Protecting Human Rights in Conflict and Crisis Situations: Revitalizing the Role of the African Commission on Human and Peoples’ Rights

I Introduction

1. Perhaps the most useful seminal reference for understanding the disturbingly shocking character of violations that are witnessed in recent times is the main Report of the African Union (AU) Commission of Inquiry on South Sudan (AUCISS) as well as the Separate Report of Prof Mohmood Mamdani. As both reports show, the level of brutality that the violations revealed during the course of the war that broke out in December 2013 has also been unprecedented. ‘The stories and reports of the human toll of the violence and brutality have been heart-wrenching’ stated the AUCISS main report. It went on to note ‘reports of people being burnt in places of worship and hospitals, mass burials, women of all ages raped; both elderly and young, women described how they were brutally gang raped, and left unconscious and bleeding, people were not simply shot, they were subjected, for instance, to beatings before being compelled to jump into a lit fire. The Commission heard of some captured people being forced to eat human flesh or forced to drink human blood.’ In the words of Mamdani’s separate opinion, ‘[g]ratuitous degradation was a marked feature in many of the incidents of brutality narrated to us.’

2. Ours is indeed an era witnessing qualitative shift in the nature and scale of human rights violations. With even the bare minimum of humane conduct totally abandoned, violence is used with unrestrained zeal and unconscionably absolute brutality. This is particularly true in conflict and crisis situations. In noting the barbarity that is often witnessed in conflict situations, the African Commission in its fact-finding mission report on Burundi noted that, ‘[i]n some of the killings, body parts of victims were butchered’, revealing ‘level of cruelty on the part of perpetrators and showed complete disregard to the sanctity of human life.’ Indeed, no other situation exhibits the worst and heinous manifestations of violations of

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2 AU, A Separate Opinion of Mahmood Mamdani, a member of the AU Commission of Inquiry on South Sudan. [AUCISS Separate Opinion]
3 AUCISS Final Report, 380.
4 Ibid.
5 AUCISS Separate Opinion, para. 9.
human rights and international humanitarian law than those of major political crisis and armed conflicts.

3. Ours is also an era when the institutional foundation on which the human rights edifice has been built notably the nation state and the multilateral system face unprecedented assault from a web of both local and global actors. While the occurrence of violations of human rights and humanitarian law in situations of conflict and crisis is not new, these conditions have made the need for a close scrutiny of the role of the African Union’s human rights system in addressing such violations, including in close coordination with other relevant bodies such as the Peace and Security Council (PSC) of the AU, very pressing and more urgent. The changes in the character of the violations and the contemporary pressure facing national and multilateral frameworks reveal that there is a higher demand and urgency for an effective system of response to human rights issues in conflict situations than in normal times. This entails that the African human rights system has to have the flexibility and be equipped with the requisite means for effectively meeting the demand and urgency of these situations.

4. There are a number of other factors that reinforce the need for such review of the role of the African human rights system in the present era. First, not only that the African Union (AU) has now become a dominant player in the formulation and deployment of policy responses to crisis and conflict situations, but it is also at a stage of activating its mandate relevant to addressing human rights issues in conflict situations and has started deploying mechanisms targeted to address the human rights dimensions of conflicts.

5. Second, there are efforts to address conflicts in a more systematic and comprehensive form. In this regard, two initiatives are worth mentioning. First, the PSC of the AU has expressed its recognition on the need to have increasing focus on root causes and structural prevention of conflict in Africa, and the need for coordination among relevant AU institutions. For example, in a communiqué it adopted in October 2014, the PSC not only recognized marginalization and abuse of human rights as potent triggers of conflict but it also underscored the need for greater involvement of several institutions including the African Commission on Human and People’s Rights (African Commission) in ‘the overall efforts to promote good governance and prevent conflicts’. Second, the AU has set an ambitious target for mobilizing the continent towards ‘silencing the guns’ by 2020. This forms part of one of the goals of Agenda 2063, namely ‘a peaceful and secure Africa’, which is premised on the recognition that social inclusion, respect for human rights, justice, rule of law, good governance and democracy are “the necessary preconditions for a peaceful and conflict-free continent”.

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6. Finally, there is a need not only for optimal utilization of the African Charter on Human and Peoples’ Rights (the African Charter), the founding document of the African human rights system, and associated instruments for addressing the human rights issues in conflict and crisis situations, there is also the need for equipping the African Commission, as the principal human rights body of the AU, with the requisite tools to enable it to effectively address these issues.

7. The African Commission on Human and Peoples’ Rights (the African Commission) has not been inactive as far as human rights in conflict situations are concerned. Indeed, the record of the work of the Commission shows its various levels of engagement in this area through its communications procedure, the resolutions it adopted over the years, the fact finding missions it has undertaken or the letters of appeal members of the Commission issue. However, the nature of human rights violations in conflict situations demands much more than the ad hoc and largely reactive approach that thus far characterizes the Commission’s engagement.

8. These major developments not only set the context for looking into human rights in conflict situations but also give rise to major policy and operational issues. One such policy issue is the nature and scope of the normative frameworks of the AU system and their implications for initiating effective response to human rights and IHL issues in crisis and conflict situations. The other is the availability of the decision-making authority and structures and the requisite mechanisms/tools for tracking, investigating and responding to human rights issues in conflict situations. Related to this is the issue of whether the human rights and the peace and security actors have developed mechanisms for a systematic and institutionalized consideration of human rights issues in all their initiatives to address all crisis or conflict situations. There is also the question of what the practice of the two systems shows in this regard and the gap between what the legal instruments envisage and the actual operation of the two institutional frameworks. Equally important is the issue of the availability of mechanisms for structured coordination and synergy between the AU institutions on peace and security and those tasked with promotion and protection of human rights and the extent to which the two systems have in practice coordinated their actions.

Resolution 332

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9. Cognizant of the challenges arising from human rights issues in conflict situations and acting on its mandate under Article 45 of the African Charter on Human and Peoples’ Rights (the African Charter), the African Commission During its 19th Extraordinary Session held in Banjul, the Gambia from 16 to 25 February 2016, adopted ACHPR/Res. 332 (EXT.OS/XIX) 2016 (Resolution 332 attached in the annex). In this resolution addressing the theme of human rights in conflict situations, the African Commission decided, among others, to:

i. Conduct a study on human rights in conflict situations in Africa, with a view to developing a comprehensive study framework on the same;

ii. Collaborate with the AU PSC and other relevant stakeholders working in the issues of peace and security, towards enhancing the role of the African Commission, as well as its coordination with other continental processes, in addressing human rights issues in conflict situations.

10. This report is prepared in fulfillment of the responsibility that Resolution 332 entrusted to Commissioner Solomon Ayele Dersso for implementing the objectives of the resolution. It presents the analysis and recommendations of the study done in pursuit of the objectives of this resolution. As such, apart from taking stoke of the work of the Commission in this area, the report aims at not only clarifying ways of meeting the challenges that conflict situations present to the protection of human rights and international humanitarian law but also to fill in the gaps in the existing approaches.

The context covered under Resolution 332

11. The starting point in clarifying the context covered in Resolution 332 is the term ‘conflict’, which comes from the Latin word *conflictus*, which means collision or clash. The term has now evolved to include concepts other than physical collision or struggle such as disagreement or opposition of interest, ideas etc. Nevertheless, while there is still no commonly agreed definition of the term, a commonly accepted definition that encompasses the basic elements of the term could be ‘a disagreement through which the parties involved perceive a threat to their needs, interests or concerns.’

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8 Conflict Resolution, University of Wisconsin, Human Resource Development available at
12. While in conflict studies the literature classifies conflicts based on, for instance, the parties to the conflict, the context, the motivations or needs behind, the consequences, duration, intensity and absence or presence of violence, the types of conflicts (conflict situations in the language of resolution 332) that are of interest to this study are those classified based on the parties to the conflict and the existence and degree of violence involved.

13. The human rights issues that are covered under resolution 332 are thus those arising in conflict situations. The phrase ‘conflict situations’ in this context covers not only armed conflicts, both international and non-international, to which International Humanitarian Law (IHL) applies but also other instances of crisis situations manifesting violent actions of various gravity short of armed conflict. Apart from those cases of organized violence involving armed force between two or more parties, either State-based, or non-State, armed actors of various forms, conflict situations thus additionally cover conditions of major instability or violence lacking the use of non-state based armed force.

14. Such conceptualization of conflict situations recognizes the changes characterizing various contemporary conflicts manifesting unconventional organization and use of armed violence (but not meeting the threshold of armed conflicts) taking the form of “countless little wars with no front lines, no battlefields, no clear conflict zones, no distinction between combatants and civilians and no ideology,” 9 whether such involved conventional or traditional weapons. The inclusion (in Resolution 332’s language of conflict situations’) of crises situations other than armed conflicts also recognizes internal crises, which, while lacking the use of non-state-based armed violence, manifest upheavals or disturbances involving non-armed violent actions. These include riots, uprisings, violently contested elections, unconstitutional changes of government and other forms of contestations over transitions or constitutional term limits, the systematic and violent crackdown against political opposition, civil society organizations and the media in situations of political tension.

15. Accordingly, the defining characteristic of conflict situations as used in Resolution 332 should not only be situations involving the use of armed force by non-state actors of various degrees of organization. But, should equally cover situations of political tension manifesting non-armed violent

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actions.

16. This line of interpretation is in line with the spirit of Resolution 332 and AU’s legal and normative framework. In one of its operative paragraphs, Resolution 332 refers to “its previous Resolutions pertaining to human rights in conflict situations” and mentions four as examples.\(^\text{10}\) Reading of these four resolutions reveals that they are not only concerned with human rights violations in situations of conventional armed conflicts but also with other cases of crisis situation varying from the unconstitutional change of governments in the Republics of Guinea and Guinea Bissau to the post-election crisis in Kenya and clampdown on political dissent, journalists and the media in Eritrea to the barbaric terrorist attacks against civilians by Al Shabab, Al Qaeda and Boko Haram in the Eastern, Northern and Western parts of the continent respectively.

17. This approach in using the term ‘conflict situations’ in Resolution 332 is also consistent with Article 2 of the Protocol Relating to the Establishment of the PSC, which establishes the PSC as a standing decision-making organ to “facilitate timely and efficient response to conflict and crisis situations in Africa”. According to Article 4 of the same Protocol containing “crisis situations so as to prevent them from developing into full-blown conflicts” is one of the guiding principles of the PSC.

18. The inclusion of conflict prevention, management and resolution in the Resolution further corroborates such inclusive reading of crisis situations. As the reference to conflict prevention measures indicate, crisis situations in Africa and the relevance of the use of the applicable human rights regime are not limited to conflicts. Rather, mainstreaming of human rights is increasingly becoming relevant to various forms of management or prevention of crises including but not limited to preventive diplomacy and deployment, and increasingly in measures for the prevention and countering of violent extremism.

19. Finally, the frequency of violent riots and uprisings, the prevalence of the use of lethal force against civilians, and the pervasiveness of the declaration of state of emergency on the continent has made violations of human rights in crisis situations as comparably grave and alarming as those of armed conflict situations. Furthermore, in addition to the increasing similarity of the human rights violations in the two situations, the not uncommon quick escalation of crisis situations to full-blown conflicts in many instances blurs the distinction between conflict and crisis

\(^{10}\) The four resolutions referred to in Resolution 332 are: ACHPR/Res.117 (XLII) 07 Resolution on Strengthening the Responsibility to Protect in Africa; ACHPR/Res.157 (XLVI) 09 and ACHPR/Res.207 (L) 11 Resolution on the General Human Rights Situation in Africa; and ACHPR/Res.276 (LV) 14 Resolution on Terrorist Acts in Africa.
situations further justifying the treatment of the two situations together.

The relationship between human and peoples’ rights and conflict

20. Conventional literature articulates human rights violations as multi-dimensional and multi-causal in relation to conflict.\(^{11}\) Human rights may be considered as the causes, symptoms and consequences—or even the means—to transform or perpetuate violent conflict. Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman argue that the complexity denotes the diversity of the “interplay between human rights violations and conflict and the role of human rights violations as causes, consequences, or transformers of ongoing conflict dynamics.”\(^{12}\) In these contexts human rights violations and human rights protection are closely linked to the patterns of contemporary conflict in a number of ways. The following section provides an overview of the inter-sectionality and cross-cutting nature of human rights issues in conflict contexts.

21. Some argue that human rights violations are causes and symptoms of violent conflict as a result of the failure to meet basic human needs and to protect and fulfill human rights.\(^{13}\) This argument is derived from a theory of basic human needs that stresses the importance of explaining the causes of conflict as a result of unsatisfied human needs that impede the security of individuals and social groups, in turn generating fear and insecurity.\(^{14}\) The complementary approach, in addition to the basic needs theory, emphasizes inequality and exclusion factors. For instance, in their seminal work Oskar N.T. Thoms and James Ron argue that discrimination or discriminatory practices and laws and institutional arrangements that are organized along ethnic lines or based on other identity, region, race and class issues can generate conflict. These inequalities and exclusions are embedded in legislation, territory, national symbols, physical security, social security, political representation, and taxation that create grievances and greater potential for violence.\(^{15}\) In contemporary conflict contexts,

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\(^{11}\) Frerks, G. "Human rights violations and contemporary violent conflict; an inquiry into causes and remedies." In Human rights and conflict; Essays in honour of Bas de Gaay Fortman, pp. 67-85. Intersentia, 2012. 67, 68.


\(^{13}\)Ibid 5.

\(^{14}\)Mertus, Julie, and Jeffrey W. Helsing, eds. Human rights and conflict: exploring the links between rights, law, and peacebuilding. US Institute of Peace Press, 2006. 3.

\(^{15}\)Thoms, Oskar NT, and James Ron. "Do human rights violations cause internal conflict?" Human Rights Quarterly(2007): 692-696
issues of inequality and exclusion are multi-faceted structural conditions generating violence among and within States, between communities along ethnic, religious or linguistic divides, and race and gender divides. For instance, Thoms and Ron argue that “violations of civil and political rights are more obviously linked to conflict than abuses of economic and social rights. Discrimination and violations of social and economic rights function as underlying causes, creating grievances and group identities that may lead to violence. In contrast, violations of civil and political rights are more clearly identifiable as direct conflict triggers. When populations are unsettled by long-standing inequalities in access to basic needs and political participation, government repression may trigger violent conflict.”16 Other studies maintain that exclusion of certain groups from social, economic or political entitlements and the existence of systematic discrimination have been established as key factors generating violent conflict.17 Experience on the continent also shows that while violations of socio-economic rights and inequality often constitute root causes of conflicts, serious incidents of violations of the rights to security, liberty and life are often likely to trigger conflicts. 18

22. Even if human rights violation are not the only cause of conflict, the human rights nexus with conflict accentuates structural conditions such as inequality, corrupt and abusive systems of governance, injustice and insecurity, generating violent conflict. For example, as the north African uprisings attested such violations as torture, inhumane treatment, arbitrary detention as well as violations of freedom of thought and other political freedoms, create the conditions for or accentuate systematic marginalization and structural violence against sections of society (such as the youth in the north African countries that experienced uprisings in 2011) that would in turn create grievance, dissatisfaction and frustration, creating the conditions that incentivize actors to resort to violence and armed conflict.

Human rights violations as consequence of conflicts

23. Violation of human rights may also be the consequence of violent conflict. Conflicts that have causes rooted in multi-faceted factors ultimately result in killing and displacement of civilians and gross and systematic human

16 Ibid 674, 701.
rights violations. Contemporary conflicts are regarded as the major cause of civilian death and suffering, as they employ deliberate targeting of civilians as a mode of warfare. Some common human rights violations include torture and disappearances, but there may also be war crimes, crimes against humanity, and even genocide. Historical examples include the 1994 genocide against the Tutsi in Rwanda and the protracted conflicts in Angola and Sudan that demonstrate massive human rights violations. The rebels of Foday Sankoh’s Revolutionary United Front in Sierra Leone used human rights violations as a strategy of war to intimidate opponents and terrorize civilians. These violations included mutilation and amputation of people’s hands and other body parts, rape and displacement, as well as targeted “ethnic cleansing.” Human rights violations have also been perpetuated through denial of humanitarian relief and destruction of civilians’ livelihoods. For instance the work of humanitarian organizations in South Sudan has been obstructed by government forces despite the looming humanitarian crisis that has already put 7.8 million people in dire need of assistance. Direct violence as a result of conflict situations often manifests in the form of violations such as censorship, mass atrocities, armed forces’ excessive use of force, intimidation of political opponents, rape, summary executions, disappearances and torture. And these often result in the destruction of infrastructure such as schools and health clinics that in turn affect social and economic rights, which may bring about massive displacement of civilian populations and destruction of their livelihood.

**Human rights violations as transformers of conflict**

24. Sustained human rights violations in a protracted conflict setting can also serve as driving factors that deepen divides and animosity among parties in conflict. Human rights violations can continue to reinforce grievances and resentment among opposing parties, creating fertile ground for elite manipulation, and armed groups can also mobilize to create us vs. them divides. For instance, the conflict in the Sudan that resulted in the deaths

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20 Ibid 5


of over two million people and the internal displacement of four million persons out of a total national population of 38 million fueled resentment and protracted the conflict that ended with the secession of South Sudan in 2011.

Contemporary conflicts in Africa: Nature, prevalence and dynamics

25. Despite similarities, the nature and manifestation of human rights (IHL) issues are not the same for all conflict and crisis situations. The human rights (and IHL) issues that arise in conflict and crisis situations depend on the nature and form of the conflict/crisis situation. Human rights issues that arise in a civil war, in violent confrontation between protestors and security forces, in situations of electoral dispute and in the so-called war against terror are not the same.

26. The nature, dynamics and prevalence of conflict and violence in the continent have evolved with new causes and driving factors and far-reaching consequences. As the economic, political, cultural and demographic landscape has changed, so too has Africa’s security landscape, with some positive developments but also regression. Observers of the conflict landscape in Africa have witnessed a significant decline in inter-State conflict while protracted internal social conflicts such as civil wars and instability showed a marked rise. Contemporary conflicts in Africa have involved either factional warfare, ethnic-based or regional conflict involving State actors. The factional type of conflicts are characterized as fluid in their nature, often aiming to control or mobilize the civilian population and controlling commercial, mineral and natural resources to sustain the conflict. Examples of such conflicts include those seen in Somalia, Liberia (internally), Uganda (internally) Namibia and Cote D’Ivoire. Other aspects of contemporary conflict are ethnic based, mobilizing the ethnic identities of populations and resulting in huge death tolls, massive displacement, fear and insecurity. Such occurrences have taken place in Burundi, the DRC in the Kivu region, and most notably in Nigeria, which in recent years have experienced outbreaks of ethnic and religious violence.

27. The other major type of conflict on the continent amounts to what some observers have termed the "new warfare" also called transnational, encompassing the regionalized nature of conflicts involving conventional State forces with military operations supporting factional armed groups as proxies. This type of conflict has been witnessed in the war in the DRC that involves the armed forces of eight countries, including Rwanda, Burundi and Uganda. Similar dynamics have been observed in the war in Sierra Leone, and the conflict in South Sudan has also retained its strong regional
dimension. As a result, civilians have suffered displacement and death, epidemic diseases and multi-faceted human rights violations.

28. Across the continent, these conflict situations in their varied forms have resulted in massive internal displacement of civilians and through 2016 accounted for 12.6 million African civilian casualties, as well as other forms of extreme violence deliberately targeting civilians. These human rights violations include increasing use of violence in the form of mutilation, torture of women and children, violent rituals and the forcible involvement of children, spouses and other relatives in killing and rape. These forms of violence are used as a means of waging war primarily by militia groups and certain State proxies.

29. The other type of conflict situation is that related to election disputes. Clear instances of this sort of conflict situation have followed contested elections and political tension in Kenya in 2007, in 2008 in Zimbabwe, in 2011 in Cote d’Ivoire and after the 2016 elections in Gabon, to name only a few. The violations that often accompany these conflict situations include violent crack down against opposition politicians, civil society actors, journalists, the media and supporters of opposition parties. Where the situation escalates, as it did in Kenya in 2007/08 and in Cote d’Ivoire in 2011, the confrontation between the incumbent and the opposition descends into armed violence leading to the killing, maiming and displacement of large scale of the civilian population.

30. Distinct but related to the above are crises situations related to contested political transitions, which at times center around disputes over constitutional term limits and unconstitutional changes of government. This has been the case in a number of countries including Burkina Faso, Burundi, Congo, Guinea-Bissau, Mauritania, Madagascar, Mali, and Togo among others. While these often lead to widespread human rights violations including excessive use of lethal force by government security

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forces, extra-judicial killings, arbitrary detention, torture and crack down on opposition politicians and civil society actors and the disruption of sources of livelihoods, in more serious cases the situation escalates into armed violence as it did in Burundi since 2015 and in DRC since 2016.

31. In Burundi, the dispute over the third term of the incumbent president leading to protests by the opposition and civil society organizations escalated into conflict involving sporadic armed violence and confrontation with security forces. As the African Commission documented in its fact-finding report, the violations that accompanied this conflict situation include excessive use of lethal force by security forces, extra-judicial killings, arbitrary detention and arrest without charges, torture, retaliatory assassinations, violent crackdown against the media and journalists, arbitrary closure of nongovernmental organizations in breach of the right to freedom of association, sexual violence and the flight of hundreds of thousands into neighboring countries.

32. In the DRC, the failure of the government to hold national elections in due time and the resultant extension of the term of office of the incumbent President has put the country in major turmoil. With opposition groups and civil society organizations mobilizing pressure against President Laurent Kabila and the government’s authoritarian drift increasingly resorting to repression and heavy-handed security responses, the country continues to witness recurring political instability. Additionally, the security situation in the country continues to show increasing deterioration with rebel or militia groups and armed confrontations surging. This spike in number of armed groups and armed fighting affect various parts of the country spreading at least across 10 provinces. In the violence that started in 2016 in the Kasai region, the extreme violence that government forces and armed militia used including against civilians reportedly led to the death of thousands with UN documenting 87 mass graves and the flight of tens of thousands of civilians into Angola.

33. The other main issue concerning the contemporary conflict landscape on the continent is terrorism, often involving religious extremist groups. The issues of terrorism and violent extremism continue as major peace and security threats on the continent. Terrorist attacks in Chad, Cameroon, Niger, Nigeria, Burkina Faso, Egypt, and Mali have targeted civilian populations, including women and children, as well as security forces. Targeted civilian attacks in north-east Nigeria have resulted in the displacement of over 2.5 million civilians as internally displaced persons
and refugees. Armed groups such as Boko Haram in the north-east and Fulani militia in the country’s middle belt has carried out small-scale suicide bombings and armed attacks primarily targeting civilians in rural villages and displacement camps. Similar trend have been witnessed in Mozambique in 2017 carried out by an armed Islamic group that calls itself ‘Al Shabaab’ and targets civilians and government institutions in the Cabo Delgado region. Furthermore, increasing numbers of non-State extremist groups and armed militias have de facto control over some areas in Libya, where the erosion of central government authority has resulted in a dire human rights situation. The ACLD database indicates that there is increasing violence targeting civilians since 2016 carried out by militant Islamist groups in West Africa, including Côte d’Ivoire and Burkina Faso and extending to Mali in the north and to the Lake Chad basin in the east. These attacks have been committed by the Al-Qaeda affiliated Al-Mourabitoun of Grand-Bassam and other unidentified militant groups.

34. Riot and violent protests have also become a common occurrence in many African countries, and these have affected civilian populations with political violence perpetuated by both State and non-State actors. Again human rights issues are at stake because there are abundant reports that security forces, intelligence and law enforcement authorities, armies and militias have been engaged in continuing human rights violations throughout the continent. Human rights violations such as extrajudicial killing, detention and torture have targeted journalists, politicians, and


3 Accessed on : 2/17/2018


Accessed on 17 February 2018
civil society leaders and activists. The general trend on the continent indicates that the massive and persistent demonstrations are occurring as a result of political crises following contested elections, the narrowing of political space for democratic participation, youth unemployment, economic and political marginalization, and lack of adequate services. Riots and protests have been a defining aspect of political instability and have often developed into widespread violence in Africa. For example, the ACLED database accounts for 101 riots and protests across Zambia between 2016 and 2017, and similar widespread riots and violence also occurred in Ethiopia, Cameroon, Togo, Congo, Angola, the Central African Republic, South Africa, Egypt, Morocco and Tunisia.

35. These riots and protests have multi-faceted causes intertwined with ethnic and/or religious issues and economic and political grievances. Governments have often responded with mixed strategies to prevent escalation both through repressive means and by providing political concessions. However, use of force and repressive tactics remain the most dominant forms of response to riots and protests, resulting in narrowing down of the political space and the resulting deteriorating human rights situations.29

36. Resource-related conflicts in the contemporary conflict landscape of Africa have also been a major concern. Despite the enormous potential and tremendous positive economic benefit to development, natural resources have long been treated as a conflict generating factor. Valuable resources including oil, diamonds, copper, and cobalt have demonstrated the “natural resources curse,” fueling violence through competition for territorial control, promoting looting and rent-seeking, and sustaining violence through financing conflict. For instance, a UN panel of experts found that the illicit trade of gold and diamonds is being used to finance conflict in the Central African Republic—and this is not a unique case.30 The problem of natural resource management and extraction has catered to corruption and misuse that in effect creates and sustains unequal distribution of wealth among communities. Berman shows that despite the extractive industries’ potential, the communities of resource-rich countries


in Africa are poor and underdeveloped. And competition to control these resources and extract them—combining rent-seeking with chronic corruption—generates conflict. Even though there is no definitive empirical data to quantify the exact role that extractive resources may play in indirectly inciting political violence, it has been demonstrated. The ACLED database provides adequate data to illustrate the prevalence of extractive resource driven conflict, including riots, protests and violence against civilians.

![Figure 1: Resource-Related Conflict in Africa, 1997-2014](image)

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31 Ibid

32 ACLED website
37. Researches also show that armed groups—militias and rebels—employ various tactics including disruption, control and manipulation of the extractive resources to finance civil wars. Such instances have been witnessed in Angola, the DRC and Sierra Leone. The ACLD dataset captures resource-related conflict related to oil, mines, diamonds, and resources with more direct links such as kidnapping of oil workers, conflicts over access to a specific diamond mine, or protesting against an oil company. In recent years, the prevalence of conflict with direct links to these resources has been increasing, and conflict occurrence is now over 5 times the level it was about 10 years ago, although the number of associated fatalities has been decreasing. Figure 1 shows that the fatalities related to these conflicts are lower than levels seen in the late 1990s. Nevertheless, the ACLD dataset illustrates increased conflict (higher prevalence of riots and protests) driven by extractive resources, resource-related battles and instances of violence against civilians only seen in a few countries such as Nigeria, Sudan, South Sudan, the DRC and Somalia. Nigeria exhibits a constant rise in directly-resource-related conflict that has resulted in targeted violence against civilians, followed by South Sudan, which has experienced violent conflict as a result of government forces’ and rebel groups’ struggle to control oil-rich regions of the new country.

Some salient human rights issues in conflict situations

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33 ACLED website
35 ACLED website
38. In the context of new forms of violence and war, both State and non-State actors are key players in explaining various patterns of human rights violations related to conflict and violent crisis situations. Some of the major non-State actors as ‘perpetrators’ of human rights violations in armed conflicts-settings and other situations of violence are non-State armed groups (rebel and opposition groups, and terrorist and other criminal groups) and economic non-State actors (multinational corporations and private military and security companies). Besides, contemporary violent conflict and related crises in Africa, there are facets of fluidity in the causes and transformation of warfare tactics, objectives, dynamics and actors.

39. Sexual violence is one of the major forms of human rights violations that has become common in conflict and crisis situations on the continent. The ACLD includes a Gendered Repression Dataset, which lists data from across the continent. For instance, the prevalence of such political violence in Zimbabwe depicts state actors such as police and the State military, as well as non-State actors such as ZANU-PF and the MDC, using gendered repression as a strategy during elections. Some examples of the tactics used include rape, physical attack, abduction, killing and the targeting of female political leaders, whose bodies are used as weapons of humiliation. Megan Bastick, Karin Grimm and Rahel Kunz argue that armed groups’ deliberate strategy of employing sexual violence as a weapon of political conflict aims to humiliate opponents and terrify society as an ultimately expression of domination. The best known examples of this are the sexual violence that has been used as a weapon of political violence in the DRC and in the

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Available on: 
https://www1.essex.ac.uk/armedcon/story_id/sexualviolence_conflict_full%5B1%5D.pdf Accessed on 17 February 2018 and see also United Nations Secretary-General’s UNiTE to End Violence against Women campaign

37 UN official calls DR Congo 'rape capital of the world', BBC News Last updated at 16:50 GMT, Wednesday, 28 April 2010 17:50 UK available on
Darfur region of Sudan.\(^{38}\)

40. As the African Committee of Experts on the Rights and Welfare of the Child report on its continental study on the impact of conflict and crises documented, violence against children is another common form of human rights violations in conflict settings and crisis situations. Armed groups use violence against children with the aim of terrorizing and fomenting a sense of fear and insecurity among civilian populations. For instance, Boko Haram attacks in Nigeria in recent years have included children as targets of violence, dramatically increasing the number of child fatalities in the conflict. Similar incidents of government and rebel forces targeting and killing children have occurred in South Sudan since 2014, reported following the discovery of dozens of mass graves.\(^{39}\) Rebel groups and armed militias in the Central African Republic have also targeted children and employed public executions of pregnant women and children, attacks on children using grenades and machetes, slitting of throats, and burning down homes, amongst other tactics.\(^{40}\) Besides directly targeting children with violence, there are reports that illustrate the prevalent practice of armed militias and rebel groups conscripting child soldiers. Such instances

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are reported to be prevalent in CAR, \(^{41}\) Uganda and the DRC, most notably because of the notorious Lord’s Resistance Army (LRA) that was infamous for child conscription, killing and abduction.\(^{42}\)

41. Contemporary conflict and crisis situations have forced millions of people—men, women and children—to flee in order to escape suffering, human rights violations and starvation. Many are unable to return to their places of origin. Conflict situations in CAR, Cameroon, Mali, Chad, Niger, Somalia, Nigeria, South Sudan and Sudan have continued to generate internally displaced people and refugees. It has been widely reported that hundreds of thousands of refugees and migrants traveled to Libya to escape persecution or extreme poverty and war, only to end up drowning in the Mediterranean or forced into slavery. In the process of migration, millions of people have suffered multi-faceted human rights violations, including sexual violence, torture and killing. Many have suffered heinous crimes committed by human traffickers and smugglers.

42. Millions of people are forced to flee their homes. For instance, in northern Nigeria two million people remain internally displaced, living in host communities or in overcrowded camps with inadequate food, water and sanitation. Tens of thousands of internally displaced persons in these camps have reportedly faced various violations including sexual exploitation, malnutrition, disease and death due to the severe conditions. Tens of thousands of refugees from CAR, Libya, Nigeria and Sudan also suffer because of poor conditions in refugee camps in neighboring countries such as Chad. More than 300,000 people have fled Burundi and remain in neighboring Rwanda and Tanzania. Approximately 2.2 million Somalis live in refugee camps in neighboring countries. The conflict in South Sudan has also generated close to 2 million displaced persons and hundreds of thousands of refugees.

Accessed on 17 February 2018

Applicable law

43. The conflict situations covered under Resolution 332 and the protection issues that they give rise to necessarily invoke normative discussion on the applicable law. The issue here is whether and how international humanitarian law (IHL) applies in relation to the human rights standards of the African Charter (HRL) to these conflict situations. In terms of the application of IHRL and IHL, the first point to note is that the application of IHL and hence its relationship to human rights law arises only in cases of armed conflicts.

44. It is worth noting that for purposes of IHL, there are two types of armed conflicts: International Armed Conflicts (IACs) and Non-International Armed Conflicts (NIACs). Common Article 2 of the Geneva Conventions of 1949 defines IACs as “all cases of declared war or of any armed conflict that may arise between two or more High Contracting Parties, even if the state of war is not recognized by one of them”\(^{43}\), and it also includes “all cases of partial or total occupation\(^{44}\) of the territory of a High Contracting Party, even if the said occupation meets no armed resistance”.\(^{45}\) There is no need for a formal declaration of war, or for recognition of the state of war.\(^{46}\) As the Commentary to the Geneva Conventions put it “[I]t makes no difference how long the conflict lasts, or how much slaughter takes place”.\(^{47}\)

45. According to Common Article 3 NIACs are “armed conflicts not of an international character occurring in the territory of one of the Contracting

\(^{43}\) Common Article 2 of Geneva Conventions of 1949.

\(^{44}\) In the words of art. 42 of the 1907 Hague Regulations, “territory is considered occupied when it is actually placed under the authority of the hostile army”.

\(^{45}\) This paragraph, although it may look superfluous, guarantees protection to not only to the sick military personnel of the occupied country, but also to all the personnel, establishments and property covered by the Convention, so as to enable them to freely carry on their charitable work as required. Otherwise, the Occupying Power could have been free to use for its own purposes medical establishments or property protected by the Convention as well as the doctors and other members of the medical service of the Occupied State.

\(^{46}\) The substitution of the term ‘war’, of which legal definition may lead to endless debates, with ‘armed conflicts’ was deliberate. A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defense. The expression "armed conflict" makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2. Jean S. Picket, Commentary on Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, ICRC, 1952, p. 32.

\(^{47}\) The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbersome machinery. It all depends on circumstances. If there is only a single wounded person as a result of the conflict, the Convention will have been applied as soon as he has been collected and tended. \textit{Id.}, p. 32.
Parties”. These include armed conflicts in which one or more non-governmental armed groups are involved in a fight either against the government or between themselves and sometimes against both the government and between themselves. But for a conflict to constitute NIAC, the Conventions further stipulate that the armed opposition forces must be “under responsible command, exercise such control over a part of its territory as to enable them to carry out sustainable and concerted military operations and to implement this Protocol”. According to this definition and as further specified in the jurisprudence of both the International Criminal Tribunal for Rwanda and International Criminal Tribunal for the former Yugoslavia, there are four cumulative elements for determining the

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48 As the four Geneva Conventions have universally been ratified now, the requirement that the armed conflict must occur “in the territory of one of the High Contracting Parties” has lost its importance in practice. Indeed, any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention. Perhaps a question arises with respect to NIACs that occur on the territories of more than one state.

49 The Commentary of the ICRC on Common Article 3 of the 1949 Geneva Conventions lays down an elaborate requirement/criteria that an armed conflict should fulfill to be regarded as NIAC:

(1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention. (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory. (3) (a) That the de jure Government has recognized the insurgents as belligerents; or (b) That it has claimed for itself the rights of a belligerent; or (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression”. Available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/466097d7a301f8c4c12563cd00424e2b

(4) (a) That the insurgents have an organization purporting to have the characteristics of a State.
(b) That the insurgent civil authority exercises de facto authority over the population within a determinate portion of the national territory.
(c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.
existence of NIAC. First, the conflict has to be between armed forces of a state and dissident or other organized armed groups. Second, the conflict takes place in the territory of the state. Third, the dissident or the armed opposition group has to be organized with command and control structure and exercising control over a part of the territory of the state. Fourth, the conflict has to be a situation of regular and intense armed confrontation and hence involving direct hostilities between the armed forces of a state and the dissident or opposition armed group.

46. With the change in the nature of conflicts including in terms of the unconventional means and methods of violence, the use of new technology and the levels of organization and control of territory, the lines that international norms neatly drawn have become blurred. For example, in the South Sudan civil war that erupted in December 2013, it is doubtful that the conflict would be treated as NIAC before it reached the threshold in Common Article 3 of the Geneva Conventions or in relation to fighting involving non-state armed groups lacking the level of organization or degree of regularity of the armed confrontation. Similarly, in the conflict involving Boko Haram it is not clear in relation at what point it would be classified as NIAC. Other situations that similarly give rise to challenges in determining the applicable law include those involving foreign intervention (including those involving international organizations such as NATO, UN or AU) in intra-state conflicts of another state such as the role of Ugandan forces in the 2013 South Sudan conflict and NIAC of a transnational nature or other forms of intra-state conflicts taking place on the territories of several states as in the conflict involving the Lord Resistance Army in the central Africa region or Boko Haram in the Lake Chad basin. Such confusion in categorization often has serious consequences in the protection of individual and peoples’ rights in conflict situations as the issue of the applicable legal regime or even worse the applicability at all of IHL and/or IHRL as in the case of terrorism is at times questioned.

47. In this context, the second point to note in terms of the applicable law is that the traditional distinction that reserves the application of IHL to war times and IHRL to peace no longer holds. The distinct nature of the two legal regimes is articulated as IHL, often termed as ‘jus in bello,’ regulates and governs the way warfare is conducted, such that it is purely humanitarian (i.e., ultimately pursue the objective of limiting suffering as a cause of war). And IHL essentially excludes ‘jus ad bellum,’ with the potential of prevention and justification or reasons for war. Jus ad bellum is the principle that signifies the rule on use of force or war as a last resort.

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But IHRL is concerned with the legitimacy and lawfulness of use of force.\textsuperscript{51} This means that use of force under IHL in non-international armed conflict could be argued legal,\textsuperscript{52} while use of force could amount to breach of IHRL standards because use of force is a last resort.\textsuperscript{53}

48. The contemporary international law position does not uphold this dichotomy between Human rights law and IHL in armed conflicts. The evolving legal consensus has been that that even in times of armed conflict, human rights continue to apply but unlike in situations other than those amounting to armed conflict human rights law does not have exclusive application. Rather it applies alongside IHL. In 1996, the ICJ in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapon opined that ‘the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in time of emergency.’ Even in cases of emergency, according to the UN Human Rights Committee, states are not considered as operating in a legal vacuum. In its General Comment No. 29, the Committee clearly affirmed


\textsuperscript{52} While State armed forces are not considered civilians, practice is not clear as to whether members of armed opposition groups are civilians subject to Rule 6 on loss of protection from attack in the event of direct participation or whether members of such groups are liable to attack as such, independently of the operation of Rule 6. This is a quote needs to be in 1 J. HENCKAERTS & L. DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 19, & 17-24 (2005); see also International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, 28th International Conference of the Red Cross and Red Crescent, ICRC, Geneva, 2003, 27-36, available at http://www.icrc.org/Web/eng/siteeng0.nsf/html/5XRDC3C (last visited June 16, 2007).

that States’ measures of derogation from treaty obligation should be in accordance with humanitarian law. Emergency derogations from human rights law automatically activate the application of humanitarian law, which enforces the criteria of distinction between civilian and military targets, requirements of necessity and proportionality, and humane treatment of protected persons.

49. Given the changes in the nature of conflicts noted above and the ensuing legal issues, the co-applicability of these two regimes of law has become a legal imperative currently supported by diverse sources of authority. The European Union Guidelines states “IHL is applicable in time of armed conflict and occupation. Conversely, human rights law is applicable to everyone within the jurisdiction of the State concerned in time of peace as well as in time of armed conflict. Thus while distinct, the two sets of rules may both be applicable to a particular situation.” Concurrent applicability of IHRL and IHL is evidenced in the States’ declaration at the Teheran Conference in 1968; decisions of international and regional judicial and quasi-judicial bodies; general comments of the UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, (para. 11). Available at: http://www.refworld.org/docid/453883fd1f.html [accessed 17 February 2018]. According to the Committee, states may in no circumstances invoke Art. 4 ICCPR for acting in violation of humanitarian law:


Rights Committee\textsuperscript{58} and the UN Committee on Economic, Social and Cultural Rights;\textsuperscript{59} and the Inter-American Commission and Court of Human Rights.\textsuperscript{61} The interdependence and parallel application of IHL and IHRL is affirmed in the International Court of Justice decisions on the Construction of the Wall in the Occupied Palestinian Territory and DRC v. Uganda. In the Congo-Uganda case, the Court observed that Uganda committed human rights law and humanitarian law violations\textsuperscript{62} because Ugandan forces in the occupied parts of the Congo committed serious and widespread human rights and humanitarian law violations.\textsuperscript{63} As a result, many scholars argue

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  \item \textsuperscript{58} UN Human Rights Committee (HRC), \textit{CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency}, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: \url{http://www.refworld.org/docid/453883fd1f.html} [accessed 17 February 2018]
  \item \textsuperscript{63} ibid
the applicability of IHRL during armed conflict concomitant with IHL.⁶⁴

50. The African human rights system took the position that the rights and freedoms guaranteed in the Charter apply both in peace and war times. First, in legislative terms unlike other human rights instruments that allow derogation in cases of a state of emergency, the African Charter does not make similar provision. The African Commission adopted a more explicit position in its practice. According to the Commission, people must be protected from violation of their rights including threats to their lives not only in times of peace but also in war situations. Similarly, based on Articles 60 and 61 of the African Charter, the African Commission upheld the applicability of IHL rules in various cases of conflict situations.

51. However, even with the co-applicability of IHL and IHRL, there are enormous challenges in actual implementation of IHRL and IHL in the context of emerging forms of conflict such as the ‘war on terror’ or intra-state conflicts in the territories of several states that brings in, among others, the problem of IHRL’s extra-territorial applicability.⁶⁵ There are also ample precedents that provide evidence about the extra-territorial applicability of IHRL if it is established that a State exercises effective territorial control.⁶⁶ Many point to the ICJ decision and the UN human rights bodies and their case law.⁶⁷ This means that if a State exercises effective control over a territory, the State should abide by its obligations under IHRL. Additionally, even in instances where there are doubts on the question of effective control where a state uses force no legal vacuum arises and the applicability of IHL and/or IHRL should understandably be


⁶⁶ Ibid 649-650

determined after due examination of the specific circumstances of the conflict situation.

52. For purposes of the African Charter and indeed this study, what the co-applicability of the two regimes of law entails is not that the African Commission directly applies IHL. In conflict situations in which IHL applies, the African Commission resorts to the applicable IHL rules on the basis of Articles 60 and 61 of the African Charter. And instead of making a finding on the existence of violation of IHL, the Commission uses the IHL standards, rather than the normal human rights standards for assessing existence of violations, to determine violations of Charter rights.

53. In terms of the applicable law, the other issue that arises is the applicability IHRL to non-state actors. IHL is applicable to armed non-State groups provided that these armed groups are party to an armed conflict and fulfill the legal definition with sufficient organization and the requisite degree of intensity of the fight. However, the binding nature of IHRL on armed non-State groups in either wartime or peacetime is contentious, because they are not party to international treaties. There is emerging view in international law that certain rules of IHRL applies to non-state actors where they exercise effective control over territory. Such arguments have been forwarded by the UN Human Right Council, stating

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Accessed 17 February 2018.


that certain IHRL provisions should be applicable to armed non-State actors in Afghanistan and Libya because they have *de facto* control over a territory.\(^72\) Similarly, the UN Security Council denounced the human rights violations and acts of violence committed in northern Mali. The report directly calls out rebels, terrorist groups and other organized transnational crime networks for the violence perpetrated against women and children, the killings, the hostage-taking, pillaging, theft and destruction of religious and cultural sites, as well as the recruitment of child soldiers, and calls for the perpetrators of these acts to be brought to justice.\(^73\) The African Commission held similar views in the various resolutions and statements it issued in relation to various conflict situations including the one involving Boko Haram. This illustrates the tacit recognition of the applicability of IHRL to non-State armed groups.

**PART II**

**THE AFRICAN HUMAN RIGHTS SYSTEM AND CONFLICT SITUATIONS**

I. **Analysis of relevant norms**

54. This part seeks to identify and discuss the relevant legal instruments and how these instruments address conflict and crisis situations. This offers an analysis of the various legislative instruments including the African

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http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf accessed 3 February, 2018

\(^73\) Security Council, Resolution 2056, UN Doc. S/Res/2056 2012, para.13 available at:


Charter, the Maputo Protocol, the African Children’s charter, and the Kampala Convention as well as the other relevant AU instruments including the Constitutive Act of the AU.

A. The African Charter

55. The founding instrument of the African human rights system if the African Charter that was formally adopted by the nineteenth summit of the OAU in Nairobi, Kenya, in June 1981 and entered into force in October 1986. The African Charter is broadly divided into three parts: part one (Articles 1 to 29) specifies the list of human and peoples’ rights and individual duties; part two (Articles 30 to 63) addresses the establishment and organization of the ACHPR; finally, part three (Articles 64 to 68) contains general procedural provisions.

56. The Charter enshrines almost all internationally recognised rights. Accordingly, it recognizes the civil and political rights of individuals, including those to freedom from discrimination; to equality; to bodily integrity and to life; to dignity and to protection from torture and inhumane treatment; to liberty and security; to a fair trial; to freedom of conscience; to freedom of expression, association, assembly and movement; to political participation; and to property. As rightly pointed out, ‘these guarantees seek to protect people from institutional, political or social conditions that threaten their liberty, physical integrity and freedoms.’ They do so through proscribing extrajudicial and arbitrary killings, unlawful detention or imprisonment, torture and other physical or psychological abuses.

57. The African Charter provides for economic, social and cultural rights on an equal footing with civil and political rights. These rights include those to equitable and satisfactory conditions of work; health; education; and protection of the family. In addition, ‘Guidelines for National Periodic Reports’ define parameters for, among others, the rights to social security, social insurance and an adequate standard of living, which are not expressly mentioned in the Charter. Given that socio-economic deprivations and inequality often create the underlying conditions for the emergence of conflict situations on the continent, the socio-economic rights of the Charter offer useful framework ‘in the fight against poverty and mend social divisions that catalyse political competition and subsequent

75 Ibid.
76 Ibid, 12.
77 Ibid.
violent conflict.’ 78

58. These are rights that guarantee protection to individuals and communities against destruction through violent acts of their homes, sources of livelihoods and infrastructures of public services on which they depend for their survival. In various communications, the African Commission has dealt with violations of economic and social rights in conditions of armed conflicts or situations of political instability. In COHRE/Sudan the Commission found several violations. It considered that the right to health under the African Charter had been breached, given that “the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells, exposed the victims to serious health risks”. ... The Commission also relied on the right to property in finding violations of the right to housing (in that) ... the fact that the victims cannot derive their livelihood from what they possessed for generations means they have been deprived of the use of their property under conditions which are not permitted by article 14.” 79 Similarly in Democratic Republic of the Congo v. Burundi, Rwanda and Uganda, the Commission stated that: “the looting, killing, mass and indiscriminate transfers of civilian population, the besiege and damage of the hydro-dam, stopping of essential services in the hospital, leading to death of patients and the general disruption of life and state of war ... are in violation of Article 14 guaranteeing the right to property. 80

59. Perhaps the most distinctive feature of the African Charter vis-à-vis other human rights instruments is its elaboration of the collective rights of peoples. 81 The importance attached to peoples’ rights and the resultant uniqueness of the African Charter is expressed by the use of peoples’ rights together with human rights in the title of this historical document. The formulation of these rights under the African Charter is by far the most generous and comprehensive. 82 The African Charter proclaims not only the internationally recognized right of all peoples to self-determination 83 but

78 Ibid.
79 Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE)/Sudan, Communications Nos. 279/03 and 296/05, decision of May 2009. See in particular paras. 9–14, 205, 209 and 212; Office of the UN High Commissioner for Human Rights (2014); Transitional Justice and Social, Economic and Cultural Rights HR/PUB/13/5 )
83 Article 20.
also the right of peoples to equality;\textsuperscript{84} the right to existence;\textsuperscript{85} the right to development;\textsuperscript{86} the right to national and international peace;\textsuperscript{87} and the right to environment.\textsuperscript{88} Given that conflicts in Africa often follow group-based identity lines, the enunciation of these collective rights of peoples is of paramount importance to address the full scope of rights issues that arise in such conflicts.

60. Article 20 of the African Charter provides for the right of all peoples to existence and self-determination. At a minimum, this article prohibits measures that would amount to genocide according to international law. ‘Article 20 also prohibits what is known as ‘cultural genocide’, that is, acts that, although do not destroy a group physically, have the effect of destroying the group as such.’ The Charter also guarantees peoples’ rights to self-determination which is not only important in asserting collective identity, but is also instrumental in ensuring the rights of people to dispose their wealth and resources, and the right to determine their own path of political, economic and social development.

61. Another substantive right of particular importance is the right to peace provided for under Article 23 of the African Charter. This right demands, among others, that measures are taken to prevent conflicts and where conflicts have erupted, all steps are taken to manage, resolve and bring them to an end. For countries in conflict, the right to peace and security imposes the obligation on parties to seek peace negotiations and achieve compromise for ending the conflict and the attendant human and peoples’ rights violations.\textsuperscript{89}

62. The African Charter displays equal measure of uniqueness in enshrining the duties of individuals, dubbed by one of the leading African human rights scholars Makau Mutua, the African cultural fingerprint.\textsuperscript{90} Articles 27 to 29 of the African Charter provide for an individual’s duties towards his/her ‘family and society, the State and other legally recognised communities and the international community’ \textsuperscript{91}, while being called upon to exercise his/her rights ‘with due regard to the rights of others, collective security, morality and common interest’.

B. The Maputo Protocol

\textsuperscript{84} Article 19.
\textsuperscript{85} Article 20.
\textsuperscript{86} Article 22.
\textsuperscript{87} Article 23.
\textsuperscript{88} Article 24.
\textsuperscript{91} African Charter, Article 27(1)
63. As with the African Charter, the Protocol on the Rights of Women in Africa (Maputo Protocol) has a number of articles that have specific provisions that envisage the right to peace and the right to protection in armed conflicts. Article 3 of the protocol states that States are duty bound “to adopt and implement appropriate measures to prohibit exploitation or degradation of women and ensure the protection of every woman’s right to respect for her dignity and protection of women from all forms of violence.” This is a responsibility for States that must identify the causes and consequences of violence against women and take appropriate measures to prevent, eliminate and punish such violence.

64. In terms of its treatment of violence, the Protocol moves beyond the definition in the UN Declaration on the Elimination of Violence against Women, by including violence against women in conflict situations. Articles 10 and 11 go further, making direct reference to the right to peace, which affirms that women have the right to a peaceful existence and protection in armed conflicts. This means that the protocol envisages that states are obliged to respect and ensure protection for women in armed conflict. Under Article 11 ‘State Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.’

65. Further, a cumulative reading of article 11(2) with article 11(3) requires State parties to “protect civilians including women, irrespective of the population to which they belong,” including asylum-seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity. And by virtue of article 11(2), these crimes are those defined “in accordance with the obligations incumbent upon them under the international humanitarian law.” This provision is important for two main reasons. Sexual violence during armed conflict constitutes a crime against humanity, a war crime and even genocide, acts that constitute peremptory norms — *jus cogens* — from which no State can derogate. The

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92 Keetharuth, 2009, p.185
93 African Charter Art. 11(2)
95 This means that crimes against humanity, genocide, war crimes and torture are international crimes that constitute to the level of *jus cogens*. Bassiouni, M. Cherif. "Universal jurisdiction for international crimes: historical perspectives and contemporary practice." *Va. J. Int’l L.* 42 (2001): 81.108. Also see Bassiouni, M. Cherif, and Edward
violations also constitute what the Constitutive Act of the AU under Article 4 (h) terms grave circumstances which warrant intervention against the state in which they occur or there is threat of occurrence.


66. The African Children’s Charter became the first – and, to date, only – regional children’s rights document in the world, applying to all persons under the age of 18. The relevant two areas of the three ways that the Children’s charter expanded the level of protection that the UN Convention on the Rights of the child, according to Frans Viljoen, are the complete ban of the use of child soldiers in conflicts and in its protection of child refugees, the African Children’s Charter extends its ambit to ‘internally displaced children’, something the CRC does not do.

67. Indeed, the Children’s charter envisages prohibition of certain acts while demanding proactive measures to protect children during armed conflicts. Under Article 22(1) of the African Children’s Charter, State parties to the Charter are obliged to “undertake to respect and ensure respect for rules of international humanitarian law applicable to conflicts which affect children relating to conflicts and crises.” Article 22(2) of the African Children’s Charter obliges State parties to “take all necessary measures to ensure that no child shall take a direct part in hostilities and prohibition on child conscription to take part in hostility.”

68. The African Children’s Charter also obliges States to protect the civilian population (including refugee children) in armed conflict in line with their obligations under international humanitarian law. And it further obliges States to take all feasible measures to ensure the protection and care of children affected in armed conflicts. The obligation is also applicable to children in situations of internal armed conflict, tension and strife. This Charter provides a broad set of provisions that aim to protect children from a wide range of violations and acts of exploitation, violence, abuse and discrimination in all types of conflict situation.

D. The OAU refugee convention and the Kampala Convention on IDPS


96 Article 2 of the African Children’s Charter.
97 Frans Viljoen, note … above, p. 262
98 ACERWC Art 23 and 24
99 ACERWC Article 22(3)
69. One of the sources of law for the African human rights system is the OAU Convention Governing Specific Aspects of Refugee Problems in Africa of 1969. This convention was adopted in 1969 and came into force in 1974. The protections envisaged in this convention are of paramount importance as various conflicts in Africa have forced many people to flee their countries and seek refuge in neighbouring states. It provides a framework for the protection of the rights of refugees and the provision of humanitarian assistance.

70. The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, also known as the Kampala Convention was adopted on 23 October 2009 and entered into force on 6 December 2012. States have to protect the rights of IDPs, no matter what the cause of displacement is, by refraining from and preventing discrimination, genocide, crimes against humanity, war crimes, arbitrary killings and detentions, enforced disappearance, abduction, torture, sexual and gender based violence and starvation. One obligation is of particular interest, namely the obligation for States to safeguard places where IDPs are sheltered from being infiltrated by armed groups and to ensure that IDPs do not engage in subversive activities.

71. The Convention also imposes a host of other obligations on states such as providing special support to women IDPs, protection against forcible return, guaranteeing freedom of movement, putting safeguards against environmental degradation and the protection of individual, collective and cultural property left behind by IDPs.

72. Perhaps the most distinctive aspect of the Convention is its treatment of the obligation of non-state groups. The Convention provides that armed groups and their members are criminally responsible in case they violate the rights of IDPs under international or national law. They are explicitly but non-exhaustively, prohibited from carrying out arbitrary displacement, hindering the protection or assistance of IDPs in any way, restricting the IDPs’ freedom of movement, recruiting children, engaging in abduction, slavery or trafficking.

73. With regards to monitoring compliance, Article 14 establishes a Conference of States Parties to monitor and review the implementation of the objectives of the Convention. The same provision also requires states to submit reports to the African Commission and the African Peer Review Mechanism on legislative and other measures that have been taken to give

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100 Art. 9(1) of the Kampala Convention.
101 Art. 3(1)(f) of the Kampala Convention.
102 Art. 9(2)(c) – (m) of the Kampala Convention.
103 Art. 7 of the Kampala Convention.
effect to the Convention.

74. It is also worth mentioning that the Convention imposes an obligation on the African Union to share information with the African Commission on the situation of displacement and the protection and assistance given to IDPs in Africa, and also to cooperate with the Special Rapporteur on Refugees, returnees, IDPs and Asylum Seekers in Africa in addressing issues of IDPs.\textsuperscript{104}

**E. The Protocol on the Rights of Older Persons**

75. The Protocol on the Rights of Older Persons that was adopted on 13 January 2016 has not yet been ratified by any African country, and hence has not come into force.\textsuperscript{105} With respect to protection of older persons in conflict and disaster situations, it is provided that they be given priority in accessing assistance during rescue efforts, settlement, repatriation and other interventions. They are also entitled to humane treatment, protection and respect at all times and should be provided with medical assistance when needed.\textsuperscript{106} So, older persons are another category of vulnerable group that enjoy legal protection in time of conflict and crisis under the African human rights normative framework.

**F. African Youth Charter**

76. In addition to Children and Older persons, Africa also has a treaty on the rights and responsibilities of its youth. The African Youth Charter was adopted on 2 July 2006 and entered into force on 9 August 2009, and has thus far 38 ratifications.\textsuperscript{107}

77. The Youth Charter recognizes the important role that the youth play in the promotion of peace and non-violence, and the lasting physical and psychological impacts of violence, armed conflicts and war. In light of this, the Youth Charter imposes obligations on states to, among others, strengthen the capacity of the youth and their organizations in peace building, conflict prevention and resolutions; condemn armed conflict and prevent the participation in whichever form and recruitment of young people in armed conflicts; mobilize the youth for the reconstruction of

\textsuperscript{104} Art. 8(3)(e) & (f) of the Kampala Convention.


\textsuperscript{106} Art. 14 of the Protocol on the Rights of Older Persons.

areas devastated by war; and facilitate and assist physical and psychological recovery and social integrations of young victims of armed conflicts.108

G. African Charter on Democracy, Elections and Governance (ACDEG)

78. The ACDEG was adopted on 9 January 2007 and came into force on 15 February 2012 and is ratified by 30 states so far.109 This is a particularly important instrument particularly in relation to conflict situations involving electoral disputes, contested transitions and unconstitutional changes of government. The inclusion of all these aspects within ACDEG makes it ‘an important instrument that represents a systematic and comprehensive presentation and elaboration of the commitments of member states of the O/AU in various instruments.’110

79. The general obligation under ACDEG as set out in Article 9 stipulates that ‘state parties undertake to design and implement social and economic policies and programmes that promote sustainable development and human security’. The Charter also envisages the need for promoting a culture of democracy and peace, dedicating one of the chapters of the Charter. Most notably, Article 13 of the Charter enjoins States parties to ‘take measures to ensure and maintain political and social dialogue, as well as public trust and transparency between political leaders and the people, in order to consolidate democracy and peace’.

80. The Democracy Charter specifically address measures that should be taken in relation to election disputes, unconstitutional changes of government and conditions that may threaten constitutional order. Article 17 (2) provides that States shall establish and strengthen national mechanisms that redress election related disputes in a timely manner. Under Article 24 the Peace and Security Council (PSC) of the AU is vested with the power to take appropriate measures when situations arise in a state party that may affect its ‘democratic political institutional arrangements or the legitimate exercise of power’. Articles 23 and 25 respectively provide for the conditions that constitute unconstitutional changes of government and the steps that the PSC is mandated to take when such conditions arise in a State Party.

A. The OAU Convention on the Prevention and Combating of Terrorism and its Protocol

108 Art. 17 of the African Youth Charter.
81. The 2004 Protocol on the Convention against Terrorism mandates the PSC with the task of harmonizing and coordinating efforts in the prevention and combating of terrorism by, among others: facilitating information gathering, processing, and dissemination on patterns and trends of terrorist acts and the activities of terrorists and sharing of such information among states; examining reports submitted by states parties on the implementation of the provisions of the Protocol.\footnote{111} 

**Mandate of the African Commission vis-à-vis Conflict and Crisis Situations**

82. The African Commission is vested with both protective and promotional mandates. While the African Charter has given the Commission expansive latitude in terms of choosing the mechanisms for implementing its mandate including the use of any investigative method of its choice, there are established mechanisms and procedures for discharging its mandates. As far as its protective mandate is concerned, apart from the communications procedure core to the protection mandate, the available procedures and mechanisms include fact-finding missions, resolutions and urgent letters of appeal and the Article 58 procedure.

83. Its promotional mandate is implemented through awareness creation and public mobilization activities including seminars, its norm elaboration works, examination of state reports under Article 62 of the African Charter and Article 26 of the Maputo Protocol, special mechanisms and promotional missions. The promotion mandate also relates to cooperation with other African and international institutions concerned with the promotion and protection of human and peoples’ rights.\footnote{112} The objective of these partnerships is to create synergy for the better promotion and protection of human and peoples’ rights on the continent, which also includes protection of rights in times of conflict and crisis situation. Related to the promotion mandate of the Commission is also its interpretative mandate involving the delivery of advisory opinion on the interpretation of the provisions of the African Charter.

I. **Review of Existing Tools and Mechanisms of the African Commission**

84. So as to properly discharge its mandate, the African Commission has put in place several tools and mechanisms. The existing tools and mechanisms of the Commission that are pertinent to situations of conflict and crisis are Communications procedure, which includes Provisional Measures and

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\footnote{111}{Art. 4 of the Protocol on the Convention against Terrorism.}  
\footnote{112}{Art. 45(1)(c) of the African Charter.}
referral of cases to Political Organs of AU and the African Court; protection missions, urgent appeals, resolutions, statements and state reporting.

A. Communications procedure

85. Depending on the entity that files human rights complaints, Communications before the Commission can be of two types: inter-state and other or individual communications. Inter-state communications are human rights complaints brought by one or more state parties against one or more states parties to the Charter and are governed by Articles 47 to 54 of the Charter and Rules 86 to 92 of the Rules of Procedure (RoPs) of the Commission. Individual communications on the other hand are human rights complaints filed by NGOs or individuals, on their own behalf or on behalf of victim(s) against a state party and are regulated by Articles 55 to 57 of the Charter and Rules 93 to 113 of the RoPs of the Commission.

86. This procedure is the embodiment of the Commission’s quasi-judicial mandate. Through the Communications procedure the Commission deals only with specific cases of violations contained in the application of individual or group complainants. As a judicial process, this procedure is also set in motion only on the initiative of claimants and never on the Commission’s own motion.

87. States and individuals alike have been using this procedure to get redress for human rights violations in conflict situations. In the only inter-state communication decided by the Commission so far, DRC filed a complaint against Burundi, Rwanda and Uganda alleging that the three countries had committed grave violations of human and peoples’ rights by invading its territory and through the activities of rebels groups which DRC alleged were supported by the states. In its decision, the Commission found that the actions of the three states in occupying the territories of DRC violated the rights of the Congolese people to self-determination and constituted a threat to national and international peace and security. The Commission further found that the killings and massacres committed in Congolese provinces occupied by the military forces of the occupying states violated the Fourth Geneva Convention and Articles 2 and 4 of the African Charter. The Commission stated that by taking charge of several natural resources producing areas of DRC, the occupying states had deprived the Congolese peoples of their rights to freely dispose of their natural resources. Accordingly, the Commission found several violations of the provisions of the Charter and requested the offending states to, among others, pay adequate reparations for and on behalf of the victims for human rights violations committed by their armed forces while they were

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114 Id., Holding.
in effective control of the provinces of DRC.\textsuperscript{115}

88. In terms of the individual communications procedure under Article 55 (1), the Commission has addressed human rights issues in various conflict situations. According to the Commission, people must be protected from violation of their rights, including threats to their lives, both in times of peace and of war. In a decision on communication against Chad, while finding that several accounts of killings and assassinations were contrary to the right to life, the Commission indicated that the state could not use the civil war in Chad as an excuse to violate rights, or to permit or tolerate violations of rights in the African Charter.\textsuperscript{116}

89. Similarly, it emphasised that ‘[e]ven if Sudan is going through a civil war, civilians in areas of strife are specially vulnerable and the state must take all possible measures to ensure that they are treated in accordance with international humanitarian law’.\textsuperscript{117}

90. The Commission held that people should be protected not only from life threatening conditions and acts for which state authorities are directly responsible but also from those created or perpetrated by non-state actors. In the case against Sudan, it held that even if some of the executions committed were not the work of government forces, the government had a responsibility to protect all the people under its jurisdiction.\textsuperscript{118} Furthermore, it held that Chad had a responsibility to secure the safety and liberty of its citizens and to conduct investigations into murders even where it could be proved that violations were committed by government agents.\textsuperscript{119}

**B. Provisional Measures**

91. A Provisional Measure is a request made by the Commission to a Government of a State Party, against which a communication is pending before the Commission, to prevent irreparable harm against an individual’s or group’s rights. Therefore, for the Commission to issue a Provisional Measure, one, there should be a pending case before it and two, one or more of the victims in the communication must face a serious and imminent threat that may cause irreparable harm. Usually such requests are made to stop executions, evictions or prevent torture.

\textsuperscript{115} Ibid.
\textsuperscript{118} Ibid.
\textsuperscript{119} Communication 74/92 (above), para. 22.
92. They apply both in normal times but also are particularly important in conflict situations. For instance, in a number of communications joined together against Nigeria in relation to the Niger Delta conflict alleging violations of the rights to life, security and liberty, fair trial, freedom of assembly and others against a human rights activist and environmentalist Saro-Wiwa and communities living in Ogoniland, Nigeria, the Commission issued a request for Provisional Measure to stop the execution of the above mentioned victims who were sentenced to death for incitement of violence and murder. Unfortunately, The victims were however executed by the Government in complete disregard for the appeal by the Commission.\(^{120}\)

93. In a myriad of cases brought against Egypt following the recent alleged mass arrests and trials, arbitrary detention and torture of political dissidents, journalists, and human rights activists in the context of the unconstitutional change of government and political instability and terrorism related insecurity, the Commission issued a number of Provisional Measures.\(^{121}\)

94. Provisional Measures of the Commission have a very low rate of implementation despite the gravity and urgency of the issues they raise. In all the cases referred to above, the provisional measures that the Commission requested were not implemented, leading to the irreparable damage caused.

95. In a communication brought against Libya in 2012 regarding the arrest and *incommunicado* detention of Saif Al-Islam Gaddafi, the second son of the former President of Libya Muammar Gaddafi, following the armed conflict that broke out in the country, the Commission issued a Provisional Measure to stop possible death sentence that may be rendered in a trial marred by procedural irregularities. The request was not complied with and subsequently the Commission had to refer the matter to the African Court.\(^{122}\)

**C. Article 58 procedure**

\(^{120}\) ACHPR, Communications 137/94-139/94-154/96-161/97 International Pen, Constitutional Rights Porject, Civil Liberties Organization and Interights (on behalf of Ken Saro-Wiwa Jr.) v Nigeria, (October 1998).

\(^{121}\) See generally 38\(^{th}\) to 43\(^{rd}\) Activity Reports of the Commission.

96. As an important component of the protection mandate of the African Commission, Article 58 of the African Charter laid down procedures for responding to grave and emergency cases of violations of the rights guaranteed in the African Charter.

‘1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples’ rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make factual report, accompanied by its findings and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairperson of the Assembly of Heads of State and Government who may request an in-depth study.’

97. There are a number of points worth noting from these provisions. First, there are two cases envisaged in paragraphs 1 & 3 with respect of which the procedure is envisaged. These are what the Charter calls ‘special cases’ and a ‘case of emergency’. Second, with respect to special cases under paragraph 1 it is not necessary for the Commission to conclusively establish the existence of the ‘special cases’. It suffices that there are prima facie indications from the communication/s to reasonably believe that such cases appear to exist. Third, the ‘special cases’ involve situations manifesting ‘a series of serious or massive violations of human and peoples’ rights.

98. Fourth, the Commission is legally responsible for drawing the attention of the Assembly to these ‘special cases’. Fifth, it emerges from paragraph 3 that, apart from the ‘special cases’, another basis for invoking Article 58 involves ‘a case of emergency duly noticed by the Commission’. In this particular instance, the Commission shall submit such cases of emergency to the Chairperson of the Assembly. Sixth and finally, it is apparent that both situations in paragraphs 1 and 3 must be based on communications with which the Commission is seized.

99. Although it can apply in times outside of conflict situations, the most common instances in which Article 58 arises involve conflict situations. The nature, scale and gravity of violations that occur in conflict situations put

123 ACHPR, Resolution on Nigeria, 22 March 1995
them under the category of serious or massive violations. It was based on this understanding that the Commission qualified the 1994 Rwandan genocide\textsuperscript{124}, the conflicts in Darfur\textsuperscript{125}, South Sudan\textsuperscript{126}, Central African Republic\textsuperscript{127}, DRC\textsuperscript{128} and Northern Mali\textsuperscript{129} as involving serious or/and massive violations of human rights.

100. In another case against DRC, then Zaire, the Commission found serious and massive violations of rights as a result of, among others, the extrajudicial executions, torture and inhumane treatment, the arbitrary arrest and detention and unfair trials that were perpetrated on a large scale by the government.\textsuperscript{130} In fact, in this case, the Commission had referred the matter to the Assembly of Heads of State and Government based on article 58(1) of the Charter.\textsuperscript{131}

101. The above cases reveal the existence of crisis situation in those countries. The types, nature, gravity and scale of human rights violations in a country could therefore be both indicators (of the existence) and fallouts of conflict and crisis situations. Therefore, human rights violations that arise in most conflict and crisis situations do fall under article 58(1) as illustrated above. When such situations of ‘series of serious or massive’ violations of rights are brought to the attention of the Commission, it can either refer the matter to the Assembly of Heads of State and Government as envisaged under Article 58(1) or to the PSC as per Rule 84(1) of the RoPs of the Commission.

\textsuperscript{124} ACHPR, Resolution on Rwanda, 17 April 1994; ACHPR, Resolution on Rwanda, 3 November 1994.
\textsuperscript{125} ACHPR, Resolution on Darfur, 4 June 2004.
\textsuperscript{126} ACHPR, Resolution on the Human Rights Situation in the Republic of South Sudan, 14 March 2014.
\textsuperscript{128} ACHPR, Resolution on the Situation in the Democratic Republic of Congo, 5 December 2005; ACHPR, Resolution on the Situation in the Democratic Republic of Congo, 24 July 2013.
\textsuperscript{129} ACHPR, Resolution on the Situation of the North of the Republic of Mali, 2 May 2012.
102. While this is one of the important avenues for the African Commission to mobilize political pressure for averting the series of serious or massive violations, the Commission applied it sparingly and on an ad hoc basis. It has rightly been pointed out that, ‘with the passing of time, the ACHPR has become somewhat reluctant to invoke Article 58 and the provision is nearly gone into a state of disuse.’\(^{132}\) Indeed, until recently the Commission has not adopted a framework that guides the systematic application of this important procedure laid down under Article 58 of the Charter.

**D. Urgent Appeals**

103. Urgent Appeals or Letters of Appeal are letters addressed to a Head of State or Government by a Special Mechanism of the Commission, Commissioner rapporteur of a country or the Chairperson of the Commission in accordance with article 46 of the Charter. When the Commission receives reliable information that an individual or group or community in a country are likely to suffer or suffering from violations of human rights that may cause irreparable harm to life, security, liberty or freedoms guaranteed in the Charter, the Commission issues Urgent Appeal with a view to prevent such harm from occurring.

104. Once again while these can be used in times outside of conflict situations, letters of urgent appeal are commonly used in conflict situations including in cases of electoral tensions, contestations over constitutional term limits and situations of protests and riots. In June 2017, a letter of Urgent Appeal was sent to Egypt concerning allegations of the sentencing of ten individuals to death by Egyptian courts.\(^{133}\) Urgent Appeal to Kenya of May 2017 relates to the alarming trends of extrajudicial killings implicating the police in Kenya as well as the lack of investigation and prosecution in such cases.\(^{134}\) In October 2016, the Commission sent a letter of Urgent Appeal regarding the alleged deaths of more than fifty-five people in a stampede in Bishoftu, Oromia Region of Ethiopia.\(^{135}\) In the Urgent Appeal to Gambia, the Commission expressed its concern in respect of the alleged brutal repression of a peaceful demonstration and torture to death of certain opposition members challenging electoral laws in the country.\(^{136}\)

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\(^{133}\) *Id.*, 43\(^{rd}\) Activity Report, para. 30.
\(^{134}\) ACHPR, 42\(^{nd}\) Activity Report, para. 36.
\(^{135}\) ACHPR, 41\(^{st}\) Activity Report, para. 27.
\(^{136}\) ACHPR, 40\(^{th}\) Activity Report, para. 19.
Out of these four Urgent Appeals only the one, that of Gambia got a response from the state. All the rest have not solicited any response from the concerned states. This shows the low rate of compliance.

Urgent Appeals are confidential correspondences and thus the letters themselves cannot be disclosed to third parties or the wider public. But the Commissioner who issued the letter can reveal the contents of the report while presenting his/her activity report together with the response of the government, if any.

Since the existence of pending Communication is not required for issuing Urgent Appeals, the Commission has the latitude to either issue by its own initiative or with the request of stakeholders whenever grave violations that endanger the life, security, liberty, freedom and property of individuals or communities arise. Urgent Appeals create the opportunity for constructive dialogue with governments over human rights situation in their countries. And that is an essential tool in addressing human rights violations that occur in situations of conflict and crisis.

The Commission issues numerous urgent appeals every year through its various special mechanisms and members. While there is no complete record of urgent appeals issued by the Commission, the Commission has started listing Urgent Appeals sent to states in its Activity Report together with status of implementation. This is instrumental in keeping record of the Urgent Appeals as well as in tracking implementation.

**E. Protection/Fact-Finding Missions**

Protection missions also known as fact-finding missions are visits to a State Party undertaken by members of the Commission in order to investigate serious violations of rights brought to the attention of the Commission. The purpose of fact finding missions is to gather first hand information and evidence by: visiting places where the alleged human rights violations occurred, meeting with victims of the violations, with concerned government officials, national human rights institutions, civil society, UN agencies and diplomatic missions based in the country and any other entity or individual that is capable of enlightening the Commission on the situation.

Protection missions are sanctioned by Article 46 of the Charter and Rules 81 and 82 of the RoPs. The Commission can *proprio motu* request to

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undertake protection mission or be invited by a State Party. Organ of the AU can also request the Commission to carry out a mission. A state where the Commission plans to visit is required to extend an open invitation, and provide the necessary security protection and documents required for the mission by the delegation. The state should also guarantee the free movement of members of the mission and provide the facilities and authorization needed. The state should also commit not to take any kind of retaliatory measures against entities and individuals that provide the delegation with information, testimony and/or evidence.

111. When a request for protection mission comes from an organ of AU, then the requesting organ is supposed to cover the expenses of the mission. When missions are requested by an AU organ securing authorization is not a problem since the request usually comes from an organ that has the political leverage to get the authorization. However, obtaining authorization is not as easy when the request comes from the Commission. As in the case of promotion missions, requests for protection missions from the Commission are either ignored or rejected by states. This is understandable given the fact that protection missions by and large are requested when there is a volatile political situation in country that leads to widespread violations of rights. The protection missions carried out by the Commission so far are to countries destabilized by either armed conflicts or crisis situations.

112. The difference between a promotion mission and a protection mission is that a promotion mission is undertaken to monitor the general human rights situation in the country and a country’s level of compliance with Charter obligations. Whereas, protection missions are intended to investigate particular violations of human rights that are grave and widespread.


   i. **Zimbabwe**

114. In Zimbabwe, following the rejection of the draft constitution in 2000, which, among others, had provisions on land reform, invasion of commercial farms owned by white farmers became widespread. Tensions continued mounting in the run up to parliamentary elections that were due that same year as journalists, opposition leaders and supporters were reportedly being arbitrarily arrested and detained and even tortured by

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security forces. Some have even died in police custody. This caused an uproar in the country which was widely reported by international mainstream media. Following this reports, the Commission undertook a five days fact-finding mission to Zimbabwe from 24 to 28 June 2002.

115. During the visit the delegation met with government officials including the President of the country, ministers, the Speaker of Parliament and Commissioner of Police. It also met with the Chief Justice, farmers’ associations, association of journalists, lawyers, NGOs and members of opposition parties. Based on the information it gathered during the mission, the delegation found that the question of land was a manifestation of demands for change in government and quest for good governance. It also found that human rights violations were committed against journalists, opposition figures and activists by the government, and that although there was no proof that the land grab was sponsored by the government, it tolerated the illegal take overs and abuses to which it cannot be absolved of responsibility.

116. Based on the above and several other findings, the Commission made a number of recommendations to the Government with a view to improve the human rights situation in the country by addressing the root causes of the crisis. The Government was also urged to report on implementation of the recommendations of the fact-finding mission in its periodic report to the Commission.

117. The fact-finding mission to Sudan was particularly focused on the human rights and humanitarian crisis in the Darfur Region caused by the armed conflict between government forces and rebel groups. The mission was prompted by reports of killing of civilians particularly men from the Fur, Marsalit and Zaggawa ethnic groups who are indigenous to the Darfur region. The Government supported Arab militias attacked the communities involving bombing raids on villages that led to destruction of hundreds of villages, looting of crops, livestock and other goods, and reportedly forcing hundreds of thousands of often impoverished, starving and terrorized villagers to other parts of Darfur and Chad. Humanitarian assistance to affected communities was disrupted forcing IDPs and refugees to survive under extremely difficult circumstances with little food, water and shelter.

118. After receiving these reports, the Commission requested the Government of Sudan to undertake a fact-finding mission, which was duly

authorized. Accordingly, the mission took place from 8 to 18 July 2004 in the Darfur Region of Sudan. The delegation met with Government ministers, representatives of national and international humanitarian organizations, the African Union Mission in Sudan and the Office of the Coordinator for Humanitarian Affairs. The mission also visited camps for IDPs and held discussions with political and administrative heads, humanitarian organizations in the Darfur Region.

119. After the visit, the mission was able to confirm that there was indeed a pattern of gross human rights violations, which were committed during the armed conflict, by all parties to the conflict. The Commission further found that the Janjawid militia, which has the support of the government, were responsible for most of the massive violations of the human rights of the civilian population. The report of the mission also indicated that between 30,000 and 50,000 people have been killed in the conflict, villages were set on fire, cattle and other properties were looted, and over a million people were forced to flee their homes. The existence of rape and sexual abuse was also confirmed. The Commission further established that the attacks on the civilian population amounted to war crimes and crimes against humanity.

120. Based on its findings, the Commission recommended a number of measures to be taken by the Government including the payment of compensation to those who lost their houses, cattle, and other goods, which were looted, burnt or stolen by the Janjawid militia or destroyed during the military attacks.

### iii. Saharawi Arab Democratic Republic (SADR)

121. The fact-finding mission to SADR was requested by the Executive Council of the AU with the mandate to investigate human rights violations to the occupied territory of SADR. The Commission was requested to report back its findings to the Ordinary Session of the Executive Council in January 2013. The mission was accordingly undertaken from 24 to 28 September 2012 and only visited the refugee camps near Tindouf in the south of Algeria and some parts of the liberated territory as Morocco has refused to give permission to visit the occupied territories.

122. The case of SADR is a case of self-determination and decolonization from Morocco, which is in control of 80 percent of the territory of SADR since 1979. As a result of the occupation and conflicts between Moroccan forces and Polisario Front, Saharawi freedom fighters, hundreds of thousands of Saharawians have been forced to flee their country to seek shelter in neighboring countries mainly Algeria.

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123. Although the delegation was not able to visit the occupied territory, interviews held with IDPs and refugees has shown that some 4500 Saharawis living in the occupied territory were victims of enforced disappearances and several others are subjected to arbitrary arrest and detention and torture in Moroccan prisons. Freedom of association, expression and movement of those residing in the occupied territory is often violated by Moroccan security forces. Most importantly the report of the mission found that the rights to self-determination and to freely dispose wealth and natural resources of the Saharawi people is severely violated by the Government of Morocco which is illegally occupying their territory. The report concludes that the issue of SADR is the issue of decolonization.

124. In light of the above findings, the Commission recommended, inter alia, that the AU should place the issue of the self-determination of SADR as one of its priority agenda items and spur international efforts towards resolving the issue speedily. It also recommended that the AU should engage with the UN Security Council for the inclusion of monitoring of human rights violations in the occupied territory in the mandate of the United Nations Mission for the Holding of Referendum in the Western Sahara (MINURSO).

125. Following the presentation of the Commission’s report to the Executive Council, the Commission was once again requested to undertake the mission to the occupied territories and to that effect for the Commission to seek authorization from Morocco to visit the territory. The Commission accordingly sought authorization from Moroccan authorities for the mission, which was denied. The Commission was once again requested by the Executive Council to seek authorization, which the Commission did and was once again rejected.\footnote{ACHPR, 43rd Activity Report, para. 55.}

126. Most recently, during the 34th Ordinary Session of the PRC and the 31st Ordinary Session of the Executive Council, the Commission was requested to engage in a dialogue with Morocco, to facilitate the implementation of Executive Council Decision EX.CL/Dec. 689(XX). Following this, a request for authorization to undertake the mission was sent in October 2017, and a response is still being awaited.\footnote{Id., para. 56.} In its 43rd Activity Report to the Assembly of Heads of State and Government, the Commission called on the Assembly to assist in getting authorization from Morocco to undertake the mission. It also urged Morocco to grant authorization for the mission.\footnote{Id., para. 59 – Recommendations to the Kingdom of Morocco and to the Assembly of Heads of State and Government.}

127. The fact-finding mission to Mali was requested by the PSC, which was approved by the Assembly of Heads of State and Government in July 2012. The objective of the fact-finding mission was to “investigate the human rights situation in northern Mali, including the atrocities committed against the Malian military and their families in Arguel’hoc, in January 2012...”. Consequently, the Commission undertook the mission from 3 to 7 June 2013 but broadened the mandate of the mission to the whole of the Malian territory for reasons of consistency and due to the gravity of violations committed across country.

128. The mission met with representatives of several government ministries, the National Human Rights Commission, the Dialogue and Reconciliation Commission, the African-led International Support Mission in Mali (AFISMA), UN offices, civil society and the ICRC. The mission also met with families of the victims of the Aguel’hoc attack and surviving soldiers and visited IDPs camps and prisons in different parts of the country.

129. The issue of the independence of northern Mali, commonly called Azwad, is at the origin of the conflict that ravages northern Mali. Azwad demanded autonomy on the eve of independence of Mali, which was denied by the former colonizer France. In January 2012, attacks were launched in northern Mali by the National Movement for the Liberation of Azawad (MNLA) whose main interest is the independence of Azawad in this part of Mali. The MNLA was joined by the Salafi movement Ansar Dine whose aim is to impose sharia. The Sahel region then became a major hub for drug traffickers and terrorist groups such as Al-Qaeda in the Islamic Maghreb (AQMI) and the Movement for Unity and Jihad in West Africa (MUJAO).

130. The mission identified the major causes of the conflict as poor governance, weakening of the military and porosity of the country’s borders. The human rights violations that were committed during the conflict were also identified as summary executions, torture, inhuman and degrading treatment, rape and gender based violence, vandalism, and destruction and looting of public and private property committed in various parts of the country. Armed groups were identified as the main perpetrators of the violations. However, the report also points to the Malian military as another culprit.

131. In view of the above, the Commission made recommendations to the government, the National Human Rights Commission, the Dialogue and Reconciliation Commission, the AU and MINUSMA and several other stakeholders. The government was urged, inter alia, to establish democracy and rule of law; to combat impunity; strengthen national courts,
rehabilitate infrastructure, strengthen the military, and alleviate poverty.

132. The above cases show how protection missions are best suited in dealing with human rights violations that occur in conflict and crisis situations. First and foremost, in reaching on a conclusion and making recommendations, the Commission does not rely on outside sources or the parties to the conflict rather it bases its findings largely on first hand information that the Commission gathered through meetings with relevant stakeholders, visits, testimonies and documents. Second, missions create the opportunity for continued constructive dialogue with the government as well as other concerned bodies. This enables the Commission to continuously and regularly engage with the government, which creates the feeling of partnership and trust which again increases the chances of implementation of recommendations. Third, when organs of the AU are involved, the Commission gets the political leverage that it ordinarily lacks, which allows the Commission to carry out missions with fewer or no diplomatic and procedural bottlenecks. It also helps in approaching and addressing the situation in a holistic manner, that is both legal and political, which is critically needed in conflict and crisis situations.

F. State Reporting

133. Article 62 of the African Charter requires states to submit periodic reports every two years on legislative and other measures that they have taken so as to ensure the realization of the rights and freedoms guaranteed in the Charter. Article 26 of the Maputo Protocol also requires states to report on measures taken to give effect to the provisions of the Protocol. In the same vein, under Article 14(4) of the Kampala Convention states are required to report to the African Commission on the implementation of the provisions the Convention. In order to assist states in the drafting and presentation of state reports and to facilitate the process of consideration, the Commission has adopted elaborate reporting Guidelines on the African Charter and the Maputo Protocol.

134. State Reporting procedure creates the forum for constructive dialogue between the Commission and states. States are able to take stock of their achievements and failures in the light of the Charter and other supplementary treaties. It also allows the Commission to monitor the implementation of the relevant treaties and be informed of challenges that states are facing in their implementation.

135. A state report submitted to the Commission must address measures taken to give effect to the provisions of the Charter and the two supplementary treaties; progress made and challenges faced in the implementation of the Charter and the relevant supplementary treaties.
One of the factors that impedes implementation is the presence of conflicts or crisis situation in a country, and that has been raised as an issue of concern during the consideration of state reports.

136. In the Concluding Observations on the second periodic report of Uganda in November 2006, the Commission pointed to the existence of NIAC in the country between government forces and armed rebel groups as one factor restricting the enjoyment of the rights in the African Charter. The Commission noted that the rebel groups were involved in the abduction of children and other human rights violations which affected marginalized groups. The link between the conflict in Uganda with other regional conflicts was also identified as a factor that undermined development projects which in turn jeopardize the enjoyment of rights guaranteed in the Charter.\(^{145}\)

137. Under areas of concern, the Commission again emphasized that the conflicts in northern Uganda are undermining development projects. To address these challenges, the Commission recommended that the Government of Uganda, among others, reduce the marginalization of the northern part of Uganda by strengthening central government services to eradicate poverty and insecurity, and also to collaborate with national and international actors to sensitize people and address Uganda’s difficulties, in particular those related to insecurity and development.\(^{146}\)

138. The Government of Uganda was urged to inform the Commission of steps that it has taken to address the areas of concern and how it has implemented the recommendations of the Commission in its next periodic report.\(^{147}\)

139. In compliance with the recommendations of the Commission, in its third periodic report presented in May 2009, Uganda reported that with a view to address the issue of insecurity facing the northern region, it has established Ministry of State of Karamoja Affairs and also launched the Karamoja Integrated Disarmament Development Program in 2008 to develop and implement a comprehensive, coordinated and sustainable disarmament program that enhances peace building and development in Karamoja. It also reported that it has adopted the Peace, Recovery and Development Plan of Northern Uganda 2007-2010 for the stabilization, rehabilitation and consolidation of peace in Northern and Eastern parts of Uganda.\(^{148}\)


\(^{146}\) Ibid.

\(^{147}\) Ibid.

140. The Commission noted the progress and commended the Government of Uganda for its efforts to address the human rights violations that occur in the country as a result of armed conflicts.\textsuperscript{149}

141. However, the Commission also expressed its concern with regards to the continued internal armed conflict in the northern part of Uganda, and noted with concern the gruesome human rights violations that were being committed by rebel groups such as attacks on civilians by raping, mutilating, slaughtering, abducting civilians, raiding villages, looting properties, burning houses and schools and recruiting child soldiers.\textsuperscript{150} In subsequent Concluding Observations adopted by the Commission on the fourth and fifth periodic reports of Uganda, the issue of conflict related human rights violations was not raised as an issue as the conflict had subsided.\textsuperscript{151}

142. Another country where the issue of human rights violations in armed conflicts has \textbf{reduced} in its engagement with the Commission through the state reporting procedure is Sudan. After considering Sudan’s first combined periodic report in May 2004, the Commission expressed its concern about the devastating armed conflict that has been ongoing for decades that has been the cause of serious human rights violations in the country. The Commission also noted with concern the state of emergency that has been in place for years in parts of the country that have been affected by armed conflicts, which curtails the normal enjoyment of rights guaranteed in the Charter and other international instruments.\textsuperscript{152}

143. The Commission can follow up on the implementation of its recommendations emanating from Concluding Observations not only through the state reporting procedure but also through promotion missions that are undertaken to that particular country. During such missions, questions can be posed by the delegation to the relevant government offices on the status of implementation of the recommendations of the Commission. Recommendations from promotions missions could also be followed up during the consideration of state reports. This system of following up on recommendations of the Commission during state reporting and promotion missions can also be extended to recommendations from communications, fact-finding missions, requests for Provisional Measures, Urgent Appeals, and resolutions. A synchronized and coordinated approach ensures a better

\textsuperscript{149} Ibid.

\textsuperscript{150} Ibid.

\textsuperscript{151} ACHPR, Concluding Observations and Recommendations on the Fourth Periodic Report of the Republic of Uganda, 49\textsuperscript{th} Ordinary Session, 28 April to 12 May 2011.

\textsuperscript{152} ACHPR, Concluding Observations and Recommendations on the Periodic Report of the Republic of Sudan, 35\textsuperscript{th} Ordinary Session, 21 May 4 June 2004.
rate of implementation of decisions/recommendations.

G. Thematic and country-specific resolutions

144. Article 45 of the Charter mandates the Commission to ‘formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples’ rights.’ Pursuant to this provision, the Commission adopts resolutions to address diverse human rights issues. These resolutions could generally be classified into three as: thematic, country-specific and administrative.\textsuperscript{153} Administrative resolutions deal with the Commission’s procedures, internal mechanisms and relationships between the Commission and other organs of the AU, inter-governmental organizations, national human rights institutions, and NGOs. The types of resolutions that are relevant for the purposes of this Study are thematic and country-specific resolutions.

\textbf{i. Thematic Resolutions}

145. A thematic resolution elaborates in greater detail specific human rights themes or a particular substantive right covered in the Charter. It defines states’ obligations in respect of such right, and describes the standard set by the Charter.\textsuperscript{154} The Commission has passed a number of thematic resolutions covering a wide range of themes including, arrest and detention, counter-terrorism, combating sexual violence, freedom of expression and fair trial, indigenous peoples, socio-cultural rights, HIV/AIDS, and freedom of association.\textsuperscript{155}

146. Although none of the thematic resolutions adopted by the Commission so far deal solely with human rights in conflict situations, some have parts that touch on the scope and protection of specific rights during conflict and crisis situations.

147. To give few examples, the Guidelines on Combating Sexual Violence and its Consequences in Africa that was adopted in May 2017 has a part on the investigation and prosecution of crimes of sexual violence in situations of conflict and crisis as international crimes.\textsuperscript{156} The 2015 Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa under the General Principles provides that states have the obligation to respect their human rights obligations while conducting counter-

\begin{footnotesize}
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\item[153] ACHPR, Documents-Resolutions available at \url{http://www.achpr.org/search/} accessed on 1 March 2018.
\item[154] ibid.
\end{itemize}
\end{footnotesize}
terrorism operations abroad, including in times of armed conflict during which times IHL is also applicable.\(^{157}\) The part on implementation further states that the obligations outlined in the Guidelines should always be guaranteed in law and practice even during armed conflicts and state of emergency.\(^{158}\) The 2014 Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa imposes the same obligation of guarantee on states.\(^{159}\)

148. The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in Africa in defining vulnerable and disadvantaged groups includes victims of armed conflicts as one group.\(^{160}\) It also obliges states to provide mental health care to survivors of conflicts among others.\(^{161}\) States are as well required to give social security services to areas affected by armed conflicts.\(^{162}\)

149. The 2002 Robben Island Guidelines imposes absolute prohibition on torture, inhuman or degrading treatment or punishment even under situations of state of war, threat of war, internal political instability or any other public emergency.\(^{163}\) It further proscribes the use of notions of ‘necessity’, ‘national emergency’, and ‘public order’ as justification of torture, inhuman or degrading treatment or punishment.\(^{164}\)

\(\textit{ii.} \) *Country-specific Resolutions*

150. Country-specific resolutions address pertinent human rights concerns in states parties. This genre of resolution has proven very useful whenever there are widespread violations in a state party but no individual has submitted any communications to the Commission in respect of those violations.\(^{165}\) The Commission has passed one or more country-specific resolutions to address the human rights situation in Sudan, Uganda, Zimbabwe, Ethiopia, Eritrea, Somalia, Kenya, CAR, DRC, Côte d’Ivoire, Comoros, Libya, Tunisia, Guinea Bissau, Liberia, Burundi, Rwanda and


\(^{158}\) Id., Implementation A, p. 39.


\(^{161}\) Id., para. 67(ff) p. 27.

\(^{162}\) Id., para. 82(k) p. 47.

\(^{163}\) ACHPR, Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Crucel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), (2002), para. C(9).

\(^{164}\) Id., para. C(10).

many other countries.

151. For instance, in 2012 the Commission passed a resolution on Somalia, *inter alia*, calling on the Government and all armed groups to end ongoing violations of human rights against journalists and media practitioners.\(^{166}\) During the genocide in Rwanda the Commission issued a resolution calling on parties to the conflict to respect the Charter and rules of IHL and to immediately cease hostilities and work towards peaceful settlement.\(^{167}\) A 2015 resolution on Nigeria condemned acts of violence against civilian population by Boko Haram militants and the use of female and children suicide bombers.\(^{168}\) The 2013 resolution of the Commission on Mali urged the government to put an end to human rights violations, acts of violence and impunity caused by the political instability in the country.\(^{169}\) The Commission condemned the gross human rights violations committed by armed groups in eastern DRC against civilians including rape and other forms of violence on women and children.\(^{170}\)

152. Following the violence that broke out in the wake of the December 2007 elections in Kenya, the Commission condemned the human rights violations perpetrated by all parties, and called on them to exercise patience and restraint. The Commission also decided to undertake a fact-finding mission to investigate allegations of violations of human rights and called on the government and the opposition to cooperate and extend assistance to the fact-finding mission.\(^{171}\) The mission never took place because the government did not grant permission for the mission to go ahead. A resolution that deplored the serious human rights violations as a result of the unconstitutional change of government twice in a year in Guinea-Bissau was adopted by the Commission on 2 May 2012.\(^{172}\) The Commission also condemned the mass arrest and trial, and the imposition of death penalty following trials that completely disregarded fair trial standards on political dissenters and critics in Egypt in February 2015.\(^{173}\)

153. Similar country-specific resolutions were also issued on Eritrea and Ethiopia in 2005 and 2012 respectively. In Eritrea, the Commission was concerned about the arbitrary arrests and continued detention without trial for many years of several former cabinet ministers and government

\(^{166}\) ACHPR, Resolution on Attacks Against Journalists and Media Practitioners in Somalia, 2 May 2012.

\(^{167}\) ACHPR, Resolution on the Situation in Rwanda, 27 April 1994.


\(^{169}\) ACHPR, Resolution on the Political Situation in the Republic of Mali, 24 July 2013.

\(^{170}\) ACHPR, Resolution on the Human Rights Situation in the DRC, 24 July 2013.


\(^{172}\) ACHPR, Resolution on the Unconstitutional Change of Government, 2 May 2012.

\(^{173}\) ACHPR, Resolution on the Deteriorating Human Rights Situation in the Arab Republic of Egypt, 28 February 2015.
officials, members of opposition groups, journalists and media practitioners in violation of the provisions of the African Charter.\textsuperscript{174} In the case of Ethiopia, the Commission was alarmed by the arrests and prosecution of journalists and opposition members, charged with terrorism and other offences including treason, for exercising their legitimate rights to freedom of expression and freedom of association. The Commission also condemned the excessive restrictions placed on human rights work by the Charities and Societies Proclamation, denying human rights organizations access to essential funding, endowing the Charities and Societies Agency with excessive powers of interference in human rights organizations.\textsuperscript{175}

154. From the foregoing it is obvious that resolutions play a crucial role in bringing to light grave human rights violations that are committed in conflict and crisis situations. From the Rwandan genocide to the post election crisis in Kenya, unconstitutional change of government in Guinea-Bissau, terrorist attacks in Nigeria and Somali and internal tensions in Ethiopia and Eritrea, country-specific resolutions have proved to be vital tools in exposing human rights violations.

155. One shortcoming of resolutions is that they are adopted only when the Commission is in session, which is, four times in a year maximum. The implication of this is that the Commission cannot give timely response to human rights violations that occur in conflict and crisis situations unless the violations occur when the Commission is in Session or close to it.

156. The other major limitation of country-specific resolutions is that there is little or no record of compliance. It will actually not be far from the truth to state that the rate of compliance of resolutions of the Commission is lower than the other decisions and recommendations of the Commission for various reasons.

157. The first could be the procedure followed in issuing resolutions. Most of the times draft resolutions come from NGOs through the NGO forum or from the Commission itself sponsored by country rapporteurs or special mechanisms. In both cases, however, the state is not given the opportunity to give its response or feedback on the draft resolution before it is adopted by the Commission. Therefore, there is a tendency from states to view it as a procedure that lacks impartiality, and hence they seem to be reluctant to implement/comply. Some states have even accused the Commission in a number of occasions of copying resolutions of international organizations. This problem is exacerbated by the apparent absence of rules in the Charter or RoPs of the Commission that regulate the procedures for the consideration and adoption of resolutions.

\textsuperscript{174} ACHPR, Resolution on the Human Rights Situation in Ethiopia, 5 December 2005.
\textsuperscript{175} ACHPR, Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia, 2 May 2012.
158. The second reason is the lack of follow up mechanism in the RoPs as well as in practice. The Commission has not yet developed a system to follow up on the implementation of its resolutions. Recommendations of missions are followed up by subsequent missions or state reports, and state reports by state reports or missions. Decisions on communications including provisional measures by the Working Group on Communications or referral or missions and/or state reports. But there is no mechanism for following up on resolutions.

159. The third reason that is related to the second is that after resolutions are adopted they are not sent to the concerned state and stakeholders. There is a haphazard practice of sending a compilation of adopted resolutions to embassies in Addis Ababa after each session. While this is commendable, if the Commission is serious about getting its resolutions implemented then when country-specific resolutions are adopted, in addition to sending the compilation, it should also send the specific resolution to each state on which a resolution has been adopted with an accompanying letter requesting the state to report on implementation within a fixed period of time. This is, of course, assuming that the procedural defects identified above are cured by giving the state the opportunity to forward its feedback on the draft resolution, if any, before it is adopted.

160. As it stands, states on which country-specific resolution have been adopted are neither availed with a copy of the resolution as a matter of regular and formalized procedure, nor are they requested to report on implementation or compliance. There is no point in adopting a resolution on a state if the state is not going to be informed of it.

161. In order to accommodate all the above suggestions, the Commission should reconsider its resolution procedure and adopt detailed guideline on resolutions that lays down the procedure for the presentation of draft resolutions, their consideration, adoption and follow up.

H. Press Releases/Statements

162. Press releases or statements are statements that the Commission issues on topical human rights issues or its activities. The type of press release that is of relevance to this study is the one on topical human rights issues as it can be used to condemn or express concern about ongoing human rights violations in conflict or crisis situations. Press releases on activities

176 The expanded mandate of the Working Group on Communications includes following up and collecting information on the status of implementation of the Commission’s decisions on communications. ACHPR, Resolution on the Expansion of the Mandate of the Working Group on Communications and Modifying its Composition, 22 October 2012.
are meant to give information to the public on just concluded, ongoing or planned activities of the Commission or in commemoration of events.

163. The advantage that press statements have over country-specific resolutions is that they can be issued at any time. The Commission does not need to be in Session to issue them. In fact, most statements are issued when the Commission is not in session enabling timely and prompt response to human rights violations. Other than this, press statements also share similar challenges as country-specific resolutions vis-à-vis lack of follow-up mechanisms and implementation.

164. Some of the most recent press releases of the Commission are on the human rights situations in Cameroon, Kenya and DRC. In its January 2018 press release the Commission condemned the violence and human rights violations, in particular the militarization of the English-speaking regions of Cameroon and the disproportionate use of force against the population. It also condemned enforced disappearances, arbitrary detention under deplorable conditions, and prohibition of peaceful demonstrations and displacement of Anglophone Cameroonians.177 The press release on Kenya was jointly issued by the Commissioner Rapporteur for Kenya and the Special Rapporteur on Freedom of Expression and Access to Information. The Press statement raised concerns regarding the shutting down of private TV stations that were attempting to live broadcast the swearing in of opposition leader, Raila Odinga, and the refusal of the government to obey a court decision allowing the stations to be re-opened. The Commission also condemned the arrest and detention and mistreatment in detention of two opposition figures for their role in the inauguration ceremony, and the the deportation of one of them from the country.178

165. The press release on DRC was issued by the Country Rapporteur strongly condemning the abusive and disproportionate use of force against peaceful demonstrators that resulted in the loss of life and injuries.179

II. Coordination and Collaboration with Relevant AU Bodies

166. Article 45(1)(c) of the Charter authorizes the Commission to cooperate

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with African and international institutions concerned with the promotion
and protection of human rights. In line with this provision, the African
Commission has forged relations with different AU bodies for the better
promotion and protection of human and peoples’ rights, including in time
of conflict. Some of these relations have been created explicitly under the
Charter, others through Protocols and still others through RoPs of the
Commission, resolutions and Memorandum of Understandings (MoU).
Some of these formalized relationships are discussed below.

A. The Relationship between the Commission and AU Political Organs

167. The relationship between the Commission and the political organs of
AU has been set out under various provisions of the Charter and further
elaborated in the RoPs of the Commission. The Constitutive Act of the AU
also sets the promotion and protection of human rights in accordance with
the African Charter as one of the objectives of the AU. Some of the
principles of the AU also directly relate to the mandate of the Commission
such as respect for democratic principles, human rights, rule of law and
governance; promotion of social justice; respect for the sanctity of human
life, condemnation and rejection of impunity and political assassination,
acts of terrorism and subversive activities; condemnation and rejection of
unconstitutional changes of governments; prevention of conflicts and war
crimes, crimes against humanity and genocide.

168. Political organs of the AU in the context of this study refers to the
Assembly of Heads of States and Government, the Executive Council and
the Permanent Representatives Council (PRC).

169. The most relevant provisions that lay out the relationship between the
Commission and the political organs that can be used in cases of human
rights violations in conflict and crisis situations are Articles 58 and 59 of the
Charter. The nature and scope of the relationship between the two in this
regard has been discussed in detail under tools and mechanisms in this
Study. Therefore, there is no need to repeat that discussion here. But it
should be recalled that according to Article 58, the Assembly has the
ultimate and full power to enforce the decisions and recommendations of
the Commission. Hence, the enforcement of the decisions of the
Commission on violations of human rights in conflict and crisis situations
completely depends on the Assembly. Only the Assembly has the power to
convince or force the state concerned to comply with the decision of the
Commission, and that requires political will from the Assembly.

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180 See for example arts. 30, 33, 37, 39, 41, 44, 45(3) & (4), 52, 53, 54, 58, 59
181 Constitutive Act of the African Union, 2000, art. 3(h).
182 Id., art. 4.
170. So far, the Assembly has not demonstrated the required political will to enforce the decisions of the Commission. Except making general statements requiring states to comply with decisions of the Commission, the Assembly or Executive Council have not taken any concrete steps to enforce decisions. And this has seriously hampered the effectiveness of the protection mandate of the Commission and by extension the tools and mechanisms of the Commission relevant for addressing human rights violations in times of conflict and crisis.

171. Contrary to the supportive role that they are expected to play, the working relationship between the policy bodies and the Commission has become fraught with tension. As a result, at the January 2018 summit, the AU Assembly decided that the Commission holds a retreat with the members of the Permanent Representatives Committee for addressing the various issues affecting the relationship of the Commission with these bodies.

172. On the positive side, in a few occasions the Executive Council has requested the Commission to undertake fact-finding missions to investigate reports of serious and massive human rights violations in a member state. The case of SADR is one example as discussed hereinabove.

173. Thus, the greatest challenge in making the relationship between the Commission and the political organs of the AU work is the lack of political will of the latter. Additional challenge of a technical nature is the absence of established working relationship and mechanism for operationalizing the relationships envisaged under the African Charter. Until and unless these issues are addressed the objectives of the envisaged working relationship would not be effectively achieved.

B. The Relationship between the Commission and the PSC

174. In upholding the human and peoples’ rights in the African Charter, both the Constitutive Act of the AU and the Protocol Establishing the Peace and Security Council (PSC) acknowledge the role of the African Commission in the policy processes of the AU. Against this background, there have been instances in which the PSC resorted to the Commission as part of its effort in maintaining peace and security in Africa.

175. In a number of occasions since 2004 the PSC made requests to the ACHPR to undertake investigation of issues of human rights in various situations including in Cote d’Ivoire, Darfur, the Republic of Guinea and Somalia. Most recently, the PSC similarly tasked the African Commission to investigate the human rights situation in Burundi. Acting on this request, the Commission undertook its investigations on 7-13 December 2015 and presented its investigation report to the PSC on 28 April 2016.

176. In terms of the normative basis, both the PSC Protocol and the African
Commission’s legal instruments reveal that there is clear overlap in the mandates of the African Commission and the PSC. Accordingly, under the PSC Protocol, the PSC enjoys the power: (a) to institute sanctions whenever an unconstitutional change of government takes place in a member state and (b) to follow up on the progress towards the 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 by member states. Additionally, regarding ‘grave circumstances’ identified under Article 4 (h) of the Constitutive Act of the AU, the PSC is vested with the power: (a) to anticipate and prevent policies that may lead to genocide and crimes against humanity and (b) to recommend to the AU Assembly intervention in a member state in respect of grave circumstances.

177. These dimensions of the mandate of the PSC fall squarely within the area of competence of the African Commission, whose mandate and activities in the promotion and protection of human and peoples’ rights directly feature in and concern all the areas of engagement of the PSC, conflict prevention, management, resolution and post-conflict transition processes. These are all areas in which various issues of human and peoples’ rights loom large.

178. This mandate overlap and the effective implementation of the respective responsibilities of the two institutions in these areas of common interest require that the two adopt an institutionalized mechanism for close working relationship.

179. Rule 84(1) of the Rules of Procedures of the Commission stipulate that the African Commission may refer situations falling under Article 58 of the African Charter to the PSC. A more comprehensive framework for institutionalized close working relationship between the PSC and the African Commission is laid down under Article 19 of the PSC Protocol. This provision states:

The Peace and Security Council shall seek close co-operation 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.

180. Building on the Conclusions of the Dakar Retreat of the PSC in 2007 that provided for the holding of annual consultative meeting between the

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183 PSC Protocol, Art. 7 (1) (a).
184 PSC Protocol, Art. 7 (1) (e).
two and in order to operationalize Article 19 of the PSC Protocol in an institutionalized framework, the African Commission made a request for a session of the PSC to discuss the modalities for close working relationship between the PSC and the African Commission. Despite the fact that the meeting the Commission requested under Article 19 of the PSC Protocol did not take place, its request led to the convening of a session of the PSC on 5 September 2017 with organs of the AU with human rights mandates including the African Commission.

181. From the current format of collaboration, it is clear that there is a lot to be gained from close working relationship between the two bodies. Indeed, the limited experience with respect to various situations including Mali or Burundi has shown that close working relationship help advance the respective mandates of the two bodies. Given that currently the working relationship remains largely ad hoc and reactive, there is a need for having a more institutionalized arrangement in implementing Article 19 of the PSC Protocol including through activating the Conclusions of the 2007 Dakar Retreat of the PSC mandating the convening of the annual consultative meeting. Most importantly, there is a need for articulating a framework for the multidimensional operationalization of the provisions of Article 19 of the PSC Protocol.

C. The Relationship between the Commission and the Court

182. The relationship between the Commission and the Court is envisaged under Article 2 of the Court Protocol and further sketched out in the respective RoPs of the Commission and the Court. The relationship between the two is one of complementarity, the Court complements and reinforces the protection mandate of the Commission.\(^{185}\) The reason why the protection mandate of the Commission needed to be complemented by the Court is because the decisions and recommendations of the Commission are not legally binding. As a result, the majority of the decisions/recommendations of the Commission are not implemented by states and hence the need to establish a Court that gives legally binding decisions.

183. Whether the lack of compliance with decisions can be rectified by establishing a Court is by itself a topic for another research. But it should be emphasized that the problem of compliance in the African human rights system is largely related to the lack of democracy and rule of law, the prevalence of conflicts and other socio-economic factors such as poverty, corruption and harmful traditional practices. Establishing a Court without tackling these root causes of non-compliance is like treating symptoms instead of the disease.

\(^{185}\) See the Preamble and article 2 of the Court Protocol.
184. Regardless, there is no doubt that the establishment of the Court contributes to the better protection of human and peoples’ rights on the continent. But again creating a smooth, cordial, and effective relation between the Commission and the Court is indispensable for the better protection of human rights in Africa. Especially at this stage where only seven states have made the Declaration under Article 34(6) of the Court Protocol allowing individuals direct access to the Court, the Commission is the channel through which the Court should get most of its cases.

185. However, the reality on the ground is very different from this aspiration. The Commission has in eight-year period referred only three cases to the Court although the RoPs of the two institutions have been harmonized since 2010. One of the reasons proffered for this is the lack of clear rules and guidelines in the Commission to identify cases to be referred to the Court. Of course Rule 118 of the RoPs of the Commission lays out some general criteria for referral cases, which are: cases of non-compliance by states with decisions on Communications or requests for Provisional Measures of the Commission, and in those cases that involve serious or massive violations of human rights.

186. There are a number of factors that impede the implementation of the referral system. First, referral of cases to the African Court requires that there is a capacity that prepares, files and follows up the cases before the Commission. As things stand now, the Commission lacks the required resources and dedicated capacity this requires. Second and most importantly, there are some normative challenges among which is the loose or inadequate criteria for referral of cases. If one looks at the criteria under Rule 118 of the current RoP of the Commission, referral of a case that has been finalized at the level of the Commission to the Court on account of non-implementation can lead to the opening of the case all over again. Apart from this problem of the opening of the case, for those involving Article 58 situations, referring cases on the basis of gravity of violations or their jurisprudential importance would imply that the Commission deals with less serious or important cases.

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186 Article 34 of the Protocol [Ratification] stipulates that “at the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State which has not made such a declaration.” Article 5(3) states as follows: “The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol.” The seven states that have made the Declaration under article 34(6) are: Burkina Faso, Malawi, Mali, Tanzania, Ghana, Cote d’Ivoire and Benin. See the Status List (of ratification) of the Court Protocol available at https://au.int/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf
187. As a result of these challenges, five years have passed since the last referral and the Commission and the Court have been holding regular meetings every year since 2011 giving them enough time and opportunity to sort things out.\(^\text{187}\)

188. The last case that was referred to the Court was in 2012 against Libya in the case of Saïf Al-Islam Ghaddafi,\(^\text{188}\) and the Court has already rendered a judgment in the case in 2016.\(^\text{189}\) In the other case relating to the Ogiek indigenous communities of Kenya, the Court decided in favor of the community in May 2017.\(^\text{190}\)

189. The first case that was referred to the Court against Libya in 2011 was struck out by the Court for lack of diligent prosecution.\(^\text{191}\) The case that was struck out was a test case for two reasons. First, it was the first ever case referred from the Commission to the Court. Second, the case relates to human rights violations committed during the Libyan revolution by the Ghaddafi regime\(^\text{192}\) and hence could have been used to demonstrate how the Court can afford a better protection to human rights in conflict situations. But it was struck out for the Commission failed to diligently prosecute the case, which has tainted the relationship between the two institutions.

190. It is hoped that the ongoing process of the revision of the Rules of Procedure of the Commission would afford an opportunity in addressing at least the legal/technical challenges limiting referral of cases and hence the poor implementation of the complementary relationship between the Court and the Commission. At the very least, cases in which an applicant made a request for referral to the Court can be one of the factors that can be included as trigger for referring cases to the Court.

191. The other issue is that the complementary relationship between the two entails a two-way traffic involving referral both from the Commission and from the Court. In relation to referral from the Court as well,

\(^{187}\) See the 30\textsuperscript{th} to the 43\textsuperscript{rd} Activity Reports of the Commission available at http://www.achpr.org/activity-reports/

\(^{188}\) Communication 411/12 – Mr. Saïf Al-Islam Ghaddafi (represented by Mishana Hosseinioun) v. Libya registered as Application 002/2013 – African Commission on Human and Peoples’ Rights v. Libya. ACHPR, Combined 32\textsuperscript{nd} and 33\textsuperscript{rd} Activity Reports, paras. 21 & 22; and AfCHPR, Application 002/2013 – African Commission on Human and Peoples’ Rights v. Libya, Judgment, June 2016.


\(^{192}\) Ibid.
discussions thus far between the two bodies show that it is only cases involving states that did not ratify the court protocol or did not make the Article 34 (6) declaration that the Court is inclined to refer to the Commission. This however may not be considered as referral given the lack of jurisdiction on the part of the Court.

192. From the perspective of the focus of this study on conflict situations, what is of significance in terms of the working relationship between the Commission and the Court is the opportunity that it presents for elaborating the effective protection of the Charter standards in conflict situations.

D. Relationship between the Commission and the Children’s Committee

193. The Commission and the Children’s Committee are both regional human rights treaty monitoring bodies under the auspices of the AU with similar mandates. While the Commission is mandated to promote and protect human and peoples’ rights in Africa, the Children’s Committee is entrusted with the mandate of promoting and protecting the rights of the child on the continent. So, the Committee has a specific-group focused or thematic mandate and the Commission a general one.

194. Despite the existence of general provisions in their constitutive instruments that allow the two institutions to collaborate and cooperate with other AU institutions with similar mandates, no explicit statutory relation has been established between the Commission and the Children’s Committee. However, since their mandates are similar and deal with cross-cutting human rights issues, they have formalized their relationships through a resolution, and continuous engagement and sharing of information.

195. The 2009 resolution of the Commission establishes a formal relation with the Children’s Committee with a view to enhance the cooperation between the two institutions. It also appointed the Special Rapporteur on the Rights of Women in Africa as the focal person of the Commission for the cooperation, and is required to report on the status of cooperation at every Ordinary Session of the Commission.

196. Given the similarities of the mandate and working tools of the two bodies, there is huge potential for joint action for addressing human rights

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193 See article 45 of the African Charter and article 42 of the Children’s Charter.
194 See in particular article 45(1)(c) and article 42(a)(iii) of the Children’s Charter.
issues in conflict situations. In August 2017, the Commission and the Committee also sent a joint letter of Urgent Appeal to the Government of Tanzania concerning the statement made by the President on 22 June 2017 to the effect that pregnant girls and teen mothers would no longer be allowed to attend school and continue their education. 196 This is encouraging and can be effectively used to protect human rights in time of conflict and crisis situations.

197. Similar joint actions or activities can be carried out in undertaking fact-finding missions, issuing resolutions and perhaps also in referring cases to the political organs of the AU. Taking joint action will have more visibility and force, and is a strategy that should particularly be often used in cases involving human rights violations in conflicts. If for instance a joint fact-finding mission is undertaken to a troubled country and a joint report is presented to the political organs, its impact will be felt much more than when it is done solo.

198. Since the two institutions also face the same problem when it comes to implementation of their decisions, they should develop a joint strategy, if possible together with the Court, to have a body at the AU that is dedicated to oversee the enforcement of the decisions of regional human rights bodies. A continuous and concerted effort in this regard will yield the necessary results sooner than piecemeal approach.

199. Specifically in relation to the focus of this study, there were also some missed opportunities for cooperation that the Commission and the Committee should draw lessons from. A case in point is the 2016 study of the Committee on the Impact of Conflict and Crises on Children in Africa. 197 The Committee was requested to undertake the Study by the PSC 198 and if the Commission was involved in the Study in some way then the study would have had better outcome and outreach. It would have also solidified the tripartite cooperation between the Commission, the Committee and the PSC.

200. There is still no institutionalized, regularized and systematized relation and cooperation between the Commission and the Committee and it is high time that they do so now.

201. From the foregoing, it can be concluded that although the Commission has the requisite statutory or formalized relation with the relevant AU organs and institutions with human and rights and conflict related

196 ACHPR, 43rd Activity Report, para. 30.
198 See a brief description of the background to the Study on the ACERWC available at http://www.acerwc.org/study-children-and-armed-conflicts/
mandate, the formal relation has not been translated into meaningful and impactful practice. Apart from political will, the main challenges include the ad hoc nature of the interactions, a tradition of working in silos, difference of interests (as between the Commission and the policy bodies in which states are represented), lack of institutionalized arrangements for regular exchange and appropriate frameworks for the proper operationalization of working relationship. And this problem is not unique to these organs only but cuts across the whole AU system. Short of a radical and holistic reform of the system and institutions of the AU, commitment and articulation of workable strategy could address some of these challenges.

202. To conclude, the African Commission is inherently challenged in the discharge of its mandate especially in conflict and crisis situations. The African Commission has been working on communications procedure, adopting relevant resolutions on conflicts, conducting fact-finding missions as well as issuing letters of appeal. These measures have contributed in drawing attention to human rights issues in conflicts in Africa.199

203. Yet, it clearly emerges from the foregoing analysis that there are five challenges that are observed for addressing human rights issues in conflict situations:

I. The first of this is the protection challenge. This has to do with the issue of how to arrest incidents of violations and ensure that conflict parties avoid and take action against perpetration of violence. Related to this is the issue of the monitoring, investigation and reporting of violations.

II. The second challenge is the promotion challenge. This challenge entails the provision of customized inputs by way of general and thematic analysis for the full consideration and integration of human rights into peace processes that are deployed for preventing or resolving conflicts.

III. The third and equally important challenge is that of remedying (or coming to terms with) the violations that the conflict occasioned.

IV. Fourth, there is the challenge of prevention. This is a challenge about ensuring that the root causes are addressed, the triggering factors are removed and the necessary democratic and socio-economic reforms are instituted.

V. Fifth and finally, there is the challenge of coordination and synergy with other relevant AU mechanisms.

III. Proposed Approach to Addressing Human Rights Issues in Conflict and Crises Situations, and Recommendations

A. Proposed Approach for a Comprehensive Response to Human Rights Issues in Conflict Situations

204. The African Commission in collaboration with relevant stakeholders especially the PSC, should move away from the dominant *ad hoc* approach to a more institutionalized, predictable and systematized framework for promoting and protecting human rights. The adoption of Resolution 332 provides an opportunity to realize this ambition. In the implementation of Resolution 332, and in light of existing gaps in the promotion of human rights in Africa, the African Commission should consider adopting a four-pillar approach based on the following thematic priorities:

i. Monitoring and response;

ii. Prevention;

iii. Mainstreaming of Human rights to conflict prevention, management, resolution and post-conflict reconstruction and development;

iv. Remedial Action; and

v. Institutional coordination and synergy including operationalization of Article 19 of the PSC Protocol

i. Monitoring and response

205. The African Commission requires a dedicated capacity for monitoring human rights situation on the continent and, where necessary investigating violations when they occur. The establishment of such dedicated capacity inherently promotes deterrence of human rights violations. Besides, *ad hoc* arrangements such as the Commissions of Inquiries, assessments, state reporting, do not offer the timeliness and predictability that is required to inform political decision-making and effective responses.

206. To have a more institutionalized and predictable monitoring and responding to crises through various means tailored to the demands of the particular situation. In this regard, the Commission should adopt a special mechanism supported by a team of experts for monitoring and investigation of human rights violations that occur in conflict and crisis
situations. The mechanism will also be responsible for following up on decisions and actions taken by the Commission in such situations.

ii. Prevention

207. Prevention of violations of human rights cannot be isolated from broader processes aimed at addressing root causes of conflict and crisis situations. The African Commission should increasingly work with development actors preferably African home grown organizations including grass root organizations as well as relevant UN and AU specialized agencies in promoting a rights-based approach in addressing root causes of conflicts and crises. Facilitating this synergy will meaningfully contribute towards structural prevention of crisis situations and by extension, substantially mitigate the risks of human rights violations. Once the capacity of the Commission is enhanced, concrete activities and programs can be planned with these organizations.

208. Importantly, the Commission should highlight the conditions showing threats of violations evolving into conflict situations and outline specific measures that should be taken for preventing such violations. While this requires regular tracking of developments across the continent and integrated engagement of all the country rapporteurs, the experience of the Commission in terms of elaboration of standards have shown that the Commission in articulating the standards that should apply in various situations such as, for example the use of force by government security forces in the management of protests or in counter terrorism operations the Commission is able to specify the precautionary measures that should be taken for preventing the human rights violations that could otherwise occur in such situations.

iii. Mainstreaming of Human Rights in Conflict Prevention, Management, Resolution and Post-Conflict Reconstruction and Development

209. AU strategies on preventing and resolving crises should integrate human rights and in particular the role of the African Commission. There are emerging opportunities that could be further explored: for example, the ongoing attempt by the AU Commission to develop a Continental Structural Prevention Framework (CSPF) as well as a framework on preventive diplomacy should necessarily include a human rights dimension. Importantly, the Commission should establish working arrangement for sharing information and its statements on emerging situations with the Continental Early Warning System of the AU and AU’s conflict preventive diplomacy mechanism of the Panel of the Wise.
210. In addition, the planning, deployment and management of peace support operations especially in the development of mandates, Concept of Operations and other mission directives must mainstream human rights and where possible the role of the African Commission. Such integration of human rights is also required in all cycle of peace processes in general. Finally, the implementation of the AU post-10 year lessons learned study on the 2006 Framework on Post-Conflict Reconstruction and Development offers an opportunity for increased collaboration with the African Commission. Such a robust mainstreaming of human rights will ensure that the protection challenges associated with imminent or actual crisis situations are addressed.

211. There is also similar opportunities for integrating the work of the African Commission into the post-conflict reconstruction and development work of the AU. This is not only in relation to the implementation of certain components of peace agreements such as transitional justice processes but also constitutional and institutional reform measures including justice sector reforms.

iv. Remedial Action

212. The African Commission can cause to initiate various remedial measures through creative use of its protective and promotion mandates. One such measure is the availing of its communication procedure to people whose rights affected in conflict situations. From the jurisprudence of the African Commission arising from the communications procedure, one of the most useful pronouncements relevant to the adjudication of issues of interest for conflict situations relate to the requirement of exhaustion of local remedies under Article 56 of the African Charter. Accordingly, in relation to communications revealing mass violations, the Commission held that ‘[i]n accordance with its earlier decisions on cases of serious and massive violations of human rights, and in view of the vast and varied scope of the violations alleged and the large number of individuals involved, the Commission holds that local remedies need not be exhausted and, as such, declares the communications admissible.’200 The Commission reaffirmed this position excluding the application of the requirement of exhaustion of local remedies in a number of cases.201

213. Another avenue for remedial action is the use of the fact finding role of the Commission. In this respect, it is appropriate that the Commission articulates guidelines on the criteria and processes for the deployment of fact-finding missions on its own motion.

200 27/89-46/91-49/91-99/93 Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme/Rwanda, para 18
201 299/05 Anuak Justice Council / Ethiopia; para 59
214. In relation to conflict situations for which the AU deploys conflict management and resolution tools, support of victims is a necessary component of promoting durable solutions in addressing human rights abuses against vulnerable groups. In this respect, the African Commission should support the establishment of AU policies on compensation or *ex-gratia* payments including medical services (where required) to support victims. In addition, in contexts of AU peace support operations, mechanisms such as a Civilian Casualties Tracking, Analysis and Response Cell (CCTARC) could be established and resourced to provide support to victims. In addition, facilitating the establishment of independent hotlines has sometimes served to build confidence amongst local communities on real-time reporting and action against violations. Depending on the nature of the crisis situations, the African Commission should consider suitable mechanisms that will alleviate the suffering of victims.

vi. Institutional coordination and synergy including operationalization of Article 19 of the PSC Protocol

215. As has been pointed out earlier, the implementation of the working relationship envisaged under Article 19 of the PSC Protocol requires the elaboration of modalities for its operationalization. The following are some of the proposed modalities.

**Annual consultative meeting envisaged in the 2007 Dakar Conclusions of the PSC Retreat on PSC Working methods**

216. A starting point for this is the implementation of the annual consultative/briefing meeting between the ACHPR and the PSC envisaged in the Dakar Conclusions of the PSC Retreat on its working methods in 2007.

**Submission by the African Commission on the human rights dimensions of AU peace and security processes**

217. The African Commission is best placed to highlight the human rights dimensions of specific crisis situations and provide recommendations how those human rights issues can be integrated and addressed in AU peace processes whether those be preventive diplomacy, mediation, peacemaking, peace support operations or post-conflict reconstruction support initiatives. This includes supporting the AU in integrating human rights in the mandates, design and implementation of peace processes including peace support operations.
Informal consultations

218. The close working relationship between the PSC and the African Commission can also be optimally implemented through informal consultations in which the African Commission shares with the PSC about existing or emerging situations of concern with a view to enable the PSC take a policy position on dealing with the situation appropriately with due regard to the human rights issues involved.

Investigation missions and participation in PSC field missions

219. By virtue of its mandate of monitoring the human rights situation on the continent and initiating appropriate response, the African Commission together with the Children’s committee is the only body with the requisite mandate and experience for undertaking investigation into the human rights dimension of emerging or existing conflict situations.

220. Importantly, the Commission should request the PSC for its representation in the field missions of the PSC for advising the PSC on the human rights dimensions of its visits and the follow up actions required.

Information sharing on major human rights violations including t

221. The African Commission by virtue of its mandate and the nature of its activities receives and collects information on regular basis on the human rights situation of AU States Parties to the African Charter, including those on the agenda of the PSC. Since patterns of systematic or serious violations on which the African Commission receives and collects information from various sources including through visits to the field often serve as important and first hand signs of emerging or impending crisis, sharing information on such situations to the Continental Early Warning System (CEWS) and the PSC contributes to enhancing the early warning and early response system of the AU. There is accordingly a need for the African Commission to formally draw the attention of the PSC to emerging or impending situations of concern including through submitting its statements and reports as appropriate

Briefing the PSC formally on the human rights dimension of the situation or theme on the agenda of the PSC
222. The African Commission has various mechanisms and has developed a number of thematic guidelines and frameworks on various areas of human rights including those relating to situations of counter terrorism, transitional justice and conflicts. Accordingly, the African Commission can provide the PSC briefings on the human rights dimension of the situation or theme on the agenda of the PSC.

The establishment of a standing thematic agenda of the PSC on human rights and peace and security

223. In the light of the fact that human and peoples’ rights forms part of the mandate of the PSC, the African Commission submits that the PSC establishes human rights and peace and security as a standing thematic agenda of the PSC on which the PSC holds bi-annual sessions dedicated to the theme of human rights and peace and security in Africa. This will be one avenue through which the PSC receives reports dedicated to the subject of human rights and peace and security in Africa with a view to help it be fully informed of the current and emerging human rights issues in crisis situations during the reporting period and adjust its approaches to those crisis situations accordingly.

Proposing to the PSC the tabling of a situation on its agenda

224. Finally, one of the avenues that are available for mobilizing effective policy action for addressing human rights issues in conflict situations is the referral of such situations to the PSC for it to put it on its agenda.

B. Recommendations

225. The above proposed approach lays out the general approach and direction that the Commission should adopt as part of its long term plan for effectively redressing human rights violations that occur in the context of conflicts and crises situations. With a view to achieve these objectives/goals, the following interim and long-term measures are recommended:

i. For a comprehensive and coordinated response in conflict and crises situations, the Commission should work towards the full and effective operationalization of provisions of treaties and instruments that call for a joint and coordinated action for monitoring and implementation including Article 58 of the African Charter; Article 19 of the PSC Protocol; Article 5(1)(a) of the Court Protocol; Article 26(1) of the
Maputo Protocol; Article 14 and Article 8(3)(e) & (f) of the Kampala Convention; Article 49(2) and Art. 45(c) of the ACDEG; and the 2009 Resolution on Cooperation between the Commission and the Committee;

ii. A new mechanism that is devoted for monitoring, reporting and responding to human rights violations that occur in conflict and crises situations, and for coordinating strategy and efforts within the Commission and with other relevant organs of the AU should be established. It will also be responsible for monitoring state of emergency laws and practices in Africa. It should as well be given the mandate to follow up decisions and recommendations as well as letters of appeal and resolutions relating to conflict or crisis situations;

iii. Until such time that the proposal for the establishment of a new special mechanism supported by dedicated experts at the Secretariat, the Commission should designate focal persons both at the Commission and Secretariat level who will be responsible for monitoring human rights in conflict situations and for coordinating action among the various special mechanisms of the Commission and country rapporteurs for swift, coordinated and effective response by the Commission. The focal persons will also be responsible for coordinating effort with other sister AU organs and institutions. Since the the Secretariat is already overstretched, the Commission/Secretariat should approach partners that could second experts/staff;

iv. Develop, together with the Children’s Committee and the African Court, strategies to effectively lobby AU political organs for the establishment of a strong and independent body for the enforcement of their decisions;

v. Adopt the modalities highlighted above on the operationalization of Article 19 of the PSC Protocol and initiate their implementation through engagement with relevant PSC bodies;

vi. When political organs request the Commission to undertake a fact-finding mission, they should secure authorization for the mission from the state concerned or at least facilitate or intervene for authorization to
be secured. These organs, especially the PSC, should also assist in securing authorization from states when the Commission by its own initiative decides to undertake a fact-finding mission involving conflict or crises situations. This squarely fits within the framework of cooperation envisaged under Article 19 of the PSC Protocol;

vii. When feasible, undertake fact-finding missions together with other AU organs and institutions such as the PSC and the Children’s Committee;

viii. When special or mixed Courts are established at national level to try those responsible for violations of human rights and humanitarian laws in post-conflict societies, and the AU is spearheading the process, the African Commission should be involved from planning to winding up as an advisor and/or monitor. The Commission should be given the same role in the establishment of national Truth and Reconciliation Commissions.

ix. The African Commission should be represented or be given an advisory role in peace negotiations and deals led by the AU;

x. The African Commission should be allowed to regularly monitor the human rights situation of countries where AU peace keeping missions have been deployed until the end of the mission;

xi. The African Commission together with other AU organs with human rights mandates participates in the provision of induction on human rights to particularly AU peace operations leadership;

xii. The African Commission work with the AU to undertake missions before elections in countries where national elections are scheduled to be held;

xiii. The African Commission should develop a guideline on the respect, protection as well as application of IHRL and IHL in conflict and crisis situations, and effective and timely response by the Commission in such situations.

xiv. Develop clear and detailed guidelines for the referral of cases to the African Court as well as to the political organs of the AU;
xv. Review the country-specific resolutions procedure to give concerned states the opportunity to make their observations on the draft before it is adopted. States should be required to make their observations before the end of the Session wherein the draft resolution is being considered to enable the Commission adopt it at the same Session. The involvement of the state in the resolution procedure will give credibility and impartiality to the process, thereby increasing the chance of implementation; and

xvi. Include rules in the new draft RoPs of the Commission for resolutions, and also adopt detailed guidelines on the consideration, adoption, follow up as well as structure and content of resolutions.