

Taking measures without taking measurements? An insider's reflections on monitoring the implementation of the African Children's Charter in a changing context of armed conflict

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Abstract

The efforts to create a world fit for children, including for those affected by armed conflict, remain a work in progress. Increasingly, regional organizations, prime among them the African Union and its organs, are being asked to play a more meaningful role in pushing for the realization of the rights and protections of children in armed conflict. This piece explores trends and developments in respect of children and armed conflict in Africa, and offers few ideas on how the African Committee of Experts on the Rights and Welfare of the Child, which holds significant promise, can continue to rise to this challenge.

Keywords: children, armed conflict, African Children's Charter, African Committee, regional organizations.

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Introduction

The impact of armed conflict on children is staggering.¹ Graça Machel's 1996 study entitled *Impact of Armed Conflict on Children* (Machel Study)² put the children and armed conflict agenda firmly on the international political landscape.³ Since then it has spurred unprecedented action in the form of standard-setting, the adoption of numerous resolutions by the United Nations (UN) Security Council, the appointment of a Special Representative of the Secretary-General on Children and Armed Conflict (SRSG CAAC),⁴ and mobilization of resources, to name but a few successes. Some would also

- 1 See UNICEF, *25 Years of the Convention on the Rights of the Child: Is the World a Better Place for Children?*, 2014, p. 9, which highlights that "[a]lthough the number of armed conflicts around the world has decreased from a peak of 52 in 1991 to 33 in 2013, the new century has already seen major conflicts".
- 2 UN General Assembly, *Impact of Armed Conflict on Children*, UN Doc. A/51/306, 26 August 1996 (Machel Study).
- 3 In addition, substantial legal discussions on the protection of children in armed conflict occurred in the lead-up to the 1949 Geneva Conventions and the 1977 Additional Protocols, and it was the standards in these instruments that fed the text of the Convention on the Rights of the Child (CRC), Optional Protocol on the Involvement of Children in Armed Conflict (OPAC) and International Criminal Court (ICC) Statute that followed.
- 4 The UN Security Council has passed the following resolutions on the issue: UNSC Res. 1261, UN Doc. S/RES/1261, adopted at its 4,037th meeting, 25 August 1999; UNSC Res. 1314, UN Doc. S/RES/1314, adopted at its 4,185th meeting, 11 August 2000; UNSC Res. 1379, UN Doc. S/RES/1379, adopted at its 4,423rd meeting, 20 November 2001; UNSC Res. 1460, UN Doc. S/RES/1460, adopted at its 4,695th meeting, 30 January 2003; UNSC Res. 1539, UN Doc. S/RES/1539, adopted at its 4,948th meeting, 22 April 2004; UNSC Res. 1612, UN Doc. S/RES/1612, adopted at its 5,235th meeting, 26 July 2005; UNSC Res. 1882, UN Doc. S/RES/1882, adopted at its 6,176th meeting, 4 August 2009; UNSC Res. 1998, UN Doc. S/RES/1998, adopted at its 6,581st meeting, 12 July 2011; UNSC Res. 2068, UN Doc. S/RES/2068, adopted at its 6,838th meeting, 19 September 2012; UNSC Res. 2143, UN Doc. S/RES/2143, adopted at its 7,129th meeting, 7 March 2014; UNSC Res. 2225, UN Doc. S/RES/2225, adopted at its 7,466th meeting, 18 June 2015; UNSC Res. 2427, UN Doc. S/RES/2427, adopted at its 8,305th meeting, 9 July 2018.

attribute credit to the Machel Study, at least partially, for the accountability work that is done by the International Criminal Court (ICC) and other similar initiatives.⁵

Yet, in the same month that the Machel Study marked its twenty-two-year anniversary, in August 2018, the world woke up to horrific images of scattered bodies and carnage as a result of an air strike that hit a bus carrying children in Saada province in Yemen.⁶ A month earlier, a graphic video had emerged online that showed the summary execution of two women and two young children, by armed and uniformed men (allegedly Cameroonian soldiers), reportedly as punishment for the women's affiliation with Boko Haram.⁷ In June 2018, the Appeals Chamber of the ICC released the rebel commander turned politician Jean Pierre Bemba, who was initially convicted for pillage, rapes and murders, including of children, committed by his forces, the Movement for the Liberation of Congo militia.⁸ The atrocities of the Syria conflict too, which has been raging for more than eight years now, have a child's face.⁹ News feeds are full of these atrocities against children.

Sadly, many children continue to die and suffer for causes they can barely understand, and accountability still appears to be a currency that is in short supply. Particularly in Africa, the need to make concrete progress preventing and addressing violations of the rights and protections of children in the context of armed conflict cannot be over-emphasized.¹⁰

In 2015, Conflict Dynamics International (CDI) underscored the various levels of implementation and accountability for violations of international law against children in conflict – namely, the local, national, regional and international levels. At the regional level, which is the main focus of this article, human rights courts, monitoring and reporting and fact-finding missions, and regional treaty bodies are singled out as playing a critical role.¹¹ CDI also identified three critical gaps in the global accountability mechanisms for violations against children in the

5 Such as the Special Court for Sierra Leone.

6 See "Yemen War: Saudi-Led Airstrike on Bus Kills 29 Children", *BBC News*, 9 August 2018, available at: www.bbc.com/news/world-middle-east-45128367 (all internet references were accessed in June 2019).

7 Dionne Searcey, "Shootings on Video in Cameroon 'May Not Be Isolated Cases,' U.N. Fears", *New York Times*, 25 July 2018, available at: www.nytimes.com/2018/07/25/world/africa/cameroon-boko-haram-video.html; UN Office of the High Commissioner for Human Rights (OHCHR), "UN Human Rights Chief Deeply Alarmed by Reports of Serious Rights Breaches in Cameroon", 25 July 2018, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23404&LangID=E.

8 See ICC, "ICC Appeals Chamber Acquits Mr Bemba from Charges of War Crimes and Crimes against Humanity", 8 June 2018, available at: www.icc-cpi.int/Pages/item.aspx?name=pr1390.

9 Frederik Pleitgen, "Syria's Child Face of Aleppo Still Caught in the Middle a Year On," *CNN*, 6 September 2017, available at: <https://edition.cnn.com/2017/09/06/middleeast/omran-daqneesh/index.html>. Also see Anne Barnard, "How Omran Daqneesh, 5, Became a Symbol of Aleppo's Suffering", *New York Times*, 18 August 2016, available at: www.nytimes.com/2016/08/19/world/middleeast/omran-daqneesh-syria-aleppo.html.

10 See African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *Continental Study on the Impact of Conflict and Crises on Children in Africa*, 2016.

11 CDI, *Children in Armed Conflict Accountability Framework: A Framework for Advancing Accountability for Serious Violations against Children in Armed Conflict*, June 2015, p. iii, available at: <https://bettercarenetwork.org/sites/default/files/Children%20in%20Armed%20Conflict%20Accountability%20Framework.pdf>.

context of armed conflict.¹² These are the limited attention accorded to children in general accountability processes, the minimal use of child-specific accountability mechanisms, and the challenge of “working in silos”—for example, limited collaboration between those working on emergencies, development and human rights, leading to fragmentation in approaches to accountability.¹³

The point of departure for this article is that, as a regional treaty body, the potential contributions of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC or African Committee) established under the African Charter on the Rights and Welfare of the Child (ACRWC or African Children’s Charter) appear to squarely fit the last two gaps identified by CDI. The Machel Study, under the heading “Regional and Subregional Arrangements”, in particular encouraged the then Organization of African Unity “to work with national organizations and Government entities to formulate plans of action to protect children”¹⁴ within the framework of the ACRWC.¹⁵ While on the topic of treaty bodies, it is also worth noting that it is the treaty body established under the Convention on the Rights of the Child (CRC), the Committee on the Rights of the Child, that, along with the UN General Assembly, asked the Secretary-General to name an expert to study the impact of conflict on children.¹⁶

This article begins by offering a brief insight into the role of some regional organizations in preventing and addressing violations of the rights of children in the context of armed conflict. Given the increasing emphasis placed on regional organizations by the Security Council and the SRSG CAAC, this opening section places particular emphasis on these two entities. Subsequently, a closer scrutiny of the most relevant substantive provisions of the ACRWC is offered, with the aim of investigating the extent to which the potential work by the ACERWC is standing on a solid base. The section that follows offers a critical look at State Party reporting, individual complaints mechanisms and other processes that the ACERWC can avail itself of in its efforts to play a meaningful role as a regional body tasked with the role of monitoring the implementation of the ACRWC. Such an assessment takes into account and focuses on the “changing context” of children and armed conflict on the African continent, which has increasingly featured protracted internal conflicts,¹⁷ has had huge impacts on civilians, and has involved specific violations, including sexual exploitation and abuse of children by peacekeepers, that represent a particular challenge. A concluding section wraps up the discussion.

12 *Ibid.*

13 *Ibid.*

14 Machel Study, above note 2, para. 279

15 The two other relevant regional instruments mentioned are the European Convention on Human Rights and the Santiago Declaration.

16 Office of the SRSG CAAC, “Graça Machel and the Impact of Armed Conflict on Children”, available at: <https://childrenandarmedconflict.un.org/about-us/mandate/the-machel-reports/>. See also UNGA Res. 48/157, “Protection of Children Affected by Armed Conflicts”, UN Doc. A/RES/48/157, 7 March 1994.

17 UNICEF, above note 1, p. 28.

Regional organizations and children in armed conflict: A brief overview

The role of regional organizations in addressing the challenges faced by children in the context of armed conflict has been acknowledged for decades. For instance, the Machel Study alluded to this in 1996.¹⁸ However, the importance of the role of regional organizations has reached new heights in the last couple of years. To demonstrate this, the 2018 *Report of the Secretary General on Children and Armed Conflict*¹⁹ and the most recent UN Security Council Resolution on the issue²⁰ are good indicators.

The relevant section of the 2018 Report underscored, in two full paragraphs,²¹ how regional and sub-regional organizations can play a role with member States and the UN to address high levels of cross-border recruitment, and the accompanying repatriation and reintegration complexities. Regional and sub-regional organizations are also recommended to strengthen dedicated child protection capacities and assist in the development of tools aimed at preventing grave violations.²² During the debate, some States also emphasized the importance of “the strategic advantage of regional organizations in addressing the impact of armed conflict on children”²³ as well as the critical role they play in “addressing the cross-border nature of threats against children”.²⁴

UN Security Council Resolution 2427 explicitly mentions the word “regional” on no less than sixteen occasions.²⁵ For comparison purposes, it is worth noting that the three most immediately preceding resolutions – namely Resolution 2225 of 18 June 2015, Resolution 2143 of 7 March 2014, and Resolution 2068 of 19 September 2012 – make reference to the term “regional” only four, five, and zero times respectively.²⁶

In recognition of the increasing role of regional and sub-regional organizations, the SRSG CAAC has undertaken a number of measures. A cooperation agreement was signed between the Office of the SRSG CAAC and the Peace and Security Council of the African Union (AU) in 2013.²⁷ As a long-standing

18 Machel Study, above note 2, paras 279–280.

19 See *Report of the Secretary General: Children and armed conflict* (16 May 2018) (A/72/865-S/2018/465) paras 11, 17, 256.

20 UNSC Res. 2427, UN Doc. S/RES/2427, adopted at its 8,305th meeting, 9 July 2018. The other main resolutions of the Security Council that address the protection of children affected by armed conflict are listed in above note 4.

21 *Report of the Secretary General*, above note 19, paras 256, 257.

22 *Ibid.*, para. 257.

23 See Statement summary of His Excellency Tekeda Alemu, Permanent Representative of the Government of the Federal Republic of Ethiopia to the UN in New York, in UN, “Security Council Seeks to Strengthen Protections for Children in Armed Conflict, Unanimously Adopting Resolution 2427 (2018)”, 9 July 2018, available at: www.un.org/press/en/2018/sc13412.doc.htm.

24 See Statement summary of His Excellency Christof Heusgen, Permanent Representative of the Government of the Germany to the UN in New York, in UN, above note 23.

25 See UNSC Res. 2427, UN Doc. S/RES/2427, 2018, Preamble, paras 5, 8, 10, 11, 39.

26 These three Security Council resolutions are listed in above note 4.

27 See SRSG CAAC, “Working with Member States”, available at: <https://childrenandarmedconflict.un.org/about-us/working-with-the-united-nations/security-council-working-group/>.

partner, the European Union has continued to contribute its support,²⁸ including by strengthening capacity-building in countries where children are affected by armed conflict.²⁹ The relationship between the [North Atlantic Treaty Organization \(NATO\)](#) and the SRSG CAAC has further been consolidated³⁰ with the adoption of a child protection policy³¹ and guidelines that benefited from the Office's inputs.³² NATO has also provided training for its troops on children and armed conflict,³³ established an e-learning module on child protection in 2013,³⁴ and appointed focal points for children and armed conflict throughout the NATO Command Structure.³⁵

The ACRWC and the ACERWC

There is an adequate amount of literature scrutinizing the provisions of the ACRWC³⁶ and comparing them with those of the CRC.³⁷ Suffice it to mention that the issue of children living under apartheid,³⁸ the protection of refugees and internally displaced persons, the special vulnerability of girls, including in relation to accessing education during and after pregnancy,³⁹ and the monitoring mechanism set in place through the African Committee are some of the added values brought up by the ACRWC. Indeed, the use of children by armed forces and groups and the need to institute a minimum age of 18 for military service was one significant reason for the adoption of the Charter.⁴⁰

As of June 2019, the ratification of the ACRWC stood at forty-nine countries. The latest ratification of the Charter was by Sao Tome and Principe in April 2019.⁴¹ Currently, there are six countries that have not ratified the Charter;

28 The European Union has also adopted a policy on the protection of children affected by war, entitled the European Union Policy on the Rights of Children Affected by Armed Conflict.

29 SRSG CAAC, above note 27.

30 *Ibid.*

31 See NATO, *Protection of Children in Armed Conflict – the Way Forward*, March 2015.

32 SRSG CAAC, above note 27.

33 *Ibid.*

34 Remarks by NATO Deputy Secretary General Rose Gottemoeller at the International Conference on Children and Armed Conflict, 13 February 2017, available at: www.nato.int/cps/en/natohq/opinions_140895.htm?selectedLocale=en.

35 *Ibid.*

36 See, for instance, Bankole Thompson, "Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism", *International and Comparative Law Quarterly*, Vol. 41, No. 2, 1992; Benyam Dawit Mezmur, "The African Children's Charter versus the UN Convention on the Rights of the Child: A Zero-Sum Game?", *SA Public Law*, Vol. 23, No. 1, 2008.

37 See, for instance, Osifunke Ekundayo, "Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats [sic] the Convention on the Rights of the Child (CRC)'s Provisions? Examining the Similarities and the Differences between the ACRWC and the CRC", *International Journal of Humanities and Social Science*, Vol. 5, No. 7(1), 2015.

38 ACRWC, Art. 26.

39 *Ibid.*, Art. 11(6).

40 Lee Muthoga, "Introducing the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of the Child", paper delivered at the International Conference on the Rights of the Child, Community Law Centre, University of the Western Cape, 1992.

41 Available at: <https://au.int/sites/default/files/treaties/36804-sl-AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHILD.pdf>.

these are the Democratic Republic of the Congo (DRC), Morocco,⁴² the Saharawi Republic, Somalia, South Sudan and Tunisia.

The African Children's Charter prohibits, in Article 22(2), the recruitment and use of children under the age of 18 in both international and internal armed conflicts and requires that States "take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child". Unlike the CRC and the Optional Protocol on the Involvement of Children in Armed Conflict (OPAC), it adopts a "straight 18" position whereby the recruitment and/or use of persons below the age of 18 in hostilities is prohibited with no exceptions.⁴³ Moreover, the rule on the protection and care of children who are affected by armed conflict also applies "to children in situations of internal armed conflicts, tension and strife".⁴⁴

Under the ACRWC, States undertake an obligation "to take all necessary measures to ensure" that no child takes a direct part in hostilities, and to refrain in particular from recruiting any child.⁴⁵ Arguably, this should also cover children who are involved in non-combatant status but in the meantime are at risk of real danger. The risk of this broader interpretation of "direct participation" and "recruiting any child" to include children other than those fighting (including cooks, scouts, etc) is that it could mean that such children become a legitimate target for attacks.

Article 1(3) of the Charter, which is the "more conducive environment clause" that permits the application of more conducive provisions of national or international law, has significant relevance for children and armed conflict. Similar provisions are found in the CRC and OPAC.⁴⁶ Article 22 and other relevant provisions of the Charter would bind States Parties, and if the same States are a party to the CRC and/or OPAC and in the instances that these latter instruments contain more conducive provisions, they are expected to comply with the same.

In outlining the obligations of States Parties, Article 1 of the Charter makes reference to "constitutional processes".⁴⁷ While the ACERWC has not interpreted this provision as imposing an obligation on States Parties to constitutionalize the provisions of the Charter, the constitutionalization of children's rights is often welcome. In this respect, the South African Constitution and the Burundi Constitution⁴⁸ provide age 18 as the minimum age for joining armed forces. Subsidiary legislation setting the minimum age for military service at 18 is also in

42 Morocco joined the AU in January 2017 and is the only country among the six countries that has not yet signed the Charter.

43 Michael Gose, *The African Charter on the Rights and Welfare of the Child: An Assessment of the Legal Value of its Substantive Provisions by Means of a Direct Comparison to the Convention on the Rights of the Child*, Community Law Centre, University of the Western Cape, 2002, p. 28.

44 ACRWC, Art. 22(3).

45 *Ibid.*, Art. 22(2).

46 CRC, Art. 41; OPAC, Art. 5.

47 ACRWC, Art. 1(1).

48 See Constitution of South Africa, 1996, Section 28(1)(i); Constitution of Burundi, 2005, Article 45.

abundance.⁴⁹ However, out of about fifty States globally (mostly in the north⁵⁰) that allow under-18s to join the armed forces of a State,⁵¹ some are African countries.⁵²

Unlike the African Charter on Human and Peoples' Rights (ACHPR), where the discussion on the application of international humanitarian law (IHL) revolves around Article 61 (which is a general provision on sources of inspiration in international law that the African Commission "shall also take into consideration"⁵³), the ACRWC explicitly refers to IHL.⁵⁴ The reference to "relevant international humanitarian law" in Article 22 of the African Children's Charter is similar to what is contained in Article 38 of the CRC. This is an aspect of the African human rights system that is less explored, including under the ACHPR.⁵⁵

The rules of IHL are contained in the four Geneva Conventions and their two Additional Protocols.⁵⁶ In particular, Geneva Convention (IV) relative to the Protection of Civilian Persons in the Time of War of 12 August 1949 protects children. Articles 14 and 17 provide protection for "children under fifteen, expectant mothers and mothers of children under seven" from the effects of war. Article 23 caters for the removal of children and pregnant women from besieged or encircled areas and the free passage of essential necessities such as medication and food for children and expectant mothers. A number of other relevant articles

49 In Madagascar, by way of example, the minimum age of recruitment for national service has been raised to 18 years by Act No. 2005-037 of 20 February 2006. In Algeria, while the age for voluntary recruitment is unclear, the National Service Code explicitly states that the age for conscription into the regular armed forces is set at 19 years.

50 Including the United States and the United Kingdom, as well as some countries in Eastern Europe and Asia.

51 Child Soldiers International, "The Issue", 2016 (website no longer available).

52 For instance, the Seychelles, despite being a State party to the ACRWC, still maintains the possibility of under-18s being recruited into the armed forces as its Defence Act does not explicitly prohibit the enlistment of any person under the age of 18 years.

53 For a detailed discussion on this, see Michaela Hailbronner, "Laws in Conflict: The Relationship between Human Rights and International Humanitarian Law under the African Charter on Human and Peoples' Rights", *African Human Rights Law Journal*, Vol. 16, No. 2, 2016; James Fowkes, "The Relationship between IHL and IHRL in Peacekeeping Operations: Articulating the Emerging AU Position", *Journal of African Law*, Vol. 61, No. 1, 2017.

54 ACRWC, Arts 22(1), 22(3).

55 Frans Viljoen, "The Relationship between International Human Rights and Humanitarian Law in the African Human Rights System: An Institutional Approach", in Erika De Wet and Jann Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations*, Pretoria University Law Press, Pretoria, 2014, p. 303.

56 See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV); Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II). Article 77 of AP I ("Protection of Children"), which applies in international armed conflicts, and Article 4(3) of AP II (special care of children), which applies in non-international armed conflicts, are of critical importance.

include provisions for access of children to essential goods, health care and education;⁵⁷ protection of children against torture, abuse or neglect;⁵⁸ protection for children separated from their family;⁵⁹ protection for children in the hands of the enemy;⁶⁰ and protection for children deprived of their liberty.⁶¹

According to the International Committee of the Red Cross (ICRC), there are a number of customary IHL rules that are specific to children. These rules are established based on *opinio juris*, as well as State practice. In this respect, four rules are of significant relevance for the application of Article 22 of the African Children's Charter: namely Rule 120, which requires that children who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units;⁶² Rule 135, which requires that children affected by armed conflict are entitled to special respect and protection;⁶³ Rule 136, establishing that children must not be recruited into armed forces or armed groups;⁶⁴ and Rule 137, obliging that children must not be allowed to take part in hostilities.⁶⁵ By definition, customary law is binding on States, including African States, irrespective of their ratification status of treaties.

Of further particular interest is Article 22(3) of the Charter, which extends the application of "obligations under international humanitarian law" to "also apply to children in situations of internal armed conflicts, tension and strife". This provision has been lauded as reflecting the reality on the ground where there is a relatively high frequency of internal tensions. As a result, the threat that civilian children face need not reach a high threshold of violence for it to trigger the application of IHL.⁶⁶ Such an approach has been lauded as showing the priorities of a region that has suffered a lot as a result of tensions and strife.⁶⁷ Obviously, the intent of this provision is to ensure greater protections for children, and therefore Article 22(3) is not intended to apply IHL rules on the conduct of hostilities outside of situations of armed conflict, as this would incorrectly permit the targeting of military objectives as well as civilian damage that is proportionate to the military advantage of an attack.

57 See, for example, GC IV, Arts 23, 38; AP I, Art. 70(1); AP II, Art. 4(3)(a); AP I, Art. 78(2); GC IV, Art. 38.

58 See for example, AP I, Art. 75(2)(b), 77(1); AP II, Art. 4(2)(e); GC IV, Art. 68(4); AP I, Art. 77(5); AP II, Art. 6(4).

59 See GC IV, Arts 25–26, 136–140; AP II, Art. 4(3)(b); GC IV, Arts 24(3), 50(2).

60 See GC IV, Arts 50(1), 50(3); GC IV, Art. 50(2), 50(4); GC IV, Art. 50(5); GC IV, Art. 51(2).

61 See, for example, GC IV, Art. 82(2), 82(3); AP I, Art. 77(4); GC IV, Arts 76(4), 89(5), 94(2–3).

62 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 120, "Accommodation for Children Deprived of Their Liberty", available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rule120.

63 *Ibid.*, Rule 135, "Children", available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rule135.

64 *Ibid.*, Rule 136, "Recruitment of Child Soldiers", available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rule136.

65 *Ibid.*, Rule 137, "Participation of Child Soldiers in Hostilities", available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rule137.

66 Fiona Ang, Commentary on the *United Nations Convention on the Rights of the Child: Article 38*, Martinus Nijhoff, The Hague, 2005, pp. 5–6.

67 *Ibid.* See also Danwood Mzikenge Chirwa, "The Merits and Demerits of the African Children's Charter on the Rights and Welfare of the Child", *International Journal of Children's Rights*, Vol. 10, 2002, p. 168.

Monitoring is an important aspect of ensuring the implementation of rights and protections by States. The Charter establishes the treaty body, the African Committee, whose mandate is to promote and protect the rights in the Charter.⁶⁸ Before the coming into force of the Charter in 1999, an *ad hoc* committee on children and armed conflict operated as a precursor to the operationalization of the African Committee. The Committee has the power to consider State Party reports,⁶⁹ as well as individual complaints and inter-State communications.⁷⁰ The Committee, aware of the significant importance of the subject of children and armed conflict, dedicated its first continental report to this topic.⁷¹ Most of the Committee's activities in the context of children and armed conflict, and the aspects of its work in need of improvement, are a subject of detailed discussion later in this article.

Overview and thematic trends in Africa

Overview

It is reported that the number of children living in conflict zones around the world has increased from about 200 million in the early 1990s to about 357 million in 2016.⁷² The Africa region is second only to Asia, with one in five children on the African continent being affected by conflict.⁷³

In 2017, the armed conflict in Somalia was characterized as “escalating”.⁷⁴ A car-bomb blast in Mogadishu in October 2017 killed more than 350 people, including children.⁷⁵ The Human Rights Council has noted a number of violations of children's rights in the context of armed conflict in Somalia. It has, for instance,

expresse[d] concern at the abuses and violations perpetrated against children, including the unlawful recruitment and use of child soldiers and children in armed conflict, killing and maiming, rape and other sexual and gender-based violence, and abductions, and emphasize[d] the need for accountability and justice for all such violations and abuses.⁷⁶

68 ACRWC, Art. 32.

69 *Ibid.*, Art. 44(1)(a).

70 *Ibid.*, Articles 44, 45.

71 ACERWC, above note 10.

72 Save the Children International, *The War on Children: Time to End Grave Violations against Children in Conflict*, 2018, available at: www.savethechildren.org.uk/content/dam/global/reports/education-and-child-protection/war_on_children-web.pdf 7

73 *Ibid.*

74 ACLED, *Conflict Trends No. 55: Real-Time Analysis of African Political Violence*, February 2017, p. 8, available at: www.acleddata.com/wp-content/uploads/2017/02/ACLED_Conflict-Trends-Report-No.55-February-2017_pdf.pdf.

75 “Massive Car Bomb Blast Rocks Somalia's Mogadishu”, *Al Jazeera*, 14 October 2017, available at: <https://tinyurl.com/ukpm6fo>; “Mogadishu Bombing Death Toll Rises to 358”, *Al Jazeera*, 21 October 2017, available at: <https://tinyurl.com/quklrtj>.

76 UN Human Rights Council, Res. 36/27, 29 September 2017, para. 4.

The ongoing armed conflict in Northeast Nigeria, too, has seen a large number of children – reportedly more than 3,500 children – being recruited and used by non-State armed groups.⁷⁷ Children have also been killed, maimed, abducted and raped in the conflict.⁷⁸

According to the SRSR CAAC, the current state of affairs in relation to children and armed conflict remains grim. As of 2016, there were a reported fifty-nine parties to conflict at the global level, involved in conflicts in fourteen countries, that were listed in the SRSR's report's annexes.⁷⁹ Out of the fifty-nine parties, while the largest majority were non-State armed groups, eight were government forces.⁸⁰ Out of these, five were African States – namely, the Central African Republic (CAR), Mali, Somalia, South Sudan and Sudan.⁸¹ In 2017, the CAR was delisted.

The African countries where armed groups recruit children below the age of 18 are the CAR, the DRC, Mali, Nigeria, Somalia, South Sudan and Sudan.⁸² The story of child soldiers from Darfur, Sudan, taking part in the war in Yemen has also been reported in the media.⁸³ Reportedly, there is a correlation between the recruitment of children by armed forces and the creation of a more conducive environment for armed groups to do the same.⁸⁴ The SRSR CAAC also notes that the abduction of children in the context of armed conflict is a continuing problem in Africa, and is in fact increasing in a few contexts – particularly by the Lord's Resistance Army (LRA), Al-Shabaab and Boko Haram.⁸⁵

The findings of the SRSR CAAC in her 2018 report generally portray a deteriorating situation in African countries as compared to previous years.⁸⁶ In this respect, it is reported that the recruitment and use of children doubled in the DRC and quadrupled in the CAR.⁸⁷ In Somalia and South Sudan, the recruitment and use of children persisted at alarming levels, at 2,127 and 1,221 verified cases respectively.⁸⁸ A direct link between the increase in recruitment and use of children and maiming and killing of children is also

77 UNICEF, "Nearly 900 Children Released from Armed Group in North-East Nigeria", 10 May 2019, available at: www.unicef.org/nigeria/press-releases/nearly-900-children-released-armed-group-north-east-nigeria; "Militia Frees Hundreds of Child Soldiers in Nigeria", *Africa News*, 10 May 2019, available at: www.africanews.com/2019/05/10/militia-frees-over-800-child-soldiers-in-nigeria/.

78 UNICEF, above note 77.

79 SRSR CAAC, *20 Years of the Children and Armed Conflict Mandate*, August 2016, p. 5, available at: https://childrenandarmedconflict.un.org/wp-content/uploads/2016/08/Children-in-Conflict_WEB.pdf.

80 *Ibid.*

81 *Ibid.*

82 Child Soldiers International, above note 51.

83 David D. Kirkpatrick, "On the Front Line of the Saudi War in Yemen: Child Soldiers From Darfur", *New York Times*, 28 December 2018, available at: www.nytimes.com/2018/12/28/world/africa/saudi-sudan-yemen-child-fighters.html?searchResultPosition=3.

84 SRSR CAAC, *Annual Report: Children Faced with Unspeakable Violence in Conflict as Number of Grave Violations Increased in 2017*, 16 May 2018, available at: <https://undocs.org/s/2018/465>.

85 SRSR CAAC, *Annual Report of the Secretary General on Children and Armed Conflict*, UN Doc. A/70/836-S/2016/36020, April 2016, para. 9, available at: www.un.org/ga/search/view_doc.asp?symbol=s/2016/360&referer=/english/&Lang=E.

86 SRSR CAAC, above note 79.

87 *Ibid.*, para. 6.

88 *Ibid.*

emerging.⁸⁹ In Nigeria, suicide attacks, on some occasions perpetrated by children that have been forced to do so by Boko Haram, accounted for over half of verified child casualties.⁹⁰

Globally, there is an increasing trend to protect students, teachers and schools from the negative consequences of military use of schools. Part of this progress has been achieved through the *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict* and its accompanying Safe Schools Declaration. The number of African countries that have endorsed the Declaration stands at just twenty-three,⁹¹ but on a positive note, a number of countries currently undergoing armed conflict have endorsed the Declaration.

Some thematic issues

There are a number of thematic issues around which the interpretation of the ACRWC by the African Committee can add value to the promotion and protection of the rights of children in the context of armed conflict.

While the OPAC provides the possibility for State armed forces (though not armed groups) to recruit children below 18 on a voluntary basis, such a concept appears alien to the Charter, where a “straight 18” position is adopted. Accordingly, in Africa, the instances in domestic law where under-18s are allowed to join the army are rare. In fact, there are examples where voluntary enrolment is also explicitly set at 18 years. In Morocco, in terms of the law, you must be at least 20 years old to be conscripted into the army,⁹² and in terms of voluntary enrolment, the minimum age has been set at 18.⁹³ In Angola, the Armed Forces of Angola may only be joined through compulsory recruitment from the age of 20, whereas voluntary recruitment is set at 18 years of age.⁹⁴ In Egypt, voluntary recruitment is permitted from the age of 16,⁹⁵ and in Algeria, children may be voluntarily recruited into the armed forces from the age of 17.⁹⁶ In the DRC the law allows for children to be recruited into the army from the age of 16,⁹⁷ however, as the law defines “direct participation” as “direct participation in hostilities” or being at the “front lines” of hostilities, it states that

89 *Ibid.*, para. 7.

90 *Ibid.*

91 As of 25 May 2019, these countries were Angola, Botswana, Burkina Faso, Cameroon, the CAR, Chad, Côte D'Ivoire, the DRC, Djibouti, Gambia, Kenya, Liberia, Madagascar, Mali, Mozambique, Niger, Nigeria, Sierra Leone, Somalia, South Africa, South Sudan, Sudan and Zambia.

92 Morocco Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/MAR/1, 19 June 2012, para. 13.

93 *Ibid.*, para 19.

94 Angola Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/AGO/1, 23 February 2017, para. 22.

95 Egypt Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/EGY/1, 17 March 2010, para. 30.

96 Committee on the Rights of the Child, Concluding Observations to the Algeria Report, UN Doc. CRC/C/OPA/DZA/CO/1, 22 June 2018, para 19.

97 DRC Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/COD/1, 19 April 2011, paras 43–44.

those who are between 16 and 18 may not be sent to the front lines.⁹⁸ In Sudan, the Child Act prohibits the exploitation or use of children in armed conflict.⁹⁹ However, from the age of 16, children can become “cadets” who will receive military training before they turn 18;¹⁰⁰ they (officially) become soldiers when they turn 18 years of age.¹⁰¹

How age determination processes are conducted, especially in a context where there is no birth certificate, is an issue in need of close attention. For example, in Angola, the age determination process has been reported as unreliable, as oral confirmation of age by two witnesses is sufficient.¹⁰² In Uganda, the age determination process relies on confirmation by a local chief/authority or an examination of height, years of schooling completed, etc, which can be inaccurate.¹⁰³ Due to this, despite the law, it has been found that there were children serving in the Uganda People's Defence Force.¹⁰⁴ There are also children serving in militia groups such as the LRA.¹⁰⁵ Unlike in some countries such as Tunisia, it is not compulsory to show an identity card in order to verify one's age in Uganda.¹⁰⁶ In Sudan, before recruitment, at the time of application, a person has to produce a birth certificate in order to prove his or her age.¹⁰⁷

While the criminalization of child recruitment under 15 is required by IHL, it is not an obligation that explicitly emanates from the African Children's Charter and the CRC. However, under the OPAC, the Committee on the Rights of the Child has expressed concern that Algeria,¹⁰⁸ Guinea,¹⁰⁹ Malawi,¹¹⁰ the DRC¹¹¹ and Madagascar,¹¹² among others, have not yet explicitly criminalized the recruitment of child soldiers by both State and non-State armed groups or security forces. There are a few countries that explicitly criminalize recruitment of persons below 18; in Sierra Leone, for example, national legislation criminalizes the recruitment of children under 18 into the armed forces,¹¹³ and in Sudan the law criminalizes

98 *Ibid.*, paras 47, 49.

99 Sudan Report to the UN Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/SDN/1, 16 December 2009, para. 22.

100 *Ibid.*, para. 55.

101 *Ibid.*, para. 53.

102 Angola Report, above note 94, para 18.

103 Uganda Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/UGA/1, 17 July 2008, para. 19.

104 *Ibid.*, para. 14.

105 *Ibid.*, paras 14, 46–48.

106 *Ibid.*, para. 28.

107 *Ibid.*, para. 52.

108 Algeria Concluding Observations, above note 96, para. 29.

109 Committee on the Rights of the Child, Concluding Observations to the Guinea Report, UN Doc. CRC/C/OPAC/GIN/CO/1, 25 October 2017, para. 21.

110 Malawi Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/MWI/1, 20 June 2016, para. 4.2.

111 *Ibid.*, para. 83.

112 Madagascar Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/MGD/1, 5 November 2014, para. 101.

113 *Ibid.*, para. 22.

the recruitment of “someone who does not qualify” to be recruited into the army,¹¹⁴ which includes children under 18.¹¹⁵

There are instances where so-called “local militias” or “local defence forces” that are often associated with or supported by government are involved in the recruitment of children below the age of 18. The application of the provisions of the African Children’s Charter in these instances, and the accompanying obligations of States Parties, is an area that can benefit from guidance by the African Committee.

There are commendable examples from domestic law that expand the level of protection to children beyond only armed conflict. The Beninese Children’s Code, which is awaiting promulgation, prohibits the involvement of children in armed conflict and “other related matters”.¹¹⁶ In Rwanda the law sets the recruitment age at 18 and prohibits military service for persons under the age of 18.¹¹⁷ Furthermore, members of the Local Defence Force must also be at least 18 years old.¹¹⁸

The number of UN-verified cases of maiming and killing has increased globally,¹¹⁹ this increase is reported to be a staggering 300% since the year 2010.¹²⁰ Africa has contributed more than its fair share in this regard. There are documented cases of forcing children to become suicide bombers,¹²¹ including on the African continent. It is documented that Boko Haram has kidnapped children (more than 1,000 cases as of June 2015) and indoctrinated them or forced them to serve as suicide bombers.¹²²

Sexual violence as a tactic of war and terrorism, especially against women and girls, but also against boys and men, is an increasing trend recorded in at least nineteen countries.¹²³ Almost half of these countries identified by the SRSG on Sexual Violence in Conflict – namely Burundi, the CAR, Côte d’Ivoire, the DRC, Mali, Nigeria, Somalia, South Sudan and Sudan – are in Africa.¹²⁴

In this respect, some trends of serious concern include the targeting of very young girls and boys for sexual violence, including in Burundi, the CAR, the DRC, Somalia, South Sudan and Sudan (Darfur); and the increased reporting of sexual violence against boys and men, despite the reporting barriers and stigma of

114 *Ibid.*, para. 79.

115 *Ibid.*

116 Benin Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/BEN/1, 24 November 2017, para. 60.

117 Rwanda Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/RWA/1, 6 December 2011, para. 70.

118 *Ibid.*, para. 83.

119 Save the Children International, above note 72, p. 7.

120 *Ibid.*

121 Noman Benotman and Nikita Malik, *The Children of Islamic State*, 2016, p. 23, available at: <https://f-origin.hypotheses.org/wp-content/blogs.dir/2725/files/2016/04/the-children-of-islamic-state.pdf>.

122 *Ibid.* Also see Ludovico Iaccino, “It’s Not Just ISIS and Boko Haram, Child Soldier Recruitment is a Problem in Many Countries”, *International Business Times*, 24 October 2015, www.ibtimes.co.uk/focus-its-not-just-isis-boko-haram-child-soldier-recruitmentproblem-many-countries-1525390.

123 *Conflict-Related Sexual Violence: Report of the Secretary-General*, UN Doc. S/2019/280, 29 March 2019, p. 5.

124 *Ibid.*

perceived emasculation they face.¹²⁵ Often the criminalization of adult same-sex conduct, coupled with the absence of rape laws that are sex-neutral, exacerbates the situation for boys and men. Mothers and their children born of wartime rape/sexual conduct face ostracization within their communities—a good example of this being children born to Boko Haram members in Nigeria, who are labelled as “bad blood” or “children of the enemy”.¹²⁶

The arrest, detention and in some instances torture and ill-treatment of children who are accused of association with groups designated as terrorist organizations, or related activities, is also an issue in need of closer scrutiny if the enjoyment of the rights in the African Children's Charter are to be realized by all. Preventive detention, used under the guise of protecting children from joining groups such as Boko Haram and ISIS, has led to arrests of children in Cameroon, Nigeria, Libya and other countries.¹²⁷ The use of children for suicide bombing has been flagged as one of the issues in need of attention, especially in the context of Boko Haram and Al-Shabaab insurgencies. For instance, it has been reported that there has been an increase in suicide bombings carried out by children in Cameroon and Nigeria for and on behalf of Boko Haram.¹²⁸

Another issue worthy of exploration relates to the denial or unlawful use of humanitarian access, and its relationship with children's rights. Activities of this nature have reportedly increased, for instance, in the context of the conflict in South Sudan.¹²⁹ This begs the question of how the provisions of the African Children's Charter, especially Articles 22 and 5, as well as relevant standards from IHL, should be interpreted and applied. Moreover, the relative success or lack thereof of the Charter can also be measured by the extent to which its provisions and their interpretation have impacts on non-State armed groups, and are also applied in instances of extra-territoriality, including sexual exploitation and abuse by peacekeepers. Other areas in need of further interpretation and guidance include the relevance of the provisions of the Charter in reducing the impact of terrorism-related offences on children; children displaced by armed conflict; and attacks on schools and hospitals. It is important that the work of the African Committee address these issues in the foreseeable future.

Some trends on accountability

There is no evidence that the reported increase in instances of the UN Security Council Monitoring and Reporting Mechanism's six grave violations on the African continent has yet been matched with increased

¹²⁵ *Ibid.*, p. 6.

¹²⁶ *Report of the Secretary-General on Conflict-Related Sexual Violence*, UN Doc. S/2018/250, 23 March 2018, p. 5.

¹²⁷ Child Soldiers International, “Submission to the 75th Pre-session of the UN Committee on the Rights of the Child: Cameroon”, August 2016 (website no longer available).

¹²⁸ UNICEF, “Nigeria Regional Conflict: 10-Fold Increase in Number of Children Used in ‘Suicide’ Attacks”, 12 April 2016, available at: www.unicef.org/media/media_90827.html.

¹²⁹ SRSG CAAC, above note 84, para. 9.

accountability.¹³⁰ The number of countries that have withdrawn, or threatened to withdraw, from the ICC, at least at face value, could have a negative effect on accountability for violations of children in the context of armed conflict. This is more so the case until the criminal bench of the African Court of Justice becomes operational. Another example of the ineffectiveness of the ICC is displayed in the situation in respect of Saif al-Islam Gaddafi, who is accused of murder and persecution of civilians including children.¹³¹ While the ICC rejected the request by Libya to try Gaddafi domestically for crimes against humanity, on 9 June 2017 Gaddafi was released from detention by the group that captured and detained him for five years.¹³² Also, it is notable that during the 2016 UN Security Council vote to expand the role of the body in respect of accountability for the violations of the rights of children by peacekeepers, one African country abstained.¹³³

Accountability mechanisms, including domestic court processes, might fall short of addressing the particular issues faced by children in the context of armed conflict. For instance, in respect of sexual violence, it is reported that the trials of persons accused of terrorist acts in Nigeria and Mali do not contain charges of sexual violence.¹³⁴ For many instances in Africa, the operationalization of the Special Criminal Court in the CAR is an emblematic example of the need to strengthen the entire justice system as the lynchpin for the success of such initiatives.¹³⁵ The use of customary or traditional courts – to which 90% of cases were reportedly referred in Somalia and South Sudan¹³⁶ – might fall short of delivering justice, including adequate reparations to victims.

Success stories in respect of accountability, while very limited, are taking place on the continent. In the DRC, the High Military Court upheld Frederic Batumike's life sentence for the rape of thirty-nine children in Kavumu between 2013 and 2016.¹³⁷ The conviction of a colonel of the Forces Armées de la République Démocratique du Congo, including for the war crime of rape, is also worthy of mention.¹³⁸ On law reform, the successful efforts in delinking rape from adultery in criminal codes, for example in Somalia and Sudan, can assist in improving reporting and subsequent prosecution of perpetrators.¹³⁹

130 See, for example, *Children and armed Conflict: Report of the Secretary-General*, UN Doc. A/59/695-S/2005/72, 9 February 2005, para. 68.

131 See Geneva Academy, *The War Report: Armed Conflicts in 2017*, 2018, pp. 82–83 and footnotes therein, available at: www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202017.pdf. It is to be noted that the Security Council referred the situation in Libya to the ICC through UNSC Res. 1970 of 26 February 2011.

132 See Geneva Academy, above note 131, pp. 82–83 and footnotes therein.

133 See UN, "Security Council Asks Secretary-General to Replace Contingents from Countries Failing to Hold Sexual Predators Accountable", 11 March 2016, available at: www.un.org/press/en/2016/sc12277.doc.htm.

134 *Conflict-Related Sexual Violence*, above note 123, p. 8. The charges referred to in Nigeria are brought mainly under the Terrorism (Prevention) (Amendment) Act of 2013.

135 *Ibid.*, p. 9.

136 *Report of the Secretary-General*, above note 126, p. 7.

137 *Ibid.*, p. 4. See "DRC Court Sentences 12 to Life for Child Rapes, Murder", *news24*, 13 December 2017, available at: www.news24.com/Africa/News/drc-court-sentences-12-to-life-for-child-rapes-murder-20171213.

138 *Report of the Secretary-General*, above note 126, pp. 8–9.

139 *Ibid.*, p. 8.

In Nigeria, for instance, the Office of the Prosecutor of the ICC continues to follow the situation of eight potential cases involving alleged commissions of war crimes and crimes against humanity by Boko Haram (six crimes) and the Nigerian security forces (two crimes).¹⁴⁰ In due course, the Nigerian government has initiated court proceedings against Boko Haram suspects, and has established two inquiries – a Special Board of Inquiry within the Nigerian Armed Forces to investigate allegations of rights violations against the Nigerian army,¹⁴¹ and the Presidential Investigation Panel to Review Compliance of the Armed Forces with Human Rights Obligations and Rules of Engagement,¹⁴² which, *inter alia*, aims to “investigate alleged violations of international humanitarian law and human rights law and matters of conduct and discipline in the Nigerian Armed Forces in local conflicts and insurgencies”.¹⁴³ The extent to which these processes have looked into violations of the rights and legal protections of the child in the context of armed conflict remains to be seen.

Accountability mechanisms could at times either be strengthened or undermined by the unilateral measures undertaken by States involved in some form of military assistance.¹⁴⁴ A good example in this respect is the United States. Through the enactment of the Child Soldiers Prevention Act (CSPA) of 2008, one of the two instruments aimed at implementing the OPAC by the United States,¹⁴⁵ the US government prohibits the provision of several categories of US military assistance to governments that directly recruit or use child soldiers, or support non-State armed groups that recruit or use child soldiers.¹⁴⁶

There is an exception to this arrangement, however, whereby the US president has the authority to grant full or partial so-called “national interest waivers” for purposes ranging from “political considerations to supporting counterterrorism operations”.¹⁴⁷ In fact, both in 2013¹⁴⁸ and 2017,¹⁴⁹ the Committee on the Rights of the Child has expressed concerns about waivers granted to countries where reports from the UN had indicated the recruitment or use of children, or other related grave violations of the rights of the child in the

140 Geneva Academy, above note 131, p. 113.

141 This was established in March 2017.

142 This panel conducted hearings from September to October 2017, and concluded its activities in November 2017.

143 Geneva Academy, above note 131.

144 The ACRWC is silent on the issue of international cooperation; the OPAC has detailed provisions on this topic.

145 For a comprehensive and critical discussion of the law, see Heather L. Carmody, “The Child Soldiers Prevention Act: How the Act’s Inadequacy Leaves the World’s Children Vulnerable”, *California Western International Law Journal*, Vol. 43, No. 1, 2012.

146 Section 5 of the CSPA prohibits the provision of assistance in the form of finances, training or arms sales to countries whose governmental armed forces or government-supported armed groups (including paramilitaries, militias and civil defence forces) recruit or use child soldiers.

147 Rachel Stohl and Shannon Dick, “President Trump, You Can Stop the Use of Child Soldiers,” *CNN*, 27 April 2017, available at: www.cnn.com/2017/04/26/opinions/trump-child-soldiers-opinion-stohl-dick/index.html.

148 Committee on the Rights of the Child, Concluding Observations to the United States of America Report, UN Doc. CRC/C/OPAC/USA/CO/2, June 2013, paras 10, 40–41.

149 *Ibid.*

context of armed conflict. In 2013, the Committee urged the United States to amend the CSPA with a view to removing the possibility of presidential waivers.¹⁵⁰ In 2017, the Committee expressed “regrets that the State party has taken limited actions towards ... withdrawing the possibility of presidential waivers to countries involved in recruitment and use of children in armed conflict and/or hostilities”.¹⁵¹

In particular, African countries who use or support the recruitment or use of child soldiers have been beneficiaries of partial or full presidential waivers.¹⁵² For the years 2011–2017, the African countries that dot the list are the CAR,¹⁵³ Chad,¹⁵⁴ the DRC,¹⁵⁵ Libya,¹⁵⁶ Nigeria,¹⁵⁷ Rwanda,¹⁵⁸ South Sudan,¹⁵⁹ Somalia¹⁶⁰ and Sudan.¹⁶¹ While in 2017 the annual CSPA list of countries that use child soldiers included the DRC, Mali, Nigeria, South Sudan, Sudan, Somalia, Syria and Yemen as offenders, the White House stated that “only Sudan, Syria and Yemen did not receive some form of waiver this year, and none of these three countries were due any military assistance that could have been withheld in the first place”.¹⁶²

The United States has argued that instead of “granting blanket waivers”, the government tries to “connect specific policy actions with partial or full waivers, transforming the CPSA into a strategic, diplomatic tool”,¹⁶³ in order to encourage the listed governments “to enter into action plans with the UN”.¹⁶⁴ In this respect, the US government highlights the situation with Chad as a success. Chad was included on the CSPA list in 2010, 2012 and 2013, but as a result of the joint action plan it signed in 2011 with the UN outlining concrete actions, which it fulfilled (no children in its national army) by 2014, it was not included in the 2015 CSPA list.¹⁶⁵ However, while the situation of Chad is commendable (and, arguably, something of a rare example), it is still highly questionable how other countries such as Somalia and Sudan, two countries that have been on the CSPA

150 *Ibid.*, paras 10, 41.

151 *Ibid.*, para. 6.

152 See Stimson Center, “US Military Assistance to Governments Using or Supporting the Use of Child Soldiers FY10-FY17 under the Child Soldiers Prevention Act”, available at: <https://tinyurl.com/qlpz4kc>.

153 *Ibid.*

154 *Ibid.*

155 *Ibid.*

156 *Ibid.*

157 According to Human Rights Watch, by 2016 “Nigeria was included for the second year in a row, based on the use of child soldiers by the Civilian Joint Task Force, a government-allied force used to fight the armed group Boko Haram”. Human Rights Watch, “US: Don’t Fund Child Soldiers Abroad”, 30 June 2016, available at: www.hrw.org/news/2016/06/30/us-dont-fund-child-soldiers-abroad.

158 According to Human Rights Watch, by 2016 “Rwanda, which had been included in 2013 and 2014 but removed in 2015, reappeared after officials recruited child soldiers from a refugee camp”. *Ibid.*

159 A full waiver was granted in 2012 and 2013, and partial waivers were granted in 2014, 2015 and 2016.

160 Including for direct commercial arms sales.

161 See Human Rights Watch, “US: Don’t Finance Child Soldiers; Obama Administration Aid Waivers Undercut US Law”, 4 October 2011, available at: www.hrw.org/news/2011/10/04/us-dont-finance-child-soldiers.

162 Tim Molyneux, *Why Is the U.S. Still Supporting Countries that Recruit Child Soldiers?*, 21 October 2017, available at: www.newsweek.com/child-soldiers-united-states-trump-689265.

163 Committee on the Rights of the Child, above note 148, para. 31.

164 *Ibid.*

165 *Ibid.*, para. 31.

list every year at least from 2010 to 2016 and have been granted some form of waivers,¹⁶⁶ have been able to improve their compliance with the ACRWC and other relevant instruments. The argument that most of the waivers granted were “aimed at working with [the countries’] militaries to promote needed reforms and professionalize their armed forces to be more respectful of human rights”¹⁶⁷ is probably not fully supported by the data. Human Rights Watch has argued that, while one of the seven categories¹⁶⁸ of assistance – the International Military Education and Training programme – contains human rights training, the remaining six relate “almost exclusively to the provision of arms, military equipment, and financing for military purchases”.¹⁶⁹

Implementing suitable responses to address some of the main challenges: The role of the ACERWC

Upgrading the Reporting Guidelines

The reporting procedure under the African Children's Charter is the main component of its monitoring mechanism.¹⁷⁰ The quality, nature and depth of information in State Party reports is in part dependent on the extent to which the Guidelines for State Party reports are tailored in a focused and detailed manner. The ACERWC has adopted *Guidelines for Initial Reports of States Parties* (Guidelines for Initial Reports)¹⁷¹ and *Guidelines on the Form and Content of Periodic State Party Reports* (Guidelines on Periodic Reports).¹⁷² Compliance with the Guidelines helps States Parties to present reports in a uniform manner, reduce the duplication of information, and also minimize the risk that State reports are deemed inadequate in scope or insufficient in detail.¹⁷³

The Guidelines for Initial Reports are very terse on the level and nature of information that is required from States on the issue of children and armed conflict. Under a cluster on “Family Environment and Alternative Care”, they request that States provide information on law, policy and practice, including progress and

166 Human Rights Watch, above note 157.

167 CRC Committee, Response to List of Issues under OPAC: United States of America, available at: CRC/C/OPAC/USA/Q/3-4/Add.1, 23 March 2017, para. 33.

168 These are International Military Education and Training, Foreign Military Financing, Direct Commercial Sales, Foreign Military Sales, Excess Defense Articles, Section 1206, and Peacekeeping Operations.

169 Human Rights Watch, “United States: Compliance with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: Submission from Human Rights Watch to the Committee on the Rights of the Child”, 5 May 2017, p. 2.

170 ACRWC, Art. 44(1)(a).

171 ACERWC, *Guidelines for Initial Reports of States Parties under the African Charter on the Rights and Welfare of the Child*, 2004 (Guidelines for Initial Reports), available at: www.acerwc.africa/initial-reports-guidelines/.

172 ACERWC, *Guidelines on the Form and Content of Periodic State Party Reports Submitted Pursuant to Article 43(1)(b) of the African Charter on the Rights and Welfare of the Child*, 2015 (Guidelines on Periodic Reports), available at: www.acerwc.africa/initial-reports-guidelines/.

173 See, for instance, Philip Alston, “The International Covenant on Economic, Social, and Cultural Rights”, in UN, *Manual on Human Rights Reporting*, Geneva, 1997, p. 67.

challenges faced in respect of “separation caused by internal displacement arising from armed conflicts”.¹⁷⁴ In addition, under the cluster on “Special Protection Measures”, States are requested to include information in their reports that underscores progress, challenges, future goals and priorities, and to undertake legislative and other measures in respect of “[c]hildren in armed conflicts, including specific measures for child protection and care (Article 22)”.¹⁷⁵

The Guidelines on Periodic Reports are not significantly better. These Guidelines expand the request for information to include measures aimed at ensuring that “children do not take part in hostilities”,¹⁷⁶ and measures to protect those affected by armed conflict, strife and tension, including demobilization, disarmament and reintegration (DDR).¹⁷⁷ The Guidelines also request disaggregated data on the number of children affected as a result of armed conflict, tensions and strife, and the number of those that are accessing DDR.¹⁷⁸

The extent to which States appreciate the importance and depth of their reporting obligations on issues pertaining to children and armed conflict, and comply with them, is at times very limited. Experience of the reporting (or non-reporting) under the OPAC has shed light on this issue. A number of States Parties that are neither at war nor have a recent experience of armed conflict appear not to appreciate the added value of the reporting obligation established under the OPAC. As of 1 March 2017, it was reported that the OPAC had the third-highest number of initial reports overdue by States Parties of all the UN human rights treaty bodies,¹⁷⁹ and also the third-highest proportion of non-reporting States Parties (overdue initial reports), standing at 28%.¹⁸⁰ Even when State Parties report, statements by heads of delegations during the consideration of the State Party report sometimes underscore how, given the fact that there is no armed conflict in the State Party concerned, the discussions on the implementation of the OPAC are either too limited, irrelevant, or of academic interest only.¹⁸¹ With this as a backdrop, the extent to which the Guidelines of the ACERWC emphasize issues such as prevention, peace education, treatment of children on the move (including asylum-seekers) that are affected by armed conflict, and cross-border and international cooperation to address issues of children and armed conflict is important.

Another issue worthy of explicit inclusion for requests for information, as relevant, is the sexual exploitation and abuse of children by peacekeepers. With a view to demonstrating the increasing relevance of this issue, some statistics are

174 Guidelines for Initial Reports, above note 171, para. 14(c).

175 *Ibid.*, para. 21(a)(ii).

176 It is to be noted that, unlike Article 22 of the ACRWC, the Guidelines omit the reference to “direct” in “direct part in hostilities”.

177 Guidelines on Periodic Reports, above note 172, para. 29(d).

178 *Ibid.*, para. 30(c).

179 The number of reports overdue was forty-six. See OHCHR, “Compliance by States Parties with Their Reporting Obligations to International Human Rights Treaty Bodies: Note by the Secretariat”, UN Doc. HRI/MC/2017/2, 2 May 2017, para 10.

180 *Ibid.*, para. 11.

181 *Ibid.*

vital. The UN has started to provide information about the nationalities of alleged perpetrators beginning from the year 2015.¹⁸² While there are forty-three nationalities of uniformed personnel who have been implicated in allegations of sexual exploitation and abuse, what is striking is the extent to which African countries are overrepresented on the list. The list involves 206 personnel hailing from the forty-three countries.¹⁸³ On the list are twenty-eight African countries,¹⁸⁴ while the remaining fifteen come from outside of the continent.¹⁸⁵ The top thirteen countries with the highest number of personnel implicated in allegations are in Africa, amounting to 152 of the 206 personnel implicated in allegations. This reality should be sufficient enough for the Guidelines to explicitly ask for specific information on sexual exploitation and abuse by peacekeepers.

Individual complaints and investigative/advocacy missions

The ACRWC provides the ACERWC with the mandate to receive and consider individual complaints.¹⁸⁶ Individuals, civil society organizations and other relevant stakeholders are able to file complaints, including group complaints. Article 45(1) of the ACRWC also mandates the ACERWC to resort to any appropriate method of investigating any matter falling within the ambit of the Charter.

To date, the ACERWC has received a few communications¹⁸⁷ and has conducted both promotional and investigative missions pertaining to children and armed conflict on the continent. The first communication submitted, as confirmed during the sixth session of the ACERWC, related to the plight of children in Northern Uganda, and underscored the violations of rights as a result of the twenty-year-old civil war between the LRA and the government.¹⁸⁸ It emphasized the obligation of the Ugandan government under the Charter¹⁸⁹ and made an allegation that there were instances where “children were taken to the frontline in order to support intelligence gathering against the LRA”.¹⁹⁰ Before

182 UN, “Conduct in UN Field Missions”, available at: <https://conduct.unmissions.org/sea-subjects>. See also UN Secretary-General, *Special Measures for Protection from Sexual Exploitation and Abuse: A New Approach*, UN Doc. A/71/818, 28 February 2017, p. 47.

183 “Conduct in UN Field Missions”, above note 182.

184 South Africa, the DRC, Congo, Morocco, Cameroon, Burundi, Tanzania, Gabon, Niger, Senegal, Benin, Ghana, Mauritania, Nigeria, Ethiopia, Malawi, Rwanda, Burkina Faso, Chad, Egypt, Gambia, Guinea, Madagascar, Mali, Namibia, Togo, Zambia and Zimbabwe.

185 Bangladesh, Pakistan, Canada, Nepal, Guatemala, Romania, Uruguay, El Salvador, Fiji, Germany, Indonesia, Moldova, Paraguay, the Philippines and Slovakia.

186 ACRWC, Art. 44.

187 Table of cases available at: www.acerwc.africa/table-of-communications/.

188 See *Hansungule and Others (on behalf of children in Northern Uganda) v The Government of Uganda*, Communication 1/2005, 2005 (Uganda Decision). The communication related specifically to events in Northern Uganda from 2001 to 2005.

189 See Benyam Dawit Mezmur, “The African Committee of Experts on the Rights and Welfare of the Child: An Update”, *African Human Rights Law Journal*, Vol. 6, No. 2, 2006, p. 564; Julia Sloth-Nielsen and Benyam Dawit Mezmur, “Like Running on a Treadmill? The 14th and 15th Sessions of the African Committee of Experts on the Rights and Welfare of the Child”, *African Human Rights Law Journal*, Vol. 10, No. 2, 2010, pp. 547–548.

190 Uganda Decision, above note 188, para. 6.

deciding on the communication, the ACERWC undertook a field mission to Uganda in February 2013.¹⁹¹

The ACERWC's decision found a violation of children's rights and protections in respect of one of the five complaints – namely, on the recruitment and use of children.¹⁹² The Uganda Peoples' Defence Forces Act of 2005, in Section 52, introduced 18 years as the minimum age for recruitment by the armed forces. The absence of legislation to this effect covering the material time of the communication (2001–05) was found to have violated Article 1(1) of the Charter,¹⁹³ which requires States parties “to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter”. In respect of four of the other allegations – namely sexual violence, violations of the right to the highest attainable standard of health, attacks on schools, and abduction – the ACERWC did not find a violation.¹⁹⁴

The added value of the communication procedure is on display here. First, the generous standing granted by the communication mechanism, which does not have a strict “victim requirement”, is positive. It also highlights that communications which involve an unidentified number of child victims, which is often the case in the context of children and armed conflict, can be entertained, thereby demonstrating the African Committee's flexibility to entertain individual complaints even when the alleged victims are not individually identified.

Secondly, the ACERWC's decision adds value to the interpretation of Article 22 – for example, it ventured into the responsibility of the government for the role of non-State armed groups, in this case the Local Defence Units of Uganda. Furthermore, by citing jurisprudence from the African Commission on Human and People's Rights, including a decision against Chad which held the government accountable for attacks by unidentified militants, the Committee underscored States' responsibility to implement laws with due diligence in time of conflict, too.¹⁹⁵

Thirdly, the recommendations of the decision included the need to provide comprehensive provisions in Uganda's Penal Code to establish criminal responsibility for persons who recruit or use children in armed conflict; to implement fully the standard operating procedures for the reception and handover of children separated from armed groups or forces; to conduct comprehensive DDR programmes; and to improve Uganda's birth registration coverage, including by making sure that in instances where there is conflicting information on, or absence of conclusive evidence of, the age of a child, no recruitment should take place; and that the government should rely on child-friendly justice processes for accountability, and should rely on forms of accountability other than detention and criminal prosecution.¹⁹⁶ *Inter alia*, the decision sheds lights on the fact that, if implemented, the recommendations in an individual complaints mechanism can

191 *Ibid.*, para. 17.

192 *Ibid.*, para. 81.

193 *Ibid.*, para. 44.

194 *Ibid.*

195 *Ibid.*, para. 38.

196 *Ibid.*, para. 81(1–5).

address systemic issues which could assist in preventing and addressing violations including the recruitment and use of children in armed conflict.

While the decision had recommended that the Ugandan government should report on the progress of implementation of the contents of the decision within six months, and that the African Committee, in accordance with its Rules of Procedure, should appoint one of its members to follow up on the implementation of the decision,¹⁹⁷ there is no evidence that this reporting has been done. Notably, the Committee has since established the practice of implementation hearings,¹⁹⁸ which should be implemented in a systemic manner. Moreover, a few substantive areas that could have benefited from an authoritative interpretation seemed to have received limited or no attention – these include the obligations of States under IHL, and the fact that while the decision explicitly acknowledged that the “ability of a State to fulfil its human rights obligations can be severely undermined by its involvement in hostilities”¹⁹⁹ and that “the decision in this Communication give[s] due consideration to this reality”,²⁰⁰ it is not clear if there are obligations which are so fundamental that even a State involved in an armed conflict is expected to uphold them. Also, while reference is made to the fact that the Amnesty Act “does not necessarily follow the criteria for granting amnesties under international legal obligations of the State”,²⁰¹ the links between this issue and the provisions of the Charter and accountability are unfortunately not further elucidated.

In terms of Article 45(1) of the ACRWC, the African Committee may use appropriate methods to investigate any matter covered by the Charter, and to investigate measures taken by States Parties to implement the Charter. Investigative or advocacy missions enable the Committee to directly gather information relevant for monitoring the implementation or violation of the Charter by States Parties.²⁰² Apart from the promotional visits that the Committee undertook in countries experiencing conflict such as Sudan (2004) and the DRC (2013), as mentioned above, the Committee also undertook a fact-finding mission to Northern Uganda from 15 to 19 August 2005. Based on a resolution that it passed on the situations of children in South Sudan and the CAR during its 23rd Ordinary Session,²⁰³ the Committee also undertook “advocacy missions” to South Sudan²⁰⁴ and the CAR²⁰⁵ in 2014.

197 *Ibid.*, para. 81(6).

198 Two communications that have benefited from implementation hearings are *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v. The Government of Kenya*, and *The Centre for Human Rights (University of Pretoria) and La Recontre Africaine pour la Defense Des Driots de l'Homme (Senegal) v. The Government of Senegal*.

199 Uganda Decision, above note 188, para. 36.

200 *Ibid.*

201 *Ibid.*, para. 51.

202 Apart from Article 45 of the ACRWC, investigative missions are governed by the *Guidelines on the Conduct of Investigations by the ACERWC*.

203 Held from 7 to 16 April 2014 in Addis Ababa, Ethiopia.

204 ACERWC, *Report on the Advocacy Mission to Assess the Situation of Children in South Sudan*, August 2014 (South Sudan Mission Report), available at: www.refworld.org/docid/545b4e384.html.

205 ACERWC, *Mission Report of the ACERWC to Assess the Situation of Children Affected by the Conflict in Central African Republic*, December 2014 (CAR Mission Report), available at: www.refworld.org/publisher,ACERWC,,,555c51244,0.html.

The recommendations from the mission to South Sudan mostly addressed the six grave violations,²⁰⁶ and a few additional elements such as nutrition.²⁰⁷ The CAR mission recommendations included systemic improvements such as using the security sector reform process to prevent recruitment and use of children by armed groups,²⁰⁸ and a continued role for the UN Stabilization Mission in the Central African Republic in providing support for training of troops for child protection before and during deployment.²⁰⁹ The fact that the Committee was permitted to undertake missions to two non-State parties to the Charter at the time of the missions further consolidates the positive impact that this mandate can contribute, as well as the positive willingness of African countries to engage with the Committee. Moreover, undertaking such missions at the initiation of the Committee itself is commendable, and in particular can add value to conflict situations in Africa that are not on the agenda of the Security Council.²¹⁰ How such a mechanism can be used as an early warning system not only to address violations in the context of armed conflict but also to prevent them remains an issue on which the African Committee needs to reflect. Finally, it is also not clear whether a concrete follow-up to the recommendations that emanated from the missions was undertaken; this is an issue that requires close attention on the part of the Committee for further guidance.

Bridging the gap between “political” decisions and child rights decisions

There is an argument that can be made that decisions made within inter-governmental political bodies, including political regional organizations, are beyond reproach by treaty bodies. This approach seems to endeavour to demarcate a line between what is a “political” decision on the one hand, and what is a human rights decision on the other.

An example is appropriate here. In 2013, during the consideration of the State Party Report of China under the OPAC, the Committee on the Rights of the Child posed a question to the delegation on why China had abstained on Security Council Resolution 2068 (2012).²¹¹ The resolution was aimed at strengthening and extending the mandate of the SRSG CAAC. The resolution was passed with eleven “yes” votes and four abstentions.²¹²

It seems that the question posed to the government of China was in part triggered not only because of the State Party’s position as a permanent member of the Security Council but also because of information contained in its State

206 South Sudan Mission Report, above note 204, pp. 21–27.

207 *Ibid.*, above note 204, p. 26.

208 CAR Mission Report, above note 205, p. 28.

209 *Ibid.*, p. 29.

210 Such as Cameroon and Burkina Faso.

211 Committee on the Rights of the Child, *Summary Record of the 1835th Meeting*, UN Doc. CRC/C/SR.1835. November 2013, paras 45–46.

212 UN, “Security Council Adopts Resolution Stating Readiness to Impose Sanctions on Armed Groups Persistently Violating Rights of Children”, 19 September 2012, available at: www.un.org/press/en/2012/sc10769.doc.htm.

Party Report.²¹³ This information underscored China's role in and contribution to the UN and the Security Council, but also explicitly underlined how the State "supports the work of the Secretary-General and his Special Representative for Children and Armed Conflict".²¹⁴

A similar query can be raised in the context of few African countries that report to the African Committee. An example of this can be found in Security Council Resolution 2272 of 11 March 2016.²¹⁵ The resolution, the first of its kind, is aimed at preventing sexual exploitation and abuse in peacekeeping, and strengthening the accountability of perpetrators.²¹⁶ It specifically addresses three critical aspects of accountability. It underscores the power of the Secretary-General to repatriate an entire contingent in the instance of a pattern of sexual exploitation and abuse by its members;²¹⁷ reiterates the obligation of UN member States to investigate reports of sexual exploitation and abuse and to hold violators accountable;²¹⁸ and lends support to the UN administrative reforms, including improving "the ability of victims to seek justice and to see it being done by the United Nations".²¹⁹ While all members of the Security Council voted for the resolution, the government of Egypt abstained. Arguably, countries with similar records could be questioned by the ACERWC to explain such a vote, and asked to explain how their voting record fits within the State's child rights obligations under the African Children's Charter.

In its reporting responsibility to the Executive Council of the AU, the ACERWC has engaged in efforts to bring the issue of children and armed conflict to the fore of the AU's political agenda. This can in part be deciphered from the decisions of the Executive Council under the ACERWC reports. In 2018, the Executive Council endorsed "Humanitarian Action in Africa: Children's Rights First" as the theme for the Day of the African Child (celebrated every year in June 16) in 2019.²²⁰ In 2017, the Executive Council noted the African Committee's findings in its continental study on armed conflicts, and urged member States of the AU to take action to address the plight of children in such situations.²²¹ Previously,

213 Committee on the Rights of the Child, China State Party Report, UN Doc. CRC/C/OPAC/CHN/1, June 2012, para. 105.

214 *Ibid.*

215 Adopted with fourteen supports and one abstention (Egypt). See UN, "Security Council Asks Secretary-General to Replace Contingents from Countries Failing to Hold Sexual Predators Accountable", 11 March 2016, available at: www.un.org/press/en/2016/sc12277.doc.htm. For a detailed discussion on the drafting, debate and adoption of the resolution, see Jeni Whalan, *Dealing with Disgrace: Addressing Sexual Exploitation and Abuse in UN Peacekeeping*, International Peace Institute, New York, August 2017, available at: www.ipinst.org/wp-content/uploads/2017/08/IPI-Rpt-Dealing-with-Disgrace2.pdf.

216 The preambular paragraphs of the resolution express "deep concern about the serious and continuous allegations and under-reporting of sexual exploitation and abuse by United Nations peacekeepers and non-United Nations forces". UNSC Res. 2272, UN Doc. S/RES/2272, 11 March 2016.

217 *Ibid.*, para. 1.

218 *Ibid.*, paras 2, 3, 8.

219 UN, *Report of the High-Level Panel on United Nations Peace Operations*, 16 June 2015, para. 260.

220 AU Executive Council, "Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)", Doc. EX.CL/1091(XXXIII), July 2018, para. 5.

221 AU Executive Council, "Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)", Doc. EX.CL/1033(XXXI), July 2017, para. 8.

in 2016, the focus of the Executive Council had shifted onto strengthening accountability mechanisms, including in the context of armed conflicts.²²²

The occasion in recent memory where the Executive Council expressed “its strongest support” to a theme for the Day of the African Child was in 2015, for the 2016 theme “Conflict and Crises in Africa: Protecting All Children’s Rights”.²²³ The Council further expressed “grave concern” about the involvement of children in armed conflict, especially as soldiers, as well as sexual exploitation, smuggling and abduction of children.²²⁴ During the same time, South Sudan and the CAR were urged to address the challenges faced by children in their jurisdictions.²²⁵ In its July 2012 decision, the Peace and Security Council (PSC) of the AU was requested to take into account the rights of the child in its work, and also to cooperate with the ACERWC.²²⁶ The government of Uganda’s invitation to the African Committee to undertake a mission to the country to engage with stakeholders on the issue of children and armed conflict was also welcomed by the Council.²²⁷ Such efforts by the African Committee to bring the issue of children in armed conflict into the political organs of the AU should continue in a systemic manner.

In respect of the PSC too, recent developments are promising with a view to offering the ACERWC opportunities for engagement. Since 2014,²²⁸ the PSC has held open sessions exclusively devoted to children and armed conflict. The latest open session was held on 16 April 2019.²²⁹ The decision by the ACERWC to focus its continental study on children and armed conflict emanated from an engagement with the PSC. The status of implementation of decisions from the PSC open session on children and armed conflict needs to be evaluated. Such an evaluation could also include an assessment of the extent to which the PSC is bound by the African Children’s Charter, as well as whether its decisions and activities are in compliance with these obligations.²³⁰ Are efforts to implement decisions of the PSC that might lead to a violation of child rights subject to review for compliance with the Charter, for instance by the ACERWC or the African Court? In the context of the Security Council, Field has cited

222 AU Executive Council, “Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)”, Doc. EX.CL/977(XXIX), July 2016, para. 7.

223 AU Executive Council, “Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)”, Doc. EX.CL/923(XXVII), July 2015, para. 6.

224 *Ibid.*

225 *Ibid.*, para. 7.

226 AU Executive Council, “Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)”, Doc. EX.CL/744(XXI), July 2012, para. 7.

227 *Ibid.*, para. 9.

228 On 8 May 2014, for the first time, the PSC, at its 434th meeting, held an open session exclusively devoted to the children and armed conflict topic. This was held as a follow-up to the 420th meeting of the PSC, held on 18 February 2014 with the ACERWC.

229 PSC, “Press Statement of the 841th [sic] PSC Meeting on the Theme: ‘Children Affected by Armed Conflicts in Africa’”, 14 May 2019, available at: www.peaceau.org/en/article/press-statement-of-the-841th-psc-meeting-on-the-theme-children-affected-by-armed-conflicts-in-africa.

230 A similar inquiry has been made in respect of the Security Council. See, for example, Sarah M. Field, “UN Security Council Resolutions Concerning Children Affected by Armed Conflict: In Whose ‘Best Interest’?”, *International Journal of Children’s Rights*, Vol. 21, No. 1, 2013.

the experience of the European Court of Justice, which held that “regulations of the European Union implementing Council resolutions could be reviewed for compliance with fundamental rights”.²³¹

Commissions of inquiry: Bringing children and their rights from the margins to the mainstream

In recent years, a few African countries have been the subject of commissions of inquiry (CoIs) either by the AU or the UN. South Sudan, Eritrea and Burundi are prime among these. In all three cases, the impact of conflict and political instability on children is central to the reported human rights violations in the countries concerned. A brief look at the experiences of the South Sudan CoI established by the AU and the Burundi CoI established by the UN can shed light on some of the critical roles that the ACERWC can and should play in bringing children's rights in the context of conflict onto the international agenda.

The South Sudan CoI established by the AU contained, in its terms of reference, the inclusion of a “representative of Women, Youth, and Children”.²³² As is often the case when children's and women's issues are lumped together, this position was filled by an expert on women's rights – the Special Envoy of the African Union on Women and Conflict.

The methodology used in the work of the CoI underscored that “[w]ith respect to issues relating to children and youth, the Commission took a similar approach [as it did] to gender”.²³³ This seemed to suggest that as “the Commission decided to integrate gender analysis into all aspects”,²³⁴ so too was a focus on children made a golden thread that run through its work and Final Report. The end product in the form of the Final Report underscores a number of issues directly relevant to children, though some serious limitations are apparent. For example, while it is indicated that “the Commission held special meetings ... to obtain women and girls' perspectives on all mandate areas”,²³⁵ there is no indication that the same was done for boys. Also, it is not surprising that the ACERWC did not get a mention in the Final Report, perhaps because South Sudan is also a State party to the African Children's Charter, as an AU organ with a role to play. At the risk of appearing to duplicate efforts, the ACERWC actually conducted a mission to South Sudan in 2014,²³⁶ the same time the CoI was ongoing, which could have been avoided by integrating a representative of the ACERWC into the CoI.

231 *Ibid.*, p 161.

232 AU, “Concept Note on the Establishment of the Commission of Inquiry on South Sudan”, para. 7, available at: <https://tinyurl.com/rfo99vr>.

233 AU, *Final Report of the African Union Commission of Inquiry on South Sudan*, 14 October 2014, para. 16, available at: www.peaceau.org/uploads/auciss.final.report.pdf.

234 *Ibid.*, para. 13.

235 *Ibid.*, para. 17.

236 See discussions above on investigative/advocacy missions.

In November 2016, the Human Rights Council appointed three persons to serve on the CoI on Burundi.²³⁷ Despite some shortcomings, the terms of reference, as set out in the Human Rights Council resolution that established the CoI, held some promise for addressing the impact of conflict on children's rights. The first operational paragraph expressed the Human Rights Council's "deep concern" on the deterioration of human rights in the country, "in particular the situation of women and children".²³⁸ The resolution also strongly condemned "mass arbitrary arrests and detentions, including cases involving children", and violations against "young demonstrators".²³⁹ The Final Report of the CoI, however, did not follow through on this initial promise. While the devastating effect of the political instability and conflict in Burundi on children is well recorded elsewhere,²⁴⁰ it is addressed in a scant manner in the Final Report.

The non-separation of adults and children in detention did receive a mention in the Final Report.²⁴¹ In a sign of appreciation of child participation, the CoI also interviewed children that were victims of sexual violence; the Final Report contains interviews with "more than 45 victims of sexual violence whose ages ranged from 8 to 71",²⁴² but there is no disaggregated information by age. In particular, the situation of children in street situations, the right to education, and the mental health of children as a result of political instability appear to be some of the serious shortcomings of the Final Report.

The importance of having child rights expertise in the composition of the membership of such CoIs, or at a minimum in the CoI support team, cannot be overemphasized. Some of the shortcomings on engagement mentioned above are a result of the working methods, resources and priorities of external stakeholders. However, others relate to the capacity and focus of the ACERWC – for example, even though the Burundi CoI made a call for contributions,²⁴³ with an extended deadline, the ACERWC did not engage with the process. Ultimately, the recommendation on engagement with various stakeholders does not identify the ACERWC. Some of the shortcomings highlighted above in the context of the South Sudan and Burundi CoIs shed light on the potential role that the ACERWC should play in the context of similar future initiatives.

237 Human Rights Council, "President of Human Rights Council appoints Members of Commission of Inquiry on Burundi", 22 November 2016, available at: www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=20910&LangID=E.

238 Human Rights Council, Res. 33/24, "Situation of Human Rights in Burundi", UN Doc. A/HRC/RES/33/24, 30 September 2016, para. 1.

239 *Ibid.*, para. 2.

240 See, for example, OHCHR, "Burundi – A Knife or a Steel Bar? How Would You Prefer to Be Killed?", 4 September 2017, available at: www.ohchr.org/EN/NewsEvents/Pages/BurundiAknifeorasteelbar.aspx; Jessica Hatcher, "Burundi Instability Adds to Risks for Children Surviving on the Streets", *The Guardian*, 24 November 2015, available at: www.theguardian.com/global-development/2015/nov/24/burundi-instability-children-surviving-streets-violence-bujumbura-unicf-crisis.

241 OHCHR, *Report of the Commission of Inquiry on Burundi*, UN Doc. A/HRC/36/54, 11 August 2017, para. 47.

242 *Ibid.*, para 48.

243 See Human Rights Council, "Commission of Inquiry on Burundi", available at: www.ohchr.org/EN/HRBodies/HRC/CoIBurundi/Pages/CoIBurundi.aspx.

Conclusion

There is a long list of developments around the work of the ACERWC that have implications in respect of fulfilling its potential in the exercise of its mandate with a view to preventing and addressing the effect of armed conflict on children. These developments include the ongoing reform of the AU; the development of a General Comment on Children and Armed Conflict; the appointment of a Special Rapporteur on Children and Armed Conflict within the ACERWC; the appointment of a child protection adviser in the PSC; the decision by the PSC to appoint a special envoy on children and armed conflict; the increased recognition of the role of regional and sub-regional organizations as reflected in Security Council resolutions; and institutional efforts to operationalize child protection units in peace support operations in Africa.

These are indeed critical and welcome developments. However, as this article has shown, there are a number of additional aspects that the ACERWC needs to reflect on, including the changing nature of conflict, that would assist the Committee in fulfilling its mission to monitor the implementation of the Charter in Africa, lest it fall foul of taking measures without taking adequate measurements.