup> Why are not the terms “sexual violence” and “rape” used?

The analysis is not far away from, and in fact it uses the same sources, but still differs slightly from the report by the UN Secretary General to the UN Security Council which states: “The onset of the political crisis

in 2015 exacerbated the risk of sexual violence in Burundi. From May to December 2015, OHCHR documented nineteen cases of sexual violence against women by members of the security forces, most of which occurred in the context of search and arrest operations that took place primarily in opposition strongholds. The pattern was similar in all cases, with security forces allegedly entering the victims' homes, separating women from their male family members, and raping or gang-raping them."<sup>68</sup>

As discussed above, the Maputo Protocol is a highly useful instrument for the implementation of a WPS perspective and using the Protocol at all stages in the makings of the report would have contributed to a document permeated by a WPS perspective. However, the Maputo Protocol is not used at all in any part of the report. It is also notable that the sub-chapter on sexual violence does not include legal references. This is the only sub-chapter not containing a legal analysis – all other sub-chapters refer to provisions of the African Charter. In the case of Burundi, not using the Maputo protocol as a legal source has its logics to it since Burundi only signed (in 2003) but not ratified the Protocol.<sup>69</sup> However, Burundi is a State party to the Convention on the Elimination of all Forms of Discrimination Against Women – an alternative source of law that could have been used.<sup>70</sup> The mission report could also have made reference to the national action plan for the implementation of UNSCR 1325 (2012-2016).

When it comes to the analysis of victims and perpetrators, the report states that according to the testimonies received, young men constitute the bulk of victims, which also is seen as logical as this group has been the one active in protests. Here, women are mentioned as victims as well – among other groups – under the category of “Activists, opposition party members and journalists”.

### ***Recommendations by the ACHPR***

The report ends by giving recommendations to the Government of Burundi, political leaders and other stakeholders in the country, regional

and international actors, the East African Community (EAC), the AU and the international community at large. Recommendations are grouped under five sub-chapters including recommendations on 1) bringing an end to human rights violations and violence; 2) ensuring protection of human an peoples' rights; 3) the peace process; 4) accountability for violations and national reconciliation; and 5) institutional reforms and social services. Recommendations made are in general brief and do not refer to WPS in any respect.

### ***Final Communiqué***

The ACHPR also emitted a Final Communiqué by the end of the mission which is a first and very condensed version of the findings of the mission and its recommendations. In this Communiqué no reference to WPS is made and while mentioning the different human rights abuses committed during the crisis, there is no mentioning of sexual violence among offences.<sup>71</sup>

### ***Response by the PSC***

The PSC adopted a Communiqué in April 2016 in response to the ACHPR fact finding mission report. The Communiqué condemns all acts of violence and human rights violations, referring to the report. However it also makes a somewhat puzzling statement arguing that “... most of the contents of the Report have been overtaken by many national, regional, continental and international efforts aimed at the promotion of peace, security and stability in Burundi”.<sup>72</sup> It further takes notes of the recommendations made by the mission and requests the AU Commission to “regularly update Council on the evolution of the situation in the country, to enable Council to take appropriate decisions”.<sup>73</sup> Finally it stresses the need for the mediator of the EAC to take into account the recommendations and the need for deployment of AU human rights observers, military experts and police officers to monitor and report on the human rights and security situation in Burundi.

### *Comparison with UN reports and recommendations*

The report of the United Nations Independent Investigation on Burundi (UNIIB) does not entirely coincide with the time frame covered by the ACHPR report – the UN report covering the period April 2015 to June 2016 – while the ACHPR report covers April to December 2015. However, considering that they at least partly overlap, a comparison of the two is interesting for the purposes of this study.

One aspect that the ACHPR mission report does not cover is the human rights violations committed to refugees and internally displaced persons (IDPs). The UNIIB report in this case highlights the 286,000 plus persons who had sought refuge in neighbouring countries from April 2015 to August 2016 as well as the close to 110,000 IDPs as of August 2016.<sup>74</sup>

The UNIIB report states that “The crisis has exacerbated the already prevalent issue of sexual and gender-based violence in Burundi. Sexual and gender-based violence is one of the patterns of violations that emerge from UNIIB’s investigations.”<sup>75</sup> Testimonies recorded by UNIIB from Burundian refugee women and girls revealed various forms of sexual and gender-based violence experienced in Burundi and during their flight by Imbonerakure, unidentified armed men, and border guards, including as a punishment for leaving the country ‘while there was no war’. UNIIB also obtained credible information indicating that many Burundian women and girls related to males who opposed the third term of the sitting President, or were perceived as political dissidents, became the targets of physical and sexual violence by elements of the security forces. UNIIB also documented a number of cases of sexual mutilation. Finally, UNIIB also recorded first- and second-hand allegations of sexual violence against men, particularly in detention.

Further, turning to the concluding observations made to Burundi by the UN Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW Committee) in 2016, several aspects are worth mentioning.<sup>77</sup> One of the key recommendations made is for the State “To

effectively combat impunity and comply with its due diligence obligation to prevent, investigate, prosecute and punish violence perpetrated against women and girls by the police, the military and the Imbonerakure”.<sup>78</sup> In its section on WPS, the CEDAW Committee urges the State “To ensure the meaningful and inclusive participation of women in resolving the current conflict and developing and implementing restorative justice measures to rebuild trust and sustainable peace within communities affected by violence during the current conflict”.

Noting these possible shortcomings of the ACHPR mission report it is worth mentioning that the mission itself points to the difficult circumstances of the mission as it coincided with the eruption of mayor fighting on the 11 December 2015, blocking the possibility to visit sites where violations were reported and constraining the diversity of stakeholders giving their testimonies to the mission. The PSC in its Communiqué of 17 October called for an *in-depth investigation*, however the mission in its report states that due to the limited time and resources at hand as well as the restrained access to sites and stakeholders, the report “does not offer an exhaustive and full account of all acts of human rights violations and other abuses that took place in Burundi since the outbreak of the crisis”.<sup>79</sup> In addition, according to the PSC Communiqué, the mission would have to submit their report to the PSC no more than forty-five days after its adoption, counting from 17 October this would mean 1 December – prior to the actual initiation of the mission. There is no account of completion date in the report but the decision on the report by the PSC was not taken until 28 April 2016 – more than six months after that the PSC had commissioned the report.

Finally, reflecting on the report’s shortcomings in terms of WPS, refugees and IDPs, it might be worth noting that the Special Rapporteur on Rights of Women and the Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants, were not part of the mission.

## CONCLUDING ANALYSIS AND RECOMMENDATIONS

If done successfully, conflict prevention is the sum of many actions that are not necessarily properly noted and praised. It is only when prevention fails that the consequences of failure in terms of tensions, strife and armed conflict show and require the application of other measures. As of today, policy specialists in peace and security agree to the fact that prevention is the key. We ought to spend more on prevention to avoid the higher costs of conflicts escalating into full-scale armed conflicts, causing irreparable human suffering.

A central aspect in conflict prevention is to ensure the effective protection and fulfilment of human rights without distinction and discrimination. The full range of human rights – from the economic, social and cultural rights to the civil and political rights and group rights – is essential for building a society resilient to conflicts. It seems reasonable to suppose that human rights institutions – including regional systems – have a role to play in this conflict prevention project. Further, when prevention fails and there is an outbreak of armed conflict, human rights institutions can play an important role in collecting evidence for and make visible the human rights violations and violations of international humanitarian law taking place within the conflict, and advocate for justice to be made. Finally, in the process of peace negotiations, the implementation of peace accords, peace building, transitional justice processes and other processes for non-recurrence, human rights institutions have a role to play. Now, how is that role played by the regional system for human rights in Africa? Could and should it play a greater role? These are the two questions that will be elaborated upon in the concluding analysis.

## What role does the African regional human rights system play for peace and security today?

### *Legal framework*

The legal framework at the AU level is highly conducive for peace and security considering its comprehensiveness and inclusion of all rights into one document – the African Charter. Its full implementation would arguably constitute a potent action of conflict prevention. Not to mention that it provides for the *right to peace*. As is the case with the UN and the Inter-American systems for human rights, the core document has been complemented by group-specific instruments. Under the AU umbrella there are a whole range of such instruments, of which this study focuses on three: the Maputo Protocol, The Solemn Declaration on Gender Equality in Africa and the African Charter on the Rights and Welfare of the Child.<sup>80</sup>

The Maputo Protocol and the Solemn Declaration both contribute tremendously to lifting the rights of women and girls and pushing them beyond the African Charter. Their full implementation would mean a paramount contribution to peace and security on the continent ensuring women's and girls' rights, including the ones within the WPS agenda. As in the case of the mother document – the African Charter – it includes the right to peace for women and girls.

Also the implementation of the African Charter on the Rights and Welfare of the Child would mean a fundamental conflict prevention and peace building effort. Securing the rights and freedoms of children would contribute to peaceful societies and also to the realisation of the WPS-agenda. Although not explicitly granting the right to peace, the Charter includes important provisions related to the right for children not to take part in armed conflict and the protection of children in armed conflict, tension and strife – including refugees and internally displaced persons.

Turning to the PSC, the Protocol Establishing the PSC, underscores the nexus between human rights, international humanitarian law and peace and security. In the powers of the PSC is the role to anticipate and prevent disputes and conflicts, as well as policies that may lead to genocide and crimes against humanity; to make recommendations to the AU Assembly on the possible intervention in respect of grave circumstances (war crimes, genocide and crimes against humanity); follow-up on – as a measure of conflict prevention – the progress on democratic practices, good governance, rule of law and protection of human rights and international humanitarian law. The Protocol in its article 19 also regulates the interaction with the ACHPR stating that “The Peace and Security Council shall seek close cooperation with the African Commission on Human and Peoples’ Rights in all matters relevant to its objectives and mandates. The Commission on Human and Peoples’ Rights shall bring to the attention of the Peace and Security Council any information relevant to the objectives and mandate of the Peace and Security Council.”

### *Mandate of its institutions*

The toolbox available to the three institutions of the regional human rights system certainly contain a quite wide array of tools that would be suitable for contributing to peace and security on the continent. Although the nature of work is mainly reactive, follow-up on State reporting, country visits, diplomacy, the issuing of thematic and country-specific resolutions and the use of urgent appeals and provisional measures all can contribute to early warning and conflict prevention. This while the same tools together with the communications procedure of the ACHPR and the ACERWC also can contribute to peace building and non-recurrence.

Furthermore, a seldom used possibility is the article 58 mandate of ACHPR to refer situations of serious or massive violations of human rights to the AU Assembly. Upon receipt of such a notification, the AU Assembly may request an in-depth study of the situation to be conducted by the ACHPR. In this respect, the ACHPR 2010 Rules of Procedure in its rule 80 states that the ACHPR shall draw the attention of both the AU

Assembly and the PSC of situations of emergency while the Executive Council and the chair of the AU Commission shall be informed of the notification.

When it comes to the Court, the role is quite limited as it is dependent on the cases presented before it. Its reach is also restricted by the sparse number of States that have signed the special provision giving individuals and NGOs the possibility to present cases before the Court. The Court has presented a proposal that would eliminate this procedure and automatically grant this possibility to individuals and NGOs against all States parties to the Court Protocol. It remains to be seen if this request is heard. The Court could also gain more terrain if the ACHPR would delegate more cases to the Court and if States would file more cases before the Court. In relation to Member States and the AU, the Court, at the request of these can issue an advisory opinion on any legal matter related to the Charter or any other human rights instrument. This could, for example, be used by the PSC to seek an opinion on whether a given situation amounts to grave circumstances as requested for as a prerequisite for the AU to make an AU Constitutive Act article 4(h) intervention in a Member Country.

Apart from these tools, the institutions can also be used as members of Committees of inquiry in specific country situations as the one on South Sudan and the PSC can also request the ACHPR to conduct investigations on the human rights situation in any given country. In general, the regional human rights system could be used as an expert resource on all matters related to peace and security, including AU’s own Peace Support Operations.

When it comes to WPS, the same tools could be used for advancing the WPS-agenda. Now, compared to the situation of children’s rights, women’s rights do not count on their own treaty body as the instrument is a protocol under the African Charter and the follow-up on its implementation is competence of the ACHPR. Even though the ACHPR has a Special Rapporteur on Women’s Rights this can hardly be compared to what a

special treaty body on women's rights could achieve. Given the current somewhat hostile climate against the regional human rights system, the institution of such a mechanism does not seem likely in the near future, even though by means of a powerful women's advocacy it might become reality further down the road. In the meantime, the coordinated work by the ACERWC, the Special Rapporteur, the Special Envoy on WPS, the RECs and the AU Women's Directorate, will be important for advancing the implementation of the WPS-agenda.

### ***Performance of its institutions***

As elaborated upon above, the general track-record of the parts of the system and the system as a whole paints quite a mixed picture. The regional bodies present a relatively positive record when it comes to dealing with State reporting – especially considering the weak cooperation of States in this field. Also in terms of normative development and intervening in urgent situations, the system as a whole delivers. However, worrying factors include the growing back-log of cases both before the Court and the ACHPR. These cannot be separated from the fact that both institutions operate at effective staff levels considerably below their approved organisational structures.

When it comes to peace and security, both the ACHPR and the ACERWC have dedicated efforts and resources to engage in the field. ACHPR through its resolution 332, decided to dedicate more efforts to human rights in conflict situations, approached the PSC and delivered a report on addressing human rights in conflict situations, analysing their own role in contributing to peace and security. ACERWC in 2017 appointed a Special Rapporteur on Children in Armed Conflict and also contributed by means of a continental study on the impact of conflict and crises on children in Africa. The bodies have also issued country-specific and thematic resolutions as well as urgent appeals and special provisions related to conflict situations.

Regarding WPS, a complete analysis of the contribution to WPS by the

regional system made through the different tools has not been a part of the study. However, a few cases can be highlighted. As the result of a cooperation between the ACHPR and the ACERWC there was a joint General Comment on ending child marriage. Also, in 2017, the two treaty bodies sent a joint Letter of Urgent Appeal to the Government of Tanzania concerning a statement made by the President to the effect that pregnant girls and teen mothers would no longer be allowed to attend school and continue their education. This while a 2018 ruling of the Court concluded that Mali's Persons and Family Code violates international human rights standards on the State obligation to establish a minimum age of marriage for girl children, the right to consent to marriage, the right to inheritance, and the State obligation to eliminate harmful social and cultural practices for women, girl children, and children born out of wedlock.<sup>81</sup>

### ***Impact of the regional system***

The impact of the system is hard to evaluate and beyond the scope of this study, no matter it is still worth saying some words on factors that work against its impact in general and also against its contributions to peace and security. The first ten or so factors on such a list would most probably be lack of State compliance and political commitment, lack of State compliance and political commitment, and so on ... The ACHPR and the ACERWC suffer from their status as quasi-judicial bodies – meaning that their decisions are not binding for States. It also shows in catastrophic compliance rates when it comes to State reporting and reluctance by States to open up for country-visits. The impression is that the ACERWC has been slightly more successful in these respects though, succeeding in diplomatic efforts. As for political commitment, the AU Commission has the power to push through decisions by the treaty bodies, but it has not done so. The political structures are rather the ones that interfere with the system's independence when it through its actions angers one or more of the Member States.

One initiative by the ACHPR which is directed at strengthening the State implementation rate of its decisions are regional meetings reviewing

implementation together with State representatives, NGOs, National Human Rights Institutions, and human rights experts. The second session was held in 2018 and brought together seventy-two participants from the continent.<sup>82</sup>

Unfortunately, the lack of political commitment and implementation of decisions also affect the supposedly legally binding decisions of the Court. Out of the relatively few number of cases decided on merits by the Court, implementation rate is worrying. The weak political commitment also shows in the reluctance by States to allow for individuals and NGOs to file cases against them before the Court, including the recent withdrawal from this mechanism by two States.

However, although not comforting, the overall implementation rate of AU decisions is, at its best, low. Also a relatively powerful organ as the PSC meets difficulties. One example is the decision on the deployment of a Peace and Security Operation in Burundi in 2015 which was never effectuated since the Burundian Government opposed the deployment. Also, in the same case, the deployment of human rights observers was at a much lower rate than decided because of the reluctance of the Government. Lately, the decision on the establishment of a hybrid-court in South Sudan under the auspices of the African Union – part of the 2015 peace agreement – has yet not happened as the terms-of-reference for the hybrid-court is lingering with the Government.

#### ***Relationship with other AU institutions***

Criticism can be made both as to the coordination and cooperation between the three institutions making up the regional human rights system as for the coordination and cooperation with other parts of the AU. This while there also are positive examples as to when cooperation between the ACHPR and the ACERWC has resulted in important and impactful decisions such as the joint action by the two in defending the right to education of pregnant girls in Tanzania.

In cooperation and interaction with other AU institutions and RECs, there is a lot more to be asked for. Efforts are made and there are signs of some results in terms of processes that can open up, move away from the ad-hoc basis cooperation, arriving at institutionalisation of mechanism for day-to-day interaction. One challenge is the multitude of actors within the AU working on human rights, development, peace and security and the WPS-agenda. Starting out by addressing the PSC, the Peace and Security Department, the Women's Directorate and the Special Envoy on WPS would probably be strategic. Yet another challenge is the generally low level of knowledge on the regional human rights system on part of other AU institutions and decision-making bodies as well as among the RECs. An example of this is the constitution of the Commission of Inquiry on South Sudan where the Court and the ACHPR were invited to participate but not the ACERWC – allegedly due to lack of knowledge on the existence of the ACERWC. The regional system as a whole, but probably even more so the ACERWC has still lots of work to do when it comes to making themselves and their mandate known within the AU, the RECs, civil society, the international community and the public in general. It remains to be seen what the relocation of ACERWC to Lesotho will mean in this respect. The move certainly can bring some more independence but it also means a geographic distance to AU headquarters. Probably positive in some respects and negative in others.

#### **Could and should the African human rights system play a more important role?**

#### ***Potential contributions and added value of the regional system regarding peace and security***

As to whether the regional system for human rights *could* play a greater role for peace and security in Africa, the conclusion from the analysis above must be a convincing *yes*. The system not only *could* play a greater role, there is also a clear *ambition* from its institutions and important steps have been taken in this direction.

The previous chapter analysed the legal instruments at hand and also the mandates of the regional human rights bodies, arriving at the conclusion that the framework is highly relevant for advancing peace and security on the continent. Being regional expert bodies on human rights and counting a wide variety of tools, contributions to peace and security in all phases – from prevention to non-recurrence – have already been made, albeit at a somewhat ad-hoc basis. The mere working on protection and fulfilment of the rights contained in the regional and international human rights instruments constitute an act of conflict prevention and peace building. However, as indicated by the 2019 study on the topic by the ACHPR, work related to peace and security needs to be institutionalised and coordinated both within the regional system and vis-à-vis the AU ecosystem. There is a great potential in increased coordination, joining forces and avoiding duplication as well as to the effective use of the regional human rights bodies in providing expertise on peace and security matters. The regional system for human rights is there, willing to participate and should be used accordingly.

***What is needed for the regional system to play a more important role?***

There are a few factors that would facilitate a more prominent role of the regional system for human rights in contributing to peace and security in Africa. Some of the factors are under the power of the regional system itself, some in coordination with other AU institutions and others fall under the powers of the AU decision-making bodies.

- Enhanced and institutionalised coordination between the three institutions that constitute the system. The 2019 report of the ACHPR could be a valuable input in this process – arriving at common ground, common objectives and agenda for the contribution to peace and security.
- Proper dimensions of financial and human resources – including permanent premises – for the regional human rights bodies in order to be able to fully comply with their mandates and also play a prominent role in peace and security matters.

- Enhanced coordination with relevant parts of the AU, including the PSC and other parts of APSA as well as with the Gender Directorate and the Special Envoy on WPS, among other institutions. This entails better use and more timely use of the products provided by the regional human rights system as well as the more timely production, presentation, and follow-up on, for example, human rights investigation reports.
- Inclusion of the regional system for human rights in the elaboration of the APSA Roadmap.
- Enhanced coordination with RECs and RMs.
- Enhanced coordination and division of roles regarding human rights observers deployed under the umbrella of the AU Commission.

**Recommendations**

Apart from the recommendations already made in the previous chapter on how to facilitate a more prominent and effective role of the regional human rights system in the contribution to peace and security and the WPS agenda, in the following a few additional recommendations directed at different stakeholders:

***Regional Human Rights System***

- In order for the regional human rights system to work effectively and with due credibility, further efforts to reach a state of working as *one system* would be important.
- Additional efforts working to make regional instruments and the regional system widely known within the AU, the RECs and RMs, Governments, NGOs, the donor community and the general public, would contribute to its effective use.

***Peace and Security Council***

- Put in practice the institutional coordination and interaction with the regional system for human rights.
- Make use of the regional human rights system as an expert resource, including the possibility of legal advice from the Court as to whether

a particular situation makes for grave circumstances – required for an AU Constitutive Act article 4(h) intervention in a Member State.

- Ensure parity in terms of women reporters to the Continental Early Warning System.
- Adopt a rights-based approach to peace and security.

#### *African Union Commission*

- Ensure parity in terms of women observers in election missions and peace operations.
- Ensure parity in all positions and at all levels.

#### *African Union Executive Council*

- Ensure and confirm the independence and autonomy of the regional human rights system.
- Ensure that the bodies of the regional human rights system count the sufficient resources for complying with their mandates, including the administrative powers to use resources in an effective manner, adequate staffing and permanent premises.
- Include as a part of the theme of the year in 2020 “Silencing the Guns” the effective use of the regional human rights system and its interaction with other parts of the AU, RECs and RMs, in the quest for peace and security.
- Particularly focus on Women, Peace and Security within “Silencing the Guns”.
- Move on from its general appeal to States in respecting and implementing regional instruments on human rights and decisions of the regional system for human rights, to a process where States are specifically targeted and requested to comply with implementation.
- Ensure the effective implementation of the South-Sudan peace agreement through taking action to set-up the hybrid-court as envisioned in the peace agreement.
- Consider the institution of a specialised body monitoring the protection and fulfilment of women’s rights.

#### *African Union Member States*

- Ensure, respect and protect the independence and autonomy of the regional system for human rights.
- Fully cooperate with the three regional human rights bodies, including State reporting, prompt responses to urgent appeals, compliance with provisional measures, implementation of recommendations and decisions and issue a standing invitation to the ACHPR and the ACERWC.
- Accede to and implement the regional and international instruments on human rights, including the right for individuals and NGOs to present cases before the African Court on Human and Peoples’ Rights.
- Inform the public about the regional and international instruments on human rights and the regional system for human rights and facilitate the interaction of civil society with the Government, the RECs and RMs and the different AU institutions and mechanisms.
- Elaborate and ensure the implementation of national action plans on Women, Peace and Security.

#### *Donor community*

- Ensure financing of civil society organisations at all levels throughout the continent and encourage their interaction with AU-mechanisms, including the regional human rights system.
- Ensure financing of Pan-African civil society organisations which can advocate and put pressure on Governments, the PSC, RECs and RMs and the AU in general.
- Avoid “donor crowding” i.e. over-financing and competition between donors on financing certain parts of the AU, the RECs and RMs, in order to avoid duplication of efforts and other negative side effects.
- Engage with and utilise the mechanisms that the regional human rights system offers; this requires in-depth knowledge and understanding.

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### Phone interviews

**Gaye Sowe** | Executive Director, Institute for Human Rights and Development in Africa

**Ismene Zarifis** | Expert on Regional Human Rights Systems

**Frew Demeke** | National Programme Manager, Democracy, Human Rights and Gender Equality, Embassy of Sweden in Ethiopia

**Commander Abebe Muluneh Beyene** | Director, IGAD Security Sector Program

**Michelle Ndiaye** | Director, Africa Peace and Security Programme, Addis Ababa University & Head of Secretariat, Tana Forum

### Face-to-face interviews in Addis Ababa

**Remember Miamingi** | Child Protection Adviser, Peace and Security Department, African Union Commission

**Jean-Bosco Butera** | Special Adviser and Chief of Staff, Office of the Special Envoy on Women, Peace and Security, African Union Commission

**Victoria Maloka** | Acting Director, Women, Gender & Development Directorate, Bureau of the Chairperson, African Union Commission

**Violet Odala** | Programme Manager, Children and the Law Programme, African Child Policy Forum

**Marie Goretti Nduwayo** | Head of Liaison Office to the AU, UN Women

**Helena Bådagård** | Program Manager, Specialist - Democracy and Human Rights, Embassy of Sweden

## END NOTES

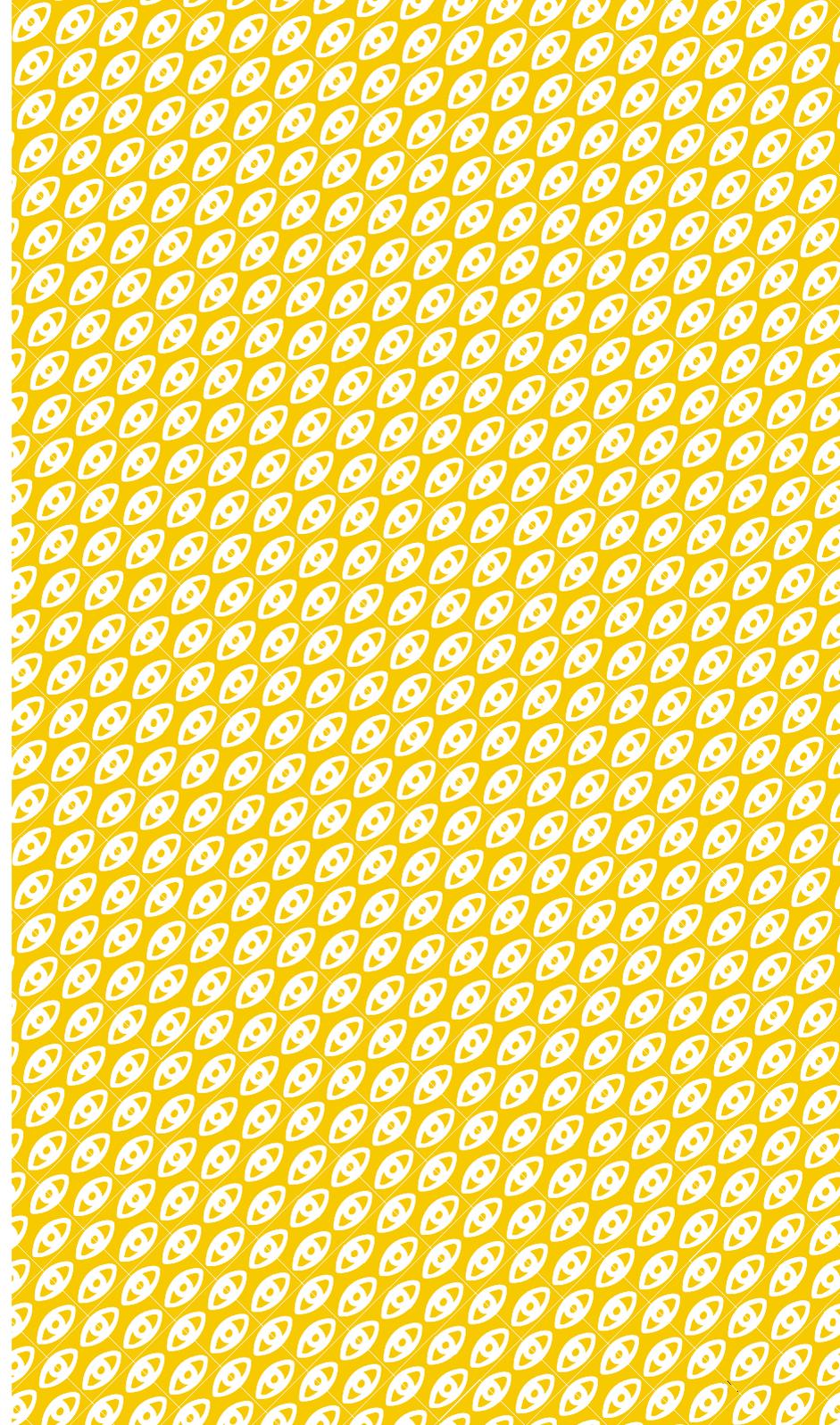
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- <sup>9</sup> The following principles are derived from AU Shared Values particularly the Constitutive Act and the African Charter on Elections, Governance and Democracy: Effective participation of the African peoples in strengthening and consolidating democratic governance in Member States and continental affairs; Respect for democratic principles, human rights, the rule of law and good governance; Holding of regular, transparent, free and fair elections; Promotion of the principle of separation of powers; Promotion of gender equality and youth empowerment; Promotion of transparency and fairness in the management of public affairs; Condemnation and rejection of acts of corruption, related offenses and impunity; Condemnation and rejection of unconstitutional changes of governments. Strengthening political pluralism and recognizing the role, rights and responsibilities of legally constituted political parties, including opposition political parties.
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- <sup>18</sup> Egypt, South Africa and Zambia have ratified with reservations.
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- <sup>22</sup> States who have ratified with reservations: Cameroon, Kenya, Mauritius, Namibia, South Africa and Uganda.
- <sup>23</sup> <https://www.acerwc.africa/ratifications-table/>  
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- <sup>29</sup> Commission Nationale des Droits de l'Homme et des Libertes v Chad and Amnesty International and Others v. Sudan
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*The full enjoyment of human rights without peace is as unthinkable as the full enjoyment of peace without human rights.*

The present study elaborates on the nexus between human rights and peace and security in Africa, focusing on the role of the African human rights system in the quest for sustainable peace. A rights-based approach to peace is the point of departure and special attention is devoted to the Women, Peace and Security Agenda. This study also examines the role of other African Union institutions, such as the Peace and Security Council and their potential to contribute to the Women, Peace and Security Agenda. Recommendations to various stakeholders is made with the ambition to break down silos, encourage the African Union to work as *one system* and support the nexus between human rights and peace and security.

**The Swedish Foundation for Human Rights** is a non-profit foundation founded in 1991, with the objective to promote human rights through human rights education, advocacy and international development cooperation. The Swedish Foundation for Human Rights has been working together with partner organisations in Africa, Asia and Latin America since the beginning of the 1990s. Over the years, the role of regional human rights systems in the protection and promotion of human rights, has grown ever more important. Simultaneously, they have been under pressure from State parties disagreeing with decisions and roles played by the regional systems. The Swedish Foundation for Human Rights has devoted efforts to make the systems and their mandates known to different actors with the aim to stimulate their use and bolster knowledge. Another important part of our mandate is to work with transitional justice. The present study connects our expertise in regional human rights systems and transitional justice and showcases their immediate implications for peace and security.



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