

**AN ANALYSIS OF THE IMPLEMENTATION OF WOMEN'S RIGHT TO PEACE  
BY THE AFRICAN UNION PEACE AND SECURITY ARCHITECTURE: A CASE  
STUDY OF ZIMBABWE**

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## Declaration

I, the undersigned PAIDAMWOYO MUKUMBIRI, do hereby solemnly state that this work is presented in its original state and has not been submitted to any other institution of learning for consideration in fulfilment of an academic requirement. While I acknowledge that some of the views used herein were taken from writings of other scholars, the sources have been fully acknowledged.

**Signature of student:** \_\_\_\_\_

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Date of signature: \_\_\_\_\_

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Above all, I thank God for with Him all things were made possible.

## **Abstract**

The study interrogates how the African Union Peace and Security Architecture (APSA) implements women's right to peace enshrined in both the African Charter on Human and Peoples' Rights (African Charter) and the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol). The study uses the sex and gender approach and the feminist standpoint theories as analytical frameworks for interrogating how APSA implements women's right to peace. This research is novel because it is the first to analyse the implementation of women's right to peace by APSA, using a case study of Zimbabwe. This thesis argues that the African Human Rights Architecture provides a limited scope of women's right to peace which does not take into account the broad nature of what the right to peace entails. The African Charter provides for the right to peace in terms of state security and self-determination. Articles 23(1) and 23(2) of the African Charter provide that the right to peace shall be maintained by preserving principles of sovereignty and cooperation among states. This thesis also argues that APSA does not adopt a gendered approach in implementing women's right to peace. The study found that the normative content of women's right to peace is not clearly pronounced in human rights instruments, making it difficult to monitor its implementation. The African Commission on Human and Peoples' Rights has not adopted guidelines and general comments to guide the implementation of the right to peace by state parties. The study also found that the APSA mainly adopts a minimalist approach to peace by paying more attention to negative peace at the neglect of structural inequalities which also are also a violation of women's right to peace. The approach neglects critical non-military issues that negatively affect women's right to peace. The study recommends a complete overhaul of APSA and the streamlining of mandates of its structures such as POW, PSC and the special envoy on peace. This recommendation is based on the fact that APSA is financially constrained, negatively affecting its capacity to implement the peace and security agenda. It also recommends the effective participation of women in all APSA structures to enable them to conceptualise peace from their standpoint. The study also proposes elements that should constitute the right to peace.

## List of abbreviations

ACHPR	AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
ACPD	AFRICA COMMUNITY PUBLISHING AND DEVELOPMENT TRUST
APSA	AFRICAN UNION PEACE AND SECURITY ARCHITECTURE
ASF	AFRICAN STANDBY FORCE
AU	AFRICAN UNION
AUDA	AFRICAN UNION DEVELOPMENT AGENCY
CEWS	CONTINENTAL EARLY WARNING SYSTEM
ECOWAS	ECONOMIC COMMUNITY OF WEST AFRICAN STATES
GNU	GOVERNMENT OF NATIONAL UNITY
GPA	GLOBAL POLITICAL AGREEMENT
MDC	MOVEMENT FOR DEMOCRATIC CHANGE
MWC	MULTIPARTY WOMEN'S COALITION
NEPAD	NEW PARTNERSHIPS FOR AFRICA'S DEVELOPMENT
PF	PEACE FUND
POW	PANEL OF THE WISE
PSC	PEACE AND SECURITY COUNCIL
RECs	REGIONAL ECONOMIC COMMUNITIES
SADC	SOUTHERN AFRICAN DEVELOPMENT COMMUNITY
UN	UNITED NATIONS
UNAMID	UNITED NATIONS-AFRICAN UNION MISSION IN DAFUR
UNISOM	UNITED NATIONS OPERATIONS IN SOMALI
ZANU-PF	ZIMBABWE AFRICAN NATIONAL UNION-PATRIOTIC FRONT

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## Chapter 1: Introduction

### 1.1 Background to the study

The study examines the implementation of women's right to peace by the African Union Peace and Security Architecture (APSA).<sup>1</sup> APSA is a political institution whose origin is based on the African Renaissance concept of 'African solutions to African problems.' APSA was established by the Protocol Relating to the Establishing of the Peace and Security Council of the African Union (PSC Protocol).<sup>2</sup> Five structures make up the APSA as follows; 'the Peace and Security Council (PSC), the Continental Early Warning System (CEWS), the African Standby Force (ASF), the Peace Fund (PF) and the Panel of the Wise (POW).'<sup>3</sup>

The PSC is the central organ of the APSA responsible for coordinating all other structures of APSA in terms of Article 2(2) of the PSC Protocol. A reading of Article 2(2) of the PSC Protocol indicates that the PSC is the main implementer of the peace and security agenda of the AU. Other structures simply complement the PSC's conflict prevention, resolution, and management role in the African continent. Hence the objectives of the PSC and its powers are integral to the operation of APSA as a whole. The PSC has the following objectives:

- a) 'promotion of peace',
- b) 'anticipation and prevention of conflicts',
- c) 'promotion and implementation of peacebuilding and post-conflict reconstruction, coordination of all AU efforts in the prevention and combating of terrorism', and

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<sup>1</sup> The African Peace and Security Architecture was established under the Peace and Security Council as a mechanism to prevent conflicts and maintain peace in Africa. The Protocol Relating to the Establishment of the Peace and Security Council of the African Union was adopted by the AU on 9 July 2002. It entered into force on 26 December 2003.

<sup>2</sup> AO Jegede 'The African Union Peace and Security Architecture: can the Panel of the Wise make a difference?' (2009) 9 *African Human Rights Law Journal* 409 410.

<sup>3</sup> Jegede (n 2 above) 410.

- d) ‘developing a common African defence policy and promoting good governance, the rule of law and human rights’.<sup>4</sup>

APSA has a role in implementing women’s right to peace. This role is derived from Article 7(m) of the PSC Protocol, which gives the PSC the power to protect human rights and fundamental freedoms. The duty to implement the right to peace is also derived from Article (3)(h) of the AU Constitutive Act, which provides that the objective of AU is to promote and protect human and peoples’ rights in terms of the ACHPR. The PSC is one of the AU institutions responsible for implementing the objectives of the AU.<sup>5</sup> Article 7(m) of the PSC Protocol should also be read in line with the general function of the PSC which is the promotion of peace and stability in the African region.

APSA is the institutional framework through ‘which African solutions to African problems is being realised or given practical application’.<sup>6</sup> Therefore, it is critical to interrogate how political, structural and cultural factors based on African philosophy intersect and influence the implementation of women’s right to peace by APSA. An examination of the African concept of peace is necessary in this regard.

Despite the adoption of APSA, the continent still experiences many conflicts.<sup>7</sup> Violence against women is still widespread in most parts of the continent.<sup>8</sup> Hence it has been argued that the ‘AU suffers no shortage of well-formulated policies; instead, it suffers from a chronic inability

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<sup>4</sup> The objectives of the PSC are provided for in article 3 of the Protocol.

<sup>5</sup> ET Aniche & M Egbuchulam ‘Is African Peace and Security Architecture the solution? analysing the implications of escalating conflicts and security challenges for African integration and development.’ A paper delivered at the 30th Annual Conference of the Nigerian Political Science Association Southeast Chapter on the theme: elections, security challenges and African Development at University of Port Harcourt, Rivers State on 26-28 June 2016.

<sup>6</sup> S Dersso ‘The quest for pax africana, the case of the African Unions’ peace and security regime’ (2012) 12 *African Journal on Conflict Resolution* 1112.

<sup>7</sup> According to the Global Peace Index Report of 2017 ‘Sub- Saharan Africa, North Africa and Middle East are major contributors to the decrease in world peace in the last decade.’ The report also stated that 4 out of the 5 countries whose peace index has fallen are in Africa. The four countries are Ethiopia, Mali, Burundi and Lesotho. Global Peace Index 2017 available at <http://visionofhumanity.org/app/uploads/2017/06/GPI17-Report.pdf> accessed 5 January 2018.

<sup>8</sup> Statement by the Special Rapporteur on the Rights of Women in Africa. Lucy Asuagbor on International Women's Day, 8 March 2019 available at <http://www.achpr.org/press/2019/03/d447/> accessed 20 April 2019.

to follow up on these policies.’<sup>9</sup> Some authors have argued that the continued insecurity in Africa despite commitments by AU member states is an indication of African’ leadership that appears to advocate for progressive ideas but lack the vigour to implement.’<sup>10</sup>

In addition to the institutional framework under the PSC Protocol, some mechanisms complement the role of APSA by interpreting the rights provided in the African Charter on Human and Peoples’ Rights (ACHPR) and other human rights instruments through issuing general comments and advisory opinions to the PSC. These are the African Commission on Human and Peoples’ Rights (African Commission) and the African Court on Human and Peoples’ Rights. (The African Court) The African Commission is not one of the constitutive units of APSA. However, its relationship to APSA concerning the implementation of the right to peace is based on Article 19 of the PSC Protocol, which provides that ‘the African Commission should bring to the attention of the PSC any information relevant to the objectives and mandate of the PSC.’ Similarly, the African Court during the adjudication of cases brought before it and through the use of its advisory jurisdiction can complement the work of APSA by interpreting the meaning of the right to peace. The role of these supervisory organs will be examined to assess the extent to which they complement the PSC towards implementing women’s right to peace through their promotion and the protection mandate as stipulated in the ACHPR.

This study seeks to understand the extent to which APSA implements the right to peace for women in Africa. The study also questions whether such implementation considers the different meanings of peace in the African context. Peace has also been categorised into two forms. These are negative peace and positive peace.<sup>11</sup> Negative peace focuses on eliminating physical violence, while positive peace is broader, covering elements of social justice, equality, poverty elimination and mutual development.<sup>12</sup> The African concept of peace embraces both

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<sup>9</sup> I Jaoko ‘Implementation remains the Achilles heel of the African Union: a study of the African Peer-Review Mechanism (APRM)’ (2016) 1 *Strathmore Law Review* 1 1.

<sup>10</sup> N Sifolo ‘African Union’s peace strides: a theoretical perspective’ (2015) 4 *Journal of African Union* 55 56.

<sup>11</sup> J Galtung ‘Violence, peace, and peace research’ (1969) 6 *Journal of Peace Research* 3 167 168

<sup>12</sup> As above.

negative and positive peace.<sup>13</sup> The African culture has rich proverbs that define peace in terms of inclusivity, harmony, social cohesion and human dignity.<sup>14</sup>

The right to peace has been debated numerous times at the United Nations General Assembly, but a consensus was not reached on the status of peace as a human right. As a result, the African Union human rights framework is the only system that views peace as a standalone right in a binding treaty. The decision to adopt peace as a human right is progressive because peace is at the heart of all human rights. The right to peace is provided in Article 23 of the ACHPR and article 10 of the Maputo Protocol. Article 10 provides that “women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace.” However, the right to peace is vaguely presented in the Protocol such that its entitlements are difficult to ascertain. While the broad heading of Article 10 refers to the right to peace, Article 10(1) of the Maputo Protocol provides for the right to a peaceful existence. Therefore, it is not clear whether the right to peace is the same as the right to a peaceful existence. Neither can it be assumed that it means the same. Under such ambiguity, a general comment would assist in defining the meaning and scope of the right.

While it is understandable that not every provision of the human rights treaty should have a general comment, the necessity of the general comment on the right to peace stems from the fact that peace itself is a complicated concept. There is no uniform definition of peace. The African Commission and the African Court have not elaborated on the contents of the right to peace in the few cases that have dealt with it. In light of these challenges on the normative content of peace, this study will examine the extent to which the APSA implements the right for the benefit of women in Africa.

The African Union has other frameworks such as the AU Solemn Declaration on Gender Equality in Africa, the African Union Gender Policy of 2009, and Agenda 2063 that promote

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<sup>13</sup> G Hansen ‘Africa: perspectives on peace and development’ in E McCandless E & T Karbo (eds) *Peace, conflict, and development in Africa: A reader* (2011) 3. J C Asike ‘The Philosophical concept of “ubuntu” as dialogic ethic and the transformation of political community in Africa’ (2016) 12 *Ogirisi: A New Journal of African Studies* 12.

<sup>14</sup> M Gerwin ‘Peace, honesty, and consent: a Hobbesian definition of ‘peace’.’ (1991) 23(2) 3 *Peace Research* 75–85.



gender equality.<sup>15</sup> These frameworks bind all AU institutions in Africa to comply with the gender parity principle in all decision-making processes. Therefore, it is crucial to examine the extent of the inclusion of women in every structure under APSA. This is because the right to peace, as provided in Article 10(2) of the Maputo Protocol, requires women's equal participation in conflict resolution processes. APSA is one of the conflict resolutions structures responsible for implementing the right to peace. It is not exempted from complying with the provisions of Article 10(2) of the Maputo Protocol.

Hilary Charlesworthy argues that '[w]e must work to ensure that women's voices find a public audience, to reorient the boundaries of mainstream human rights law so that it incorporates an understanding of the world from the perspective of the socially subjugated.'<sup>16</sup> Therefore, the participation of women in peace structures is critical in shaping the discourse on the right to peace.

The study is centred on problematising two issues. Firstly, it argues that the normative content of women's right to peace is not clearly pronounced in human rights instruments, making it difficult to monitor states' implementation of the right. It asks the following question: 'What is the normative content of women's right to peace?'

Since there is no consensus on the definition of peace itself, benchmarking states' performance towards realising the right to peace is a challenge. There are no guidelines or general comments that assist in determining the extent to which the right to peace is being implemented. Neither has the African Commission, in its concluding observations, made any pronouncements on how the right to peace should be implemented. Consequently, the state party reports to the African Commission on the right to peace have mainly focused on the participation of women in peace talks at the neglect of other crucial aspects of peace such as social and economic issues.

Secondly, the study examines how APSA implements women's right to peace. This is done on a two-pronged approach. The first approach questions whether APSA in implementing women's right to peace adopts an expansive interpretation of peace which focus more on non-

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<sup>15</sup> AU Commission 'Implementation of the women peace and security agenda in Africa' (2016) 9.

<sup>16</sup> H Charlesworth 'What are women's international human rights?' in R J Cook (ed) *Human rights of women: national and international perspectives* (1994) 58 60.

military conflicts. The second approach questions whether women are fully participating in APSA structures as required under Article 10(2) of the Maputo Protocol. The Maputo Protocol mandates states to ensure that women participate in all peace structures at national, regional and international levels. Since there is no agreed definition of peace, the participation of women allows them to define peace from their stand point and eventually enables the realisation of the right to peace.

Therefore, the thesis assists by proposing elements that define the right to peace. It proposes that the right to participation, equality and human dignity should be the core elements of the right to peace. Participation enables beneficiaries of the right to determine how they conceptualize peace. Equality ensures meaningful participation and equal respect of the views of the participants. Lastly, the recognition of human dignity is the overarching basis for the protection of all human rights and thus is an element of the right to peace.

The thesis uses the case study of Zimbabwe to examine how APSA implements women's right to peace in countries that are not going through an armed conflict but are facing economic and political challenges which also result in the violation of women's right to peace. As highlighted above, peace is more than the absence of physical violence. It also includes structural violence which results in social and economic inequalities. Zimbabwe has been facing economic challenges for a period close to two decades now. Women have borne the brunt of this economic meltdown more than men due to gender inequalities in accessing economic resources. As such the study will interrogate how APSA has utilised its role to protect women's right to peace in Zimbabwe.

## **1.2 Thesis statement**

The study examines APSA's implementation of women's right to peace. It questions whether such implementation is inclusive of women's perspectives in terms of Article 10(2) of the Maputo Protocol.

## **1.3 Problem statement**

The African Human Rights Architecture has a solid legal and institutional framework that protects women's right to peace. Some of the legal instruments that have provisions for protecting women from violence include PSC Protocol, the Maputo Protocol, the ACHPR, and the Solemn Declaration on Gender Equality in Africa. Special envoys and special rapporteurs on women's rights were also appointed. Whilst the legislative and structural framework of

APSA has been put in place, the continent still suffers from instability, which violates women's right to a peaceful existence. Hendricks has noted that 'there has not been sufficient translation of the changes at the institutional level into meaningful transformation of the everyday experiences of women in conflict and non-conflict situations.'<sup>17</sup> She further argues that women's participation in peace initiatives has not increased.<sup>18</sup>

The AU Commission 2018 Report noted that implementing the Maputo Protocol and making the provisions of the Protocol a reality for women has been one of the biggest challenges that the African continent faces.<sup>19</sup> It has been noted that despite extensive efforts, women in Africa are 'still experiencing violence outside conflict situations in the different forms such as female genital mutilation (FGM), forced marriages, female infanticide, abductions, and many forms of sexual and gender-based violence'.<sup>20</sup> Women continue to face sexual abuse during conflict and supposedly peaceful situations.<sup>21</sup> The AU Commission's report summarised the insecurity and violence that women in Africa have been facing over the years as follows:<sup>22</sup>

The prevailing situation of women across the continent, including high levels of economic disenfranchisement, conflict-related and other forms of sexual and gender-based violence, low levels of representation in public decision-making, poor access to justice and other remedies, continues to challenge the achievement of this vision. More needs to be done to deepen implementation of commitments and bring about on-the-ground impact and true change to the situation of women in Africa.

Peace has been elusive for women in Africa despite the apparent progressive institutional and legal framework protecting the right to peace. The establishment of APSA has not stopped armed conflicts in Africa, especially intra-state wars.<sup>23</sup> Armed conflicts in Africa are increasing,

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<sup>17</sup> C Hendricks 'Progress and challenges in implementing the women, peace and security agenda in the African Union's Peace and Security Architecture' (2017) XLII (3) *Africa Development* 73 98.

<sup>18</sup> Hendricks (n 17 above).

<sup>19</sup> African Union Commission 'Women's rights in Africa challenges, opportunities and proposals for accelerated implementation' (2018) 27. available at <https://www.un.org/en/africa/osaa/pdf/pubs/2016womenpeacesecurity-auc.pdf> accessed 20 June 2019.

<sup>20</sup> Statement by the Special Rapporteur on the Rights of Women in Africa Lucy Asuagbor. Available at <https://www.achpr.org/pressrelease/detail?id=56> accessed 20 October 2019.

<sup>21</sup> AU Commission report (n 19 above) 15.

<sup>22</sup> AU Commission report (n 19 above) 10.

<sup>23</sup> The Global Peace Index of 2016 highlights that the level of peace in Africa has deteriorated particularly in North Africa. See also Aniche and Egbuchulam (n 5 above).

which has led scholars to doubt the appropriateness of APSA as a solution to peace and security challenges in Africa.<sup>24</sup> These conflicts also increase women's vulnerability to abuse and exclusion from participation in peace processes. As pointed out by the 'Special Rapporteur on the Rights of Women in Africa,' conflict is often a trigger to sexual violence.<sup>25</sup>

Women also suffer from discrimination from participating in decision-making processes in violation of Article 10(2) of the Maputo Protocol. APSA is not paying adequate attention to women's right to peace, particularly by failing to integrate gender equality into its work. Hence it has been argued that women have not sufficiently engaged with the right to peace as conceptualised by Article 10 of the Maputo Protocol.<sup>26</sup> There are existing challenges in the participation of women in the peace structures. The Maputo Protocol provides that women should equally participate in peace and conflict resolution processes. However, 'despite women's contributions in resolving conflict in their communities and fostering peace, they are often left out from the formal peace processes, and negotiations and their concerns are not heard'.<sup>27</sup> The Africa Report on the implementation of the women's peace and security agenda indicated that between 1990 and 2018 only 20% of peace agreements had provisions for gender equality.<sup>28</sup>

Another challenge is the inclusion of women based on wrong perceptions. Women have been included as victims and not as capable participants in the conflict resolution processes on the continent. Women have also been co-opted in the peace structures based on the stereotyped roles of women as pacifiers and not as competent negotiators. Such an approach negates the fact that women can also be perpetrators of violence. It also undermines the equal worth and value of women in peace activities.

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<sup>24</sup> Aniche & Egbuchulam (n 5 above) 9.

<sup>25</sup> Special Rapporteur on the Rights of Women in Africa statement (n 20 above).

<sup>26</sup> See the Report of the African Union Commission Report (n 21 above) which highlighted that women's participation in peace processes is still low.

<sup>27</sup> AU Commission report (n 19 above) 15.

<sup>28</sup> Amani Africa Report No 8 '10 Years Review of the Women, Peace and Security Agenda of the AU Peace and Security Council' (2020)17

Women are still severely underrepresented in peace negotiations and peace support operations in Africa. Women constituted an average of less than 30% membership of participants and negotiators in the peace talks held in Kenya, Somalia, Sierra Leone, Liberia and Burundi.<sup>29</sup> It has been noted that since the establishment of APSA “to date women have not occupied the positions of Commissioner and Director of Peace and Security. There is no division of the peace and security department that is headed by women beyond acting capacities.”<sup>30</sup> Women are severely underrepresented in the majority of the structures under APSA. The Panel of the wise is the only institution with more than 50% female representation.

The challenges to implementing women’s right to peace could result from two factors. First, this could be attributed to the failure to adopt the human rights-based approach to peace by APSA. Peace is viewed more as a political issue than a human right under the APSA. This is despite the fact that peace is a guaranteed right under the African Charter and the Maputo Protocol. Members of the AU “adopt a vision of what peace looks like for women from the perspective a state-centric approach, that focuses on combatants ‘silencing the guns’ and sending peacekeepers to war zones.”<sup>31</sup> While elimination of conflicts through military approach maybe a starting point, there are critical issues that violate women’s rights to peace such as social and economic inequalities.

Secondly, the right to peace as guaranteed by the ACHPR and the Maputo Protocol has no clear entitlements. The role of the duty bearers and the entitlements of right holders under the right to peace remain hazy. The jurisprudence of the African regional human rights system does not comprehensively elaborate on the nature of the obligations that accrue from this right. This is mainly because of the fact that no cases have been litigated before the commission or the court pertaining to women’s right to peace. However, the Commission and the Court could still elaborate on the normative content of this right through advisory opinions and general comments. There is not even a single general comment or an advisory opinion on the right to peace. The failure to take such actions has not developed the jurisprudence on the right to peace. General comments clarify the reporting obligations of state parties to a treaty. In this regard,

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<sup>29</sup> AU Commission report (n 19 above) 15.

<sup>30</sup> Amani Africa Report (n 28 above) 16.

<sup>31</sup> H. Kezie-Nwoha ‘Feminist Peace and Security in Africa’ (2020) Oxfam International 10.

they assist by clarifying the rights of citizens and the corresponding duties of the states, which also assist in the overall implementation of rights in general. Similarly, advisory opinions are authoritative, although they are not binding. The role of an advisory opinion is to develop human rights norms.<sup>32</sup> However, the failure by the Court to give advisory opinions cannot be faulted since it only gives advisory opinions after a request by the AU member states and other AU organisations.<sup>33</sup> AU institutions are not fully exploiting opportunities to interpret the meaning of the right to peace by requesting for advisory opinion.

#### **1.4 Objectives of the study**

The objective of the research is to interrogate the implementation of women's right to peace by the APSA. The research will first interrogate the content of women's right to peace as provided by the ACHPR and the Maputo Protocol. It is critical to interrogate the meaning and scope of the right to peace so as to examine what APSA is expected to implement in relation to this right. Secondly, the research examines how APSA implements women's right to peace in terms of article 10(2) of the Maputo Protocol which places emphasis on women's participation in peace structures. While this research acknowledges that other researches has explored the challenges that APSA is facing, it is important to examine how the right to peace for women can be achieved amid these challenges.<sup>34</sup>

Finally, the study examines how the African Commission and the African Court complement the work of APSA in implementing the right to peace. Article 19 of the PSC Protocol mandates the PSC to work with the African Commission to pursue its objective of conflict prevention and management. Therefore, the African Commission is obliged to bring before the PSC any relevant information that will assist in implementing the mandate of the PSC. Further, the

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<sup>32</sup> JC Schmid 'Advisory opinions on human rights: moving beyond a pyrrhic victory' (2016) 16 *Duke Journal of Comparative & International Law* 415 415.

<sup>33</sup> Article 4 of the Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights provides that AU member states, AU organisations and other organisations that are recognised by the AU can request for advisory opinion.

<sup>34</sup> See the following articles which highlight the challenges that APSA is facing. A Sithole, 'The African Union Peace and Security mechanism's crawl from design to reality: was the Libyan crisis a depiction of severe limitations?' (2012) 12(2) *African Journal On Conflict Resolution* 117 133; U Engel & J G Porto 'Imagining, implementing, and integrating the African Peace and Security Architecture: the African Union's challenges' *African Security* (2014) 7 (3) 135 144; AK Domson-Lindsay 'Peace and security in Africa: past, present and future' (2015) 4 (2:3) *Journal of African Union Studies* 5; E Y Omorogbe 'Can the African Union deliver peace and security?' (2011) *Journal of Conflict & Security Law* 35 35.

interpretative mandate of both the African Commission and the advisory jurisdiction of the African Court is critical in defining what the right to peace entails and how it should be implemented.

### **1.5 Research questions**

The overarching research question that this study will seek to answer is:

To what extent is the women's right to peace as enshrined in the African Human Rights Architecture implemented by APSA?

In answering this core question, the following adjunct questions will also be answered:

- i. What is the nature and 'normative content' of women's right to peace as envisaged by APSA, ACHPR, the Maputo Protocol and other human rights instruments?
- ii. How effective is the African Commission and the African Court on Human and Peoples' Rights in complementing APSA to implement women's right to peace?
- iii. How does Zimbabwe protect the right to peace?
- iv. How is the APSA contributing towards the promotion and maintenance of peace in Zimbabwe?
- v. How can the human rights-based approach to peace be utilised to enable effective implementation of the right to peace under the APSA?

### **1.6 Research methodology**

The methodology for this study is desk-top based, and it involves an analysis of all sources of information relevant to the study. Human rights instruments such as the ACHPR, Maputo Protocol, various UN resolutions and declarations were analysed to examine the extent to which they guarantee the right to peace. Literature on the study topic, including books, articles, reports of AU institutions, and the African Commission cases, was examined. In answering the main question of how APSA is implementing the women's right to peace, the research engages in a descriptive and informative analysis of the work of the APSA.

The research uses the case study method to assess the extent to which APSA adopts an expansive interpretation of peace in implementing women's right to peace. Using Zimbabwe as a case study presents an opportunity to interrogate how APSA implements women's right to

peace in states that do not have armed conflicts but face social and economic challenges that affect the realisation of women's right to peace.

A combination of feminist approaches is utilised as analytical tools to examine how APSA implements the right to peace for women. Firstly, the study utilises the feminist standpoint theory. Feminist standpoint theory posits that knowledge is the product of a particular point of view such that all knowledge is partial.<sup>35</sup> The theory places women at the centre of legal thinking and criticizes the idea of legal impartiality.<sup>36</sup> The theory explores relations between knowledge and power. Feminist standpoints acknowledge that there cannot be universally true claims.<sup>37</sup> In this study, the feminist standpoint theory examined the perceptions and approaches to implementing the right to peace that APSA adopts. It is argued that APSA structures emphasise militaristic approach in implementing the right to peace. Such an approach is minimalistic and does not assist in the realisation of positive peace. Women have been and continue to be victims of the absence of peace and security. They should have a voice to define how peace is to be implemented from their standpoint. One of the recommendations advanced in this study is to increase the participatory framework for women in peace and security issues.

The second theoretical approach is sex and gender analysis. The sex and gender approach was useful in interrogating the participation of women in APSA structures. The research found that women's participation in APSA conforms to the societal gender binary roles of femininity and masculinity. The sex and gender approach unmasked the gender roles replicated in the APSA structures. An example is the composition of more women in the civilian part of the ASF than in the armed forces. The majority of Chairpersons of APSA structures are men, thereby confirming the gender stereotype that men should assume leadership roles.

Similarly, the implementation of peace by APSA can be said to be more masculine as the focus is on eradicating armed conflicts at the neglect of non-violent situations that result in the breach of peace. In instances where women chaired various PSC committees, they deliberately

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<sup>35</sup> K Van Marle & E Bonthuys 'Feminist theories and concepts' in E Bonthuys & C Albertyn (eds) *Gender, law and justice* (2007) 15.

<sup>36</sup> Van Marle & Bonthuys (n 35 above) 47.

<sup>37</sup> As above.



selected thematic areas that focus on issues relating to women and children in conformity with stereotypes that women are more feminine and relational in nature.<sup>38</sup>

## 1.7 Literature review

### 1.7.1 The nature of the right to peace

The discourse on whether peace should be considered as a human right has been ongoing since the early nineties when the Declaration on Preparation on Societies to Life in Peace of 1978 was adopted.<sup>39</sup> There have been scholarly debates on whether peace should be recognised as a human right in a binding global treaty.

Puyana's whole thesis is dedicated to analysing the debates and discussions that have ensued on whether peace should be viewed as a human right.<sup>40</sup> According to Puyana, the major reasons advanced by antagonists of the right to peace are that, first, peace is a 'vague and legally flawed concept.'<sup>41</sup> Its contents cannot be ascertained. Second, the recognition of the right was opposed because the right has no legal basis. It can be gleaned from various other existing rights that are already recognised by the international instruments. These include the right to life, the right to self-determination and the right to dignity. Third, opponents of the right to peace reasoned that 'instead of re-creating new rights without the necessary consensus or unanimity, the international community should progressively elaborate existing and already consolidated rights in international law.'<sup>42</sup>

Fourth, it is not clear how the right to peace relates to the right to self-defence provided in the Charter of the United Nations.

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<sup>38</sup> UN OAU Bulletin - August-October 2017, 8 available at [https://unoau.unmissions.org/sites/default/files/unoau\\_bulletin-aug-oct\\_2017.pdf](https://unoau.unmissions.org/sites/default/files/unoau_bulletin-aug-oct_2017.pdf) accessed 30 May 2018.

<sup>39</sup> The Declaration was adopted by the United Nations General Assembly in 1978.

<sup>40</sup> DF Puyana 'Analysis of the international debate on the right to peace in the context of the human rights and intergovernmental bodies of the United Nation.' Unpublished PHD thesis, University of Pompeu Fabra Barcelona, 2014 142. According to Puyana, the representatives of Italy mentioned their opposition to the declaration at a workshop organized by the Human Rights Council to discuss draft declaration on the right to peace. The workshop was held on 15-16 December 2009 in Geneva.

<sup>41</sup> Puyana (n 40 above) 142.

<sup>42</sup> Puyana (n 40 above) 262.

Fifth, that ‘peace should be developed in accordance with the principles of the UN Charter, such as the freedom to self-determination and justice and not as a standalone right.’<sup>43</sup>

Sixth, that peace is not ‘a human right but a goal that can be realized through the enforcement of existing human rights.’<sup>44</sup>

The right to peace has only found consensus and full recognition as a human right in the African regional human rights system under Article 23 of ACHPR and Article 10 of the Maputo Protocol. As argued by Winks, the legal status and basis of the right in Africa are, therefore, beyond question, although the references to the right in practice is extremely limited, as the African Commission has only referred to the right in very few cases.<sup>45</sup> Winks argues that the Commission does not specify any concrete criteria for fulfilling or breaching this right.<sup>46</sup> The African Commission guidelines on state party reports do not elaborate the obligations of states on this right.<sup>47</sup> Hence, in their reports, African countries have also not adopted a wide interpretation of the right to peace. State reports have focused mainly on the steps that have been taken to implement the right to peace, but these only relate to peace agreements, peacekeeping missions and protection of women in armed conflicts.<sup>48</sup>

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<sup>43</sup> Puyana (n 40 above) 262.

<sup>44</sup> Puyana (n 40 above) 142.

<sup>45</sup> So far, the African Commission has made decisions in relation to the right to peace in the cases of *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 and *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19.

<sup>46</sup> B Winks ‘Reviving the right of peoples to peace: concepts, contents and consequences’ (2014) *South African Yearbook of International Law* 282 284.

<sup>47</sup> The African Commission’s guidelines on state reporting have not even elaborated the information that states should submit in their periodic reports. The guidelines simply regurgitated Article 23 of the ACHPR without breaking down or itemising the steps that the countries should do in fulfilling this right.

<sup>48</sup> South Africa’s reported on the inclusion of women in peacekeeping missions, promulgation of laws on terrorism and reduction of military expenditure as some of the steps taken by the Country in fulfilling the right to peace. Zimbabwe’s report makes mention of the promulgation of the Public Order and Security Act as a way of protecting the right to peace. The same can be said of the report of Mozambique, Mauritius, Namibia, Kenya, Ethiopia, Djibouti, and Algeria.

The right to peace has been described as more complicated than any other right.<sup>49</sup> This is so because of the lack of a clear and unanimous concept of peace under international law.<sup>50</sup> The United Nations has recognized the human right to peace in general terms without elaboration of the obligations of states in fulfilling this right.<sup>51</sup> As argued by Przetacznik,<sup>52</sup> the right to peace is very old, although it lacks precision in definition.<sup>53</sup>

Several scholars have defined the right to peace in general terms without any specific reference to women.<sup>54</sup> Discussions around peace have focused on whether peace should be viewed first as a human right and secondly as a standalone human right. It has been argued that peace is a very broad concept and as such could be looked at as an umbrella protecting the implementation of many first- and second-generation rights.<sup>55</sup> Proponents of this argument opine that the right to peace is an amorphous right,<sup>56</sup> and instead of providing specifically for it, it can be protected by the general human rights framework. Gross has argued that the right to peace is ambiguous and difficult to measure where it involves states' compliance.<sup>57</sup> Drzewicki also argues that 'the connection between peace and human rights is apparently insufficient to proclaim the right to peace'.<sup>58</sup> According to Gross, 'the right has conflicting interests such that reliable and tangible

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<sup>49</sup> B Gross 'Power, rights and peace' (1991) 23 *Bill of Rights Journal* 23 28.

<sup>50</sup> C Wellman 'Solidarity, the individual and human rights' (2000) 22 *Human Rights Quarterly* 639 649.

<sup>51</sup> Wellman further argues that the United Nations has only elaborated the implementation of this right in its peacekeeping missions.

<sup>52</sup> F Przetacznik 'The philosophical concept of peace as a basic collective human right' (1987) 26 *Military and War of Law Review* 361 364.

<sup>53</sup> Przetacznik (n 52 above).

<sup>54</sup> These scholars include, R Bilder 'The individual and the right to peace' (1980) 11 *Bulletin of Peace Proposals* 387 390; K Tomasevski 'The right to peace after cold war' (1991) 3:3 *Peace Review* 14 22; B Gross 'Power, rights and peace' (1991) 23 *Bill of Rights Journal* 23 28; JHE Fried 'The United Nations' effort to establish a right of the peoples to peace' (1990) 2 *Pace International Law Review* 21 42.

<sup>55</sup> AK Wing 'The war against terror: religion, clothing, and the human right to peace' in B Chen et al (eds) *Activating human rights and peace, theories, practices, and contexts* (2012) 189 192.

<sup>56</sup> D Forsythe *Human rights and peace: international and national dimensions*. ((1993) 5. Forsythe argues that the right to peace has no specific meaning and does not offer specific duties and therefore it cannot exist.

<sup>57</sup> Gross (n 49 above); Forsythe (n 56 above).

<sup>58</sup> K Drzewicki 'The rights of solidarity - the third revolution of human rights' (1984) 53 *Acta Scandinavica Juris Gentium* 26 34.

remedies may be difficult to achieve.’<sup>59</sup> However, Alston has dismissed claims that the failure to identify the content of the right to peace renders the right nullity. The right still retains its status as a human right.<sup>60</sup>

The right to peace is part of the third generation of rights if the classification of rights is to be followed. Although it is a group right, it is also an individual right. Bilder interrogates the application of the right to peace to individuals.<sup>61</sup> He argues that an individual’s right to peace includes the right to participate in policy formulation relating to peace.<sup>62</sup> It also involves the freedom of speech, petition and association in opposition to government policies that disturb the peace.<sup>63</sup> While Bilder’s work analyses the individual right to peace, just like all other scholars, it has a narrow interpretation of this right, as it is mainly centred on violence in armed conflicts to the exclusion of violence in non-conflict situations.

The interconnectedness of the right to peace with other rights has been elaborated. Eide argues that the right to peace is important to realise all other rights.<sup>64</sup> The author views the right to peace as sacrosanct. As a result, recognising the right to peace would entail that all violations against all the other human rights become impossible.<sup>65</sup> To elaborate on the importance of the right to peace, Przetacznik argues that the philosophical and legal basis of the right to peace emanates from the right to life from which all other human rights stem.<sup>66</sup>

Some scholars have also highlighted the relationship between the right to peace and development.<sup>67</sup> Fernández and Puyana have also broadened the conceptual understanding of

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<sup>59</sup> Gross (n 49 above) 27.

<sup>60</sup> P Alston ‘The legal basis for the right to peace’ (1991) 3:3 *Peace Review* 23 25.

<sup>61</sup> See R Bilder ‘The individual and the right to peace’ (1980) 11 *Bulletin of Peace Proposals* 387 389.

<sup>62</sup> Bilder (n 61 above).

<sup>63</sup> According to Bilder the right to peace already incorporates other rights that are already contained in the human rights instruments.

<sup>64</sup> Eide further argues that ‘without the realization of the right to peace, all other rights remain uncertain, unfulfilled, or precarious.’ A Eide *The right to peace* (1980) 159.

<sup>65</sup> WO Peterfi, ‘The missing human right: the right to peace’ (1979) 11 *Peace Research* 19 23.

<sup>66</sup> Przetacznik (n 52 above) 364.

<sup>67</sup> See K Tomasevski ‘The right to peace after cold war’ (1991) 3:3 *Peace Review* 14 21; C G Fernández & D F Puyana ‘The BRICS commitment in the promotion of equality between women and men: analysis from the human

the right to peace by looking at how poverty, inequality, violation of the right to dignity and social injustice constitutes a violation of the right to peace.<sup>68</sup> It has also been argued that the right to peace should be inclusive of the right to security.<sup>69</sup>

Stark brings an interesting dimension towards implementing women's right to peace.<sup>70</sup> She argues that peace can only prevail if nurturing rights are available.<sup>71</sup> Nurturing rights have been defined as 'the rights of every living human being to be nurtured -to be cared for, housed, fed, clothed, healed, and if not loved, at least confident that her survival is an important priority for her society.'<sup>72</sup> Stark brings out the relationship between peace and the right to an adequate standard of living and the right to physical and mental health as provided by the International Covenant on Economic Social and Cultural Rights (CESCR).<sup>73</sup>

The scholars discussed above expect for Stark have not examined the right to peace from a women's rights perspective. This study builds on Stark's argument that implementing women's right to peace should focus more on other non-military issues that affects women's right. This study examines how APSA implements women's right to peace using the sex and gender approach.

### **1.7.2 The African Union Peace and Security Architecture (APSA)**

The APSA is driven by the African Renaissance concept of 'African solutions to African problems.' If APSA is centred on the 'African solutions to African problems' concept, how necessary is the intervention of the UN Security Council and other agencies? Kindiki's work

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rights and peace perspective.' (2014) 5 23 *BRICS Law Journal*; P N Bhagwati 'International aspects of the rights to life, peace and development' (1990) 19 *Denver Journal of International Law and Policy*. 67 74.

<sup>68</sup> CG Fernández & D F Puyana, 'The BRICS commitment in the promotion of equality between women and men: analysis from the human rights and peace perspective' (2014) *BRICS Law Journal* 5 23.

<sup>69</sup> JHE Fried 'The United Nations' effort to establish a right of the peoples to peace' (1990) 2 *Pace Yearbook of International Law* 21 41. According to Fried, security should not only be 'military but economic and ecological security.

<sup>70</sup> B Stark 'Nurturing rights: an essay on women, peace, and international human rights' (1991) 13 *Michigan Journal of International Law* 144 144.

<sup>71</sup> Stark (n 70 above) 143.

<sup>72</sup> Stark (n 70 above) 144.

<sup>73</sup> As above.

answers the above question. According to Kindiki, Article 4(h) of the PSC Protocol allows the AU to carry out military interventions without seeking the authority of the United Nations Security Council.<sup>74</sup> This is despite the fact that Article 53 of the United Nations Charter provides that the Security Council shall authorise all enforcement actions by regional arrangements. Kindiki argues that the AU Constitutive Act does not ‘anticipate the supervision of the UN Security Council concerning intervening in member states where war crimes, genocide or crimes against humanity are being committed.’<sup>75</sup> However, Kindiki’s work is limited to examining PSC’s work on peace without an examination of women’s right to peace.

The legality of the Economic Community of West African States (ECOWAS) intervention in the Gambia when the former President of that country, Yahya Jammeh, refused to relinquish power despite conceding defeat has been discussed.<sup>76</sup> Babatunde and Hehal argue that the intervention of ECOWAS in the Gambia violated Article 2(4) of the UN Charter.<sup>77</sup>

Omorogbe<sup>78</sup> questions the effectiveness of AU’s ‘African solutions to African Problems’ concept in the light of AU’s dependency on external funding to undertake peace operations. This author argues that the involvement of the other partners in managing conflicts in Africa is inevitable given the fact that the African peace fund, which is one of the structures of APSA, is not adequately funded. The African states are struggling with their economies such that they are left with nothing to contribute towards the African Peace Fund.

APSA has been in existence for close to two decades yet the reality on the ground is that conflict seems to be escalating. Women’s vulnerability to sexual violence, hunger, poverty and the

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<sup>74</sup> K Kindiki ‘The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: a critical appraisal’ (2003) 3 *African Human Rights Law Journal* 97 110.

<sup>75</sup> Kindiki (n 74 above).

<sup>76</sup> E Babatunde ‘ECOWAS Intervention in Gambia: a case study of international law on the use of force’ (2017) 6 *University College London Journal of Law and Jurisprudence* 46 47.

<sup>77</sup> M Helal ‘The ECOWAS intervention in the Gambia’ in T Ruys & O Corten (eds) *International law on the use of force: a case based approach* (2017) Public Law and Legal Theory Working Paper Series 414.

<sup>78</sup> E Y Omorogbe ‘Can the African Union deliver peace and security?’ (2011) *Journal of Conflict & Security Law* 35 35.

overburden by their gender roles during conflict remains a reality that Africa faces.<sup>79</sup> Scholars like Sifolo ask a pertinent question on whether the failure to have peace in the continent results from weak institutions.<sup>80</sup> This author argues that African leaders should engage in an honest debate on the causes of the weak institutions.<sup>81</sup> The issue then is if the debate is going to be held, will it be frank enough to point out the problems of non-accountability and non-recognition of the rule of law that characterise the majority of African countries.

The African Peer Review Mechanism (APRM) is one of the forums where discussions on good governance concerning political and economic issues should occur. The APRM broadly focuses on ‘governance’ and has four main areas: ‘democratic and political governance, economic governance and management, corporate governance, and socio-economic development.’<sup>82</sup> Women’s rights protection is covered under the theme of democracy and political governance.

According to Murithi, the lack of integrity by the African leaders is the biggest challenge in the implementation of APSA.<sup>83</sup> African leaders have the habit of ‘subscribing to norms and principles which they do not adhere to.’<sup>84</sup> Similarly, Busumtwi-Sam argues that the main obstacles to an effective peace and security architecture in Africa are political and normative.<sup>85</sup> The author criticises the intervention role that AU adopts instead of leaning more towards the prevention role through the use of the ‘New Partnership for Africa’s Development’ (NEPAD), now called the ‘African Union Development Agency’ (AUDA) and Continental Early Warning

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<sup>79</sup> The reports by Special rapporteur on Women on the promotional mandates to Sudan, Angola, Djibouti and Nigeria reflect the persistent violence perpetrated on women which is sanctioned by social and cultural norms.

<sup>80</sup> Sifolo (n 10 above).

<sup>81</sup> As above.

<sup>82</sup> J Busumtwi-Sam ‘Architects of peace: the African Union and NEPAD’ (2006) *Georgetown Journal of International Affairs* 71 74.

<sup>83</sup> T Murithi ‘The African Union and the African Peace and Security Architecture Africa past, present and future’ (2012) 42(3) *Africa Insight* 42 44.

<sup>84</sup> Murithi (n 83 above).

<sup>85</sup> Busumtwi-Sam (n 82 above).

System (CEWS).<sup>86</sup> The author further argues that ‘attention should be paid to the social and economic problems since these are the causes of conflicts in most African Countries.’<sup>87</sup>

The APRM has been criticised for its failure to hold governments to account.<sup>88</sup> The fact that the process is a dialogue carried out using diplomacy and respect for the sovereignty of states weakens the process. The other weakness of the APRM is that it is voluntary. As a result, states can escape the scrutiny of the APRM. Though the impact of the APRM in inculcating good governance in Africa is doubtful, it remains an important platform for holding each other accountable.

Undoubtedly, APSA is facing many challenges, and these have been documented.<sup>89</sup> However, studies carried out on the challenges faced by APSA do not analyse the implications of these challenges towards protecting women’s right to peace. Several scholars have examined the role of the institutions under APSA in maintaining peace and conflict prevention in Africa.<sup>90</sup> The major gap in these scholarly writings is that they focus more on peace as a political concept than a human right.

Vines’ work evaluates how the AU has implemented the ‘peace and security agenda’ after a decade of coming into existence. The author provides a critique of the challenges the AU faces in implementing peace and security provisions on the continent. Some of these challenges highlighted are resource constraints and the inability of the AU to comprehensively undertake

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<sup>86</sup>Busumtwi-Sam (n 82 above).

<sup>87</sup> The author further argues that ‘even in diversity forms, conflicts in Africa are mainly triggered by ‘domestic governance and socioeconomic decline.’ Busumtwi- Sam (n 82 above) 74.

<sup>88</sup> See Jaoko (n 9 above); M Killander ‘The African Peer Review Mechanism and human rights: the first reviews and the way forward’ (2008) 30(1) *Human Rights Quarterly* 41 75.

<sup>89</sup> See the following articles which highlight the challenges that APSA is facing. A Sithole, ‘The African Union Peace and Security mechanism’s crawl from design to reality: was the Libyan crisis a depiction of severe limitations?’ (2012) 12(2) *African Journal On Conflict Resolution* 117 133; U Engel & J G Porto ‘Imagining, implementing, and integrating the African Peace and Security Architecture: the African Union’s challenges’ *African Security* (2014) 7 (3) 135 144; AK Domson-Lindsay ‘Peace and security in Africa: past, present and future’ (2015) 4 (2:3) *Journal of African Union Studies* 5; Omorogbe (n 78 above).

<sup>90</sup> Omorogbe (n 78 above); Aniche & Egbuchulam (n 5 above); A Vines ‘Decade of African Peace and Security Architecture (2013) *International Affairs* 89 105; O Fafore ‘The African Union and Peace and Security in Central Africa’ (2016) 5(2) *Journal of African Union Studies*) 51 52.



the coordinating role of all its institutions and the harmonisation of the RECs and AU institutions on peace.<sup>91</sup>

Fafore, using the case study of the Central Africa Republic, argues that the failures of APSA can easily be discerned by the conflicts in the Central African Republic.<sup>92</sup> The author argues for greater co-operation between the AU and RECs. The article mainly centres on the challenges that the APSA face. Some of the challenges highlighted include the model that APSA has adopted, which is not compatible with the African context.

Aniche and Egbuchulam also criticize the model that APSA uses in handling conflicts in Africa.<sup>93</sup> They argue that APSA is modelled on the EU neo-functional approach, which is not applicable in Africa.<sup>94</sup> The scholars further argue that APSA's work is affected by local conflicts and challenges.<sup>95</sup> As a result, states concentrate more on domestic issues, which negatively impact regional initiatives for peace.<sup>96</sup>

Strydom also provides a historical and descriptive analysis of the implementation of peace from the OAU to AU.<sup>97</sup> Further, through applying several theories of international relations, Sifolo provides a critique of AU's peace approaches.<sup>98</sup> The latter argues that even though Article 7(4) of the PSC protocol mandates member states to cooperate with the PSC in preventing and

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<sup>91</sup> This author argues that the Regional Economic Communities (RECs) makes the 'implementation of the peace and security agenda on the continent harder because of lack of commitment to AU leadership.' Some of the RECs discussed in this article are the ECOWAS, IGAD, SADC, COMESA and the EAC.

<sup>92</sup> O Fafore 'The African Union and Peace and Security in Central Africa' (2016) 5(2) *Journal of African Union Studies* 51 52.

<sup>93</sup> Aniche & Egbuchulam (n 5 above).

<sup>94</sup> The authors recommend that Africa should therefore adopt a post-nationalism approach which 'advocates for regional cooperation in matters of security at the onset as a short-term strategy for tackling the enormous security challenges in various states in Africa at the continental or regional level.'

<sup>95</sup> Aniche & Egbuchulam (n 5 above).

<sup>96</sup> As above.

<sup>97</sup> H Strydom 'Peace and security under the African Union' (2003) 28 *South African Yearbook of International Law* 59 62.

<sup>98</sup> Sifolo (n 10 above).

managing conflicts, member states have exhibited a lack of commitment to comply with the provision.<sup>99</sup>

It has always been debatable whether using force through military intervention is the path to achieving peace. Scholars have criticised military intervention as a portrayal of masculine tendencies and that women are victims of such masculinity in the same way they suffer during peacetime.<sup>100</sup> African Union's capacity to protect and maintain peace in the continent through its military interventionist approach has also been questioned. Ndubuius' and Adeoye's work is critical of AU's responses to Somalia, Sudan, and Libya crises.<sup>101</sup> These authors argue that military intervention by AU is mainly challenged by limited resources and the lack of political will by the member states.<sup>102</sup>

Omorogbe also challenges the effectiveness of the AU's intervention strategy.<sup>103</sup> With the aid of case studies of AU's intervention in Burundi, Sudan and Somalia, the author concludes that the failure by the AU to stop conflicts in these countries after intervening is a clear reflection of Africa's inability to maintain peace in the continent without reliance on external forces such as the United Nations. Fafore also analyses the intervention of the AU in the Central African Republic and recommends that APSA should cooperate with sub regional peace and security mechanisms.<sup>104</sup>

Murithi argues that APSA's approach is reactionary instead of proactive. As a result, the APSA institutions such as CEWS and the Panel of the Wise are not fully utilised. Murithi also critiques

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<sup>99</sup> Sifolo (n 10 above).

<sup>100</sup> G Heathcote 'Feminist politics and the use of force: theorising feminist action and Security Council Resolution 1325' (2011) 7 *Socio-Legal Review*. 23 24.

<sup>101</sup> A Ndubuis & OA Adeoye 'Rethinking African Union's capacity for regional conflict management' (2015) 4(1) *Journal of African Union Studies* 25 27.

<sup>102</sup> Ndubuis & Adeoye (n 101 above). The authors further argue that it is not poverty per se that is causing African states to default on contributions to the AU Peace Fund, but rather it is the embezzlement of funds by leaders in their respective countries.

<sup>103</sup> Omorogbe (n 78 above).

<sup>104</sup> Fafore (n 92 above).

AU's intervention approach, and using a case study of AU's intervention in the Horn of Africa; he concludes that AU should move from reactive intervention to proactive intervention.<sup>105</sup>

AU's intervention in Libya has been a subject of heated debate by scholars who bring out different perspectives on the impact of the AU peace framework. Scholars critique the failure of the CEWS in averting the conflict in Libya. The Libyan case study also highlighted the controversies around applying Article 4(h) of the AU Constitutive Act and the circumstances under which the AU can intervene. Sithole argues that the Libyan crisis clearly portrayed the AU's inadequacy as a regional body to protect the peace.<sup>106</sup> The AU is criticised for its indecisiveness and ineffective resolutions. It has been argued that the Libyan crisis would have been averted if the AU had intervened on time.<sup>107</sup> The Libyan case also shows a disconnection between the AU and sub regional mechanisms; for example, the Arab league supported NATO over AU. Mangu argues that NATO intervened in the Libyan case because AU had failed to comply with its provisions in the Constitutive Act. Ekwealor and Uzodike argue that the lack of unity in the AU gave NATO an opportunity to intervene in Libya, thereby rendering ineffective the 'African solutions to African Problems' mantra.<sup>108</sup> NATO then enforced its agenda.

There have been a lot of scholarly discussions on the norms, institutional structure and mandate of APSA. The work of Kindiki is quite elaborate on the normative structures of AU peace frameworks.<sup>109</sup> Kindiki adopts a comparative analysis of 'OAU mechanisms for conflict management' and APSA. The author further interrogates how the AU exercises power to intervene in a state committing gross human rights violations. Engel and Porto provide an

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<sup>105</sup> Muriithi (n 83 above).

<sup>106</sup> A Sithole 'The African Union Peace and Security mechanism's crawl from design to reality: was the Libyan crisis a depiction of severe limitations?' (2012) 12(2) *African Journal on Conflict Resolution* 117 118.

<sup>107</sup> Some of these scholars are; A Mangu 'The Arab Spring and the African Union's reaction to the crisis - use of force, regime change, and assassination of the leader of the 'Great Socialist People's Libyan Arab Jamahiriya' (2012) 42(1) *Africa Insight* 1 2; T Ekwealor & UO Uzodike 'The African Union interventions in African conflicts: unity and leadership conundrum on Libya' (2016) 5(1) *Journal of African Union Studies* 63 71.

<sup>108</sup> Ekwealor & Uzodike (n 107 above).

<sup>109</sup> Kindiki (n 74 above) 101.

analysis of the relationship amongst AU institutions that are mandated with the promotion and protection of the right to peace.<sup>110</sup>

Jaoko<sup>111</sup> also gives a historical background of the formation of the AU and critiques AU's approach to conflicts in Africa. Levitt provides a critique of the mandate of the PSC and the reason for its formation.<sup>112</sup> Mangu's work is a descriptive examination of the APRM, NEPAD, and the African Court.<sup>113</sup> Mangu expresses optimism that the establishment of initiatives such as APRM and NEPAD (now called AUDA) immensely assist in realising human rights in Africa. However, Mangu's article was written at a time when these institutions were in their infancy. An analysis of what they have achieved now would be more relevant. Further, the article fails to analyse how APRM aids in realising women's right to peace.

The efficacy of the panel of the wise as a supporting pillar of PSC has been examined. Jegede and Sithole are some of the scholars that critique the function and purpose of the POW in maintaining peace in Africa. Jegede undertakes a critique of the structure and norms of the POW.<sup>114</sup> The author argues that there is an overlap in the roles of the POW with the commission, special envoys and diplomats.<sup>115</sup> Sithole highlights the deficiency of the structure of the POW, which he argues is not adequate in responding to the numerous conflicts that the continent faces.<sup>116</sup> The applicability and effectiveness of the 'African solution to African problems' within the framework of APSA have also been interrogated.<sup>117</sup>

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<sup>110</sup> U Engel & J Porto 'Imagining, implementing, and integrating the African Peace and Security Architecture: the African Union's challenges' (2014) 7(3) *African Security* 135 138.

<sup>111</sup> Jaoko (n 9 above).

<sup>112</sup> J Levitt 'The Peace and Security Council of the African Union: the known unknowns' (2003) 13 *Transnational Law and Contemporary Problems* 109 110.

<sup>113</sup> Mangu (n 107 above) 139.

<sup>114</sup> Jegede (n 2 above).

<sup>115</sup> Jegede (n 2 above).

<sup>116</sup> Sithole (n 106 above).

<sup>117</sup> Dersso (n 6 above).

While this study acknowledges that a lot of literature has examined the institutional challenges that APSA faces in implementing peace, it has not examined these challenges from a human rights perspective which this study does.

### 1.7.3 Participation of women in peace processes

Article 10(2) of the Maputo Protocol imposes an obligation on states to ensure the participation of women in conflict resolution structures, peace programmes, and decision-making structures to protect the right to peace. It is important to interrogate the participation of women in peace processes. The following questions are quite important when seeking to understand the participation of women in peace processes:

To what extent do women make independent decisions when they participate in peace processes? Do issues such as political and tribal alliances have a bearing on the participation of women? Whose agenda will women be representing during the process? Are they independent, or do they just rubber-stamp the views of their alliances? Kouvo and Levine, therefore, warn that the focus should not only be placed on ensuring representation but also interrogating capacity; and who and what women represent.<sup>118</sup>

The participation of women in public life and the peace process is well documented. Ebeku,<sup>119</sup> Tuohy, Jordan,<sup>120</sup> and Kouvo and Levine's<sup>121</sup> work interrogate the nature of women's participation in peace processes and its impact on the overall peace agreements. The importance of the participation of women in peace negotiations has been argued to be critical to the maintenance of peace.<sup>122</sup> However, the reasons for the inclusion of women in peace talks

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<sup>118</sup> S Kouvo & C Levine 'Calling a spade a spade: tackling the 'women and peace' (2008) 16 *Feminist Legal studies* 363 364.

<sup>119</sup> K Ebeku 'African women and participation in public life and governance: relevant laws and overview of recent experience' *Law and Politics in Africa, Asia and Latin America* (2005) 38(1) 56.

<sup>120</sup> A Jordan 'Women and conflict transformation: influences, roles, and experiences' (2003)13(2/3) *Development in Practice* 239 235.

<sup>121</sup> Some of the authors on women and peace include A Tuohy, 'An Analysis of women's participation in peace negotiations; 1992 – 2010' (2011) (2) *Capstone Collection Paper* 44; Jordan (n 120 above); Kouvo and Levine (n 118 above).

<sup>122</sup> Marilee has highlighted the necessity for women to participate in all levels of decision-making processes as an element of true democracy. Marilee brings in an important aspect of a participation which includes quantitative and qualitative. K Marilee 'Women and empowerment, participation and decision making' (1995) 18; See also JF

based on gender stereotypes that women are peaceful have been questioned. Scholars argue that such rationale maintains women's subordination by reinforcing femininity, which is associated with weakness despite evidence showing that women are not entirely victims of violations of the right to peace.<sup>123</sup>

Charlesworth critiques the involvement of women in peace processes based on their 'femininity' or 'maternal instincts.'<sup>124</sup> She opines that such understanding has problems in the future because their femininity will be brought into perspective, and they end up being given feminine roles that reduce their political agency.<sup>125</sup> Kouvo and Levine have sought to further develop Charlesworth's argument on advancing equality to include women in peacebuilding initiatives, but these authors have argued that in addition to focusing on equality, we need to look at the political capacities of women.<sup>126</sup>

Manchanda focuses on a possible explanation for involving women in political participation. This includes the fact that women's notion of power and security is different from men and therefore, they are more likely to be proponents for peace.<sup>127</sup> Secondly, the author argues that 'women are more pacific than men in their approach to internal and inter-state conflict situations'<sup>128</sup> and as a result, they make compromises for peace.<sup>129</sup>

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O'Barr, 'Making the invisible visible: African women in politics and policy' (1975) 18(3) *African Studies Review* 19 21; Ebeku (n 119 above).

<sup>123</sup> Such scholars include Porter who argues that we should not assume that women are naturally peaceful. E Porter 'Women, peace and securing human rights' in B Goh et al (eds) *Activating Human Rights and Peace Theories, Practices and Contexts* (2012) 202.

<sup>124</sup> H Charlesworth 'Are women peaceful? reflections on the role of women in peace-building' (2008) 16(3) *Feminist Legal Studies* 347 361.

<sup>125</sup> Charlesworth, (n 124 above).

<sup>126</sup> Kouvo and Levine (n 118 above) 367.

<sup>127</sup> R Manchanda 'Redefining and feminising security' (2001) 36(22) *Economic and Political Weekly* 4100 4107.

<sup>128</sup> Manchanda (n 127 above).

<sup>129</sup> Manchanda (n 127 above.)

Cockburn, in contrast to Manchanda, argues that women compromise in the peace process not because it is their nature, but it is a result of their experiences of oppression and exclusions.<sup>130</sup> Hence, whenever women get an opportunity, they move on the compromise side because they have experienced and borne the brunt of the conflict. This line of thought is supported by Fernández and Puyana, who argue that ‘experiences of women, whether as victims or as armed participants, are the bases for involving them in peace processes.’<sup>131</sup>

There is also scholarly work on women’s participation in decision making structures. Some have focused on women’s participation in parliament.<sup>132</sup> Thabane and Buthelezi<sup>133</sup> identify a gap between the law in theory and women’s lived realities. They argue that there is an inadequate implementation of the various human rights instruments that guarantee women’s participation in decision-making. They further analyse the reasons why women are absent in decision making spaces. According to them, these include factors such as ‘religion, women’s low levels of education and the negative impact of globalisation.’<sup>134</sup> While Thabane and Buthelezi’s work looks at women’s participation, it is limited in scope as it only covers women’s participation in parliament.

The AU Commission has noted that ‘despite the fact that women’s participation in decision making and public life is multi-faceted, parliamentary representation remains one of the most documented and utilized measures of women’s participation in the public sphere and the focus of numerous policy interventions.’<sup>135</sup> This study departs from such narrow interrogation of women’s participation and adopts a broader analysis of a critique of how women’s participation in different organs under APSA results in the protection of their right to peace. This research

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<sup>130</sup> C Cockburn ‘Gender, armed conflict and political violence’ (1999) *Background paper, The World Bank* Washington DC.

<sup>131</sup> Fernandez & Puyana (n 68 above) 9.

<sup>132</sup> See T Dube ‘Engendering politics and parliamentary representation in Zimbabwe’ (2013) 5(8) *Journal of African Studies and Development* 200 207 whose research analyses women’s representation in Parliament from 1980- 2013; Ebeku (n 119 above); R Gaidzanwa ‘Gender, women and electoral politics in Zimbabwe’ (2004) 8 *EISA Research Report*.

<sup>133</sup> T Thabane & M Buthelezi ‘Bridging the gap between de jure and de facto parliamentary representation of women in Africa’ (2008) 41(2) *The Comparative and International Law Journal of Southern Africa* 175 200.

<sup>134</sup> Thabane & Buthelezi (n 133 above).

<sup>135</sup> AU Commission (n 21 above).

interrogates the participation of women in all spheres of life that have a bearing on the right to peace. This includes participation in traditional leadership, judiciary, politics and religion. The literature on participation of women adopts a gendered approach to peace, however it examines peace from a general perspective. This research specifically examines the implementation of women's right to peace by APSA using feminist lenses.

#### **1.7.4 Feminist perspectives on peace**

Feminist perspectives question argues that humanitarian intervention widens unequal gender relations with some form of gender-neutral assistance that does not consider women's security concerns.<sup>136</sup> Feminist perspectives also emphasise that gender equality is essential to realising sustainable peace.<sup>137</sup> The belief that women are more vulnerable in conflicts is challenged on the basis that it reinforces the stereotypes that men are aggressive and women are weak individuals that need protection. Such understanding downplays the role of women as combatants and men as victims of violence. It does not highlight the gender dynamics in conflict

There have been feminist critiques of violence against women in general, and these are in abundance.<sup>138</sup> Scholarship on feminist analysis of violence against women has not been comprehensive enough to examine APSA's role in implementing women's right to peace.<sup>139</sup> This is so because such scholarly work has examined peace from participatory and peacebuilding frameworks. It does not adopt a feminist analysis of how APSA implements peace as a women's rights issue. This research covers that gap.

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<sup>136</sup> A Kiamba & A Waris 'An African feminist perspective on security and early warning mechanisms: IGAD' in M Mwagiru & O Oculi (eds) *Rethinking global security: an African perspective?* (2006) 93.

<sup>137</sup> Kiamba & Waris (n 136 above) 93.

<sup>138</sup> Some of the scholars are A Tickner 'Feminist responses to international security studies' (2004)16(1) *Peace Review* 43 45; Heathcote (n 100 above); S McKay 'Women, human security, and peace-building: a feminist analysis' *Conflict and Human Security: a Search for New Approaches of Peace-building* (2004) (19) 153 170; H Hudson 'Doing' security as though humans matter: a feminist perspective on gender and the politics of human security' (2005) 36(2) *Security Dialogue* 155 160.

<sup>139</sup> Mazurana and MacKay have analysed the concept of structural violence against women. However, their research is limited to harmful cultural practices such as son preference. See D Mazurana & S McKay 'Women, girls, and structural violence: a global analysis' in D J Christie et al (eds) *Peace, conflict, and violence: Peace psychology for the 21st century* (2001).



The Maputo Protocol has been praised for its comprehensive definition of discrimination against women, violence against women and its provisions on reproductive rights.<sup>140</sup> Banda<sup>141</sup> and Munalula<sup>142</sup> view the Maputo Protocol as revolutionary by being alive to the unique problems that African women face. Musa, Mohammed and Manji<sup>143</sup> bring out the practical challenges of implementing the protocol. The authors discussed above did not ask the important question of how the AU's institutional framework protects women's right to peace. This research will further interrogate the extent to which APSA implements women's right to peace, as provided in Article 23 of the ACHPR and Article 10 of the Maputo Protocol.

Literature on gender mainstreaming within the APSA is scarce. This contrasts with the UN Security Resolution 1325, which has received wide scholarly attention.<sup>144</sup> The AU Commission has even established a compulsory reporting system by states on implementing UN SCR 1325 under the Solemn Declaration on Gender Equality in Africa. Under this Declaration, countries are required to provide action plans that highlight the implementation of the resolution.

Kasumba and Lotze argue that the peacekeeping role of the AU lacks gender mainstreaming despite the presence of the AU Gender Policy, which addresses gender mainstreaming in the AU's organs.<sup>145</sup> Stefiszyn's work is a gender analysis of the African Union's institutional framework.<sup>146</sup> This author analysed the AU's commitment to the advancement of women by examining programmes and institutions such as the NEPAD, the AU Assembly, the Pan-African Parliament, the Executive Council and the African Court. The author concludes that

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<sup>140</sup> See Ebeku (n 119 above).

<sup>141</sup> F Banda *Women, law and human rights: an African perspective* (2005) 106.

<sup>142</sup> M Munalula *Women, gender discrimination and the law* (2005) 10.

<sup>143</sup> R Musa et al (eds) *Breathing Life into the African Union Protocol on Women's Rights.* (2006) Solidarity for African Women's Rights & African Union Gender and Development Directorate 2.

<sup>144</sup> The following scholarly work provides a gender analysis of the implementation of UNSCR 1325 by states J Tickner 'Feminist responses to international security studies' (2004) 16(1) *Peace Review* 43; Heathcote (n100 above) McKay (n 139 above); Hudson (n 138 above).

<sup>145</sup> Y Kasumba & W Lotze 'Mainstreaming gender into African Union peace support operations: why we are getting it wrong' (2013) 2 *Conflict Trends* 23 26.

<sup>146</sup> K Stefiszynik 'The African Union: challenges and opportunities for women' (2005) *African Human Rights Law Journal* 358 380.

inequality persists in AU organs as women are excluded from key decision-making bodies.<sup>147</sup> While this author brings out an insightful analysis of the AU's commitment towards gender equality, the Article's scope is too general and lacks a detailed analysis of how the AU's inability to achieve gender mainstreaming impacts women's right to peace.

Similarly, Hendricks's work is a gender-based analysis of APSA.<sup>148</sup> The author argues that gender mainstreaming in APSA has been ad hoc and limited in scope. The PSC is criticised for concentrating on 'sexual and gender-based violence training' and conferences that portray women as victims needing protection.<sup>149</sup> This author further argues that the representation of women in peace making has been very slow despite the enabling frameworks. In situations where women have been included, they have not taken key decision-making positions that will enable them to influence the agenda.

Abdullah, just like Hendricks, provides a sharp criticism of the lack of gender analysis in the AU's peace prevention and management processes. Abdullah argues that women have been portrayed as passive victims of conflict, just like the elderly, children and the disabled.<sup>150</sup> Abdullah further argues that any approaches to gender equality in peace making processes should consider the various roles that women can play in conflicts, including taking into account that women can be perpetrators of violence or leaders in peacebuilding initiatives.<sup>151</sup> However, Hendricks and Abdullah's research do not critique APSA's work from a human rights approach. Their scholarly work is limited in terms of gender analysis of women's political participation in AU institutions. This research in addition to adopting a sex and gender analysis of APSA's work on peace, examines the implementation of peace as a human right.

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<sup>147</sup> Stefiszynik (n 146 above).

<sup>148</sup> C Hendricks 'Women, peace and security in Africa, African Security' (2015) 24(4) *African Security Review* 364 368.

<sup>149</sup> Hendricks (n 148 above).

<sup>150</sup> T Abdullah 'The African Union's gender, peace, and security mechanisms: policy options for protecting women in conflict' (2016) 4 *African Peace Building Network (APN) Briefing Note* available at [https://s3.amazonaws.com/ssrccdnl/crmuploads/new\\_publication\\_3/%7B355FCA7B-C7BE-E511-940C-005056AB4B80%7D.pdf](https://s3.amazonaws.com/ssrccdnl/crmuploads/new_publication_3/%7B355FCA7B-C7BE-E511-940C-005056AB4B80%7D.pdf) accessed 17 July 2017.

<sup>151</sup> Abdullah (n 150 above.)

Iwiladei interrogates how women's participation in peace talks fulfils gender equality.<sup>152</sup> The author criticises the use of male relationships and alliances to gain access to participate in peace talks. She argues that the use of male connections detracts women's capacity to stand as equal citizens and reinforces male chauvinism.

Literature is scarce on how APSA institutions protect women's right to peace. Research available is mainly an analysis of women's involvement in peace initiatives. The literature does not interrogate the impact of exclusions on women's right to peace. Nakaya,<sup>153</sup> through a case study of Guatemala and Somalia, asks an important question on whether the inclusion of women in the peace process has any impact on the outcome of the process. While her research is important in pointing out the gap in peace research, it falls short of viewing peace as a human right.

Domison-Lindsay's work brings out an expansive interpretation of peace and urges the AU to move from conventional perceptions of peace to non-traditional sources of violent conflict.<sup>154</sup> These include structural factors such as underdevelopment, poverty, injustice, unemployment, poor service delivery and weak institutions. This study will build upon this research and, using Zimbabwe as a case study, will seek to analyse the implementation of the right to peace by APSA, particularly focusing on positive peace.

#### **1.7.5 APSA's role in Zimbabwe's political and economic crisis**

Literature on the role of APSA in maintaining peace in Zimbabwe is scarce. The literature available is mainly based on a critique of the participation of women in the 2008 peace process, which resulted in the Government of National Unity.<sup>155</sup> There is also literature that examined the involvement of the African Union in Zimbabwe's protracted political and economic crisis.

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<sup>152</sup> A Iwiladei 'Women and peace talks in Africa' (2011) (12) (1) *Journal of International Women's Studies* 22 30.

<sup>153</sup> S Nakaya 'Women and gender equality in peace processes: from women at the negotiating table to postwar structural reforms in Guatemala and Somalia' (2003) 9 *Global Governance* 459 460.

<sup>154</sup> A Domson-Lindsay 'Peace and security in Africa: past, present and future' (2015) 4(2:3) *Journal of African Union Studies* 5 6.

<sup>155</sup> See T Mugadza & H Hermann (eds) '*Gender Analysis of Zimbabwe's Global Political Agreement*' (2011) ; Research Advocacy Unit, '*Putting it Right: Addressing Human Rights Violations against Zimbabwean Women*' (2009) 10; Z Gambahaya '*Tokenism and deception: how women have been sidelined since the GPA*' OSISA available at [http://www.osisa.org/sites/default/files/sup\\_files/Tokenism%20and%20deception.pdf](http://www.osisa.org/sites/default/files/sup_files/Tokenism%20and%20deception.pdf) accessed 14 June 2016.

The APSA delegated SADC to deal with Zimbabwe's crisis through the appointed mediator, Thabo Mbeki. Badza argues that the AU peace architecture exhibited a bias towards the former President of Zimbabwe, Robert Mugabe.<sup>156</sup> He further argues that the crisis in Zimbabwe was seen as a fight against Africa and its former colonisers, such as Europe. As a result, Robert Mugabe was supported for fighting an African cause, and his disregard of the SADC instruments on human rights and democracy was not a priority over the perceived African solidarity.<sup>157</sup>

The African Union was blamed for failing to condemn and discredit the 2008 presidential run-off, despite wide condemnation by the international community.<sup>158</sup> The African Union and SADC were also accused of tacitly endorsing the presidential election run-off and its outcome as credible and legitimate despite serious allegations of voters' intimidation and violence.<sup>159</sup> Raftopoulos argues that Mbeki was criticised for his quiet diplomacy and the fact that 'his assessment of the Zimbabwean problem and issues around democratisation were secondary to the question of sovereignty, the need for stability, and his perception of the threat of regime change by the West in Zimbabwe.'<sup>160</sup> As such, Mbeki leaned in favour of Robert Mugabe's dictates because of the fear that if regime change were effected in Zimbabwe, it would set a bad example to all other African countries.<sup>161</sup> This study seeks to fill this gap by firstly examining the extent of APSA's engagement with Zimbabwe and secondly whether such engagement includes women in compliance with Article 10(2) of the Maputo Protocol.

### 1.7.6 Conclusion

Given the challenges that APSA faces, should a conclusion be reached that Africa's efforts to eradicate conflict in Africa and protect women's right to peace have failed? Alternatively, will

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<sup>156</sup> S Badza 'Zimbabwe's 2008 harmonized elections. regional and international reaction' in E Masunungure (ed) *Defying the winds of change: Zimbabwe's 2008 elections* 155.

<sup>157</sup> Badza (n 156 above).

<sup>158</sup> Badza (n 156 above).

<sup>159</sup> As above.

<sup>160</sup> B Raftopoulos, 'An Overview of the politics of the Global Political Agreement: national conflict, regional agony, international dilemma' in B Raftopoulos *The hard road to reform. The politics of Zimbabwe's Global Political Agreement* (2013).

<sup>161</sup> Raftopoulos (n 160 above).

it result in implementing women's right to peace in Africa? Is the APSA framework expansive enough to achieve the kind of peace explained by Galtung? Aniche and Egbuchulam have argued that APSA is not a solution to the conflicts in Africa.<sup>162</sup> Therefore, this research will interrogate the prospects of strengthening APSA to enable the full realisation of women's right to peace. Although the current literature interrogates APSA's work on peace, a gap remains on how APSA implements peace as a human right for the benefit of women. A gendered critique of such implementation is necessary. This study seeks to fill that gap.

### **1.8 Study limitation**

The research is limited in scope. It focuses on implementing the right to peace by APSA and human rights institutions as it applies to women only. Secondly, in as much as other rights will be discussed, the main focus for the research is the right to peace for women. The research uses Zimbabwe as a case study to assess the role of APSA in implementing the right to peace. The study deliberately avoids using countries such as Sudan, DRC and Somalia, where there are ongoing conflicts, as case studies. Zimbabwe has been selected as a case study to interrogate how APSA implements women's right to peace in a country that does not have armed conflict.

### **1.9 Significance of the research**

The thesis examines the normative content of women's right to peace. It discusses the definitions of peace from legal and cultural perspectives. It also brings out a new frontier on women's right to peace. The thesis proposes the elements that should constitute the right to peace. This will assist in the implementation and monitoring of the right to peace. It argues that participation, equality and human dignity should be the core elements of the right to peace. Building on the feminist standpoint theory, participation enables beneficiaries of the right to determine how they conceptualize peace from their standpoint. Equality ensures meaningful participation and equal value of the participants' views towards realising the right to peace. Lastly, dignity is at the core of all human rights and thus is an element of the right to peace. Hence, this study adopts a concept of peace that takes into account human rights principles of participation, human dignity and equality as the 'foundation of positive peace'. It is also hoped that the findings and recommendations generated by this thesis will be useful as inputs for the institutional reform of APSA. The thesis also provoked further academic research on how the

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<sup>162</sup> Aniche & Egbuchulam (n 5 above).

‘African solutions to African problems’ philosophy can be utilised to implement women’s right to peace.

## **1.10 Outline of chapters**

The research has seven chapters.

### **Chapter 1**

The first chapter is the introductory part, which comprises the background to the study, problem statement, research questions, literature review, and research methodology.

### **Chapter 2**

Chapter 2 is the conceptual and theoretical framework of the study. It examines the concept of peace as propounded by various scholars. Furthermore, it interrogates the concept of peace from both legal and African cultural perspectives. This Chapter also seeks to examine whether the African concept of peace assist in implementing women’s right to peace? Lastly, the chapter discusses the relationship of the right to peace with other rights.

### **Chapter 3**

This Chapter discusses the AU framework on peace. It analyses how the AU instruments and policies provide for the right to peace. Some of the instruments examined in this chapter include the Constitutive Act of the AU, the PSC Protocol, the African Charter on Democracy, Elections and Governance, the ACHPR and the Maputo Protocol. It is important to note that only the ACHPR and the Maputo Protocol provide for the right to peace. However, some of the AU instruments have norms that contribute to realising the right to peace. After discussing the conceptual meanings of peace in Chapter 2, this chapter discusses how the AU instruments address the right to peace in the continent. It also examines how African countries approach the right to peace in their constitutions

### **Chapter 4**

After discussing the normative content of the right to peace as provided for in human rights instruments and national constitutions in chapter 3, chapter 4 examines the constitutional and legislative provisions on the right to peace in Zimbabwe. The chapter examines the peace architecture in Zimbabwe. This includes an analysis of the work of the institutions that have a mandate to maintain peace, such as the National Peace and Reconciliation Commission, the Zimbabwe Human Rights Commission, the Zimbabwe Gender Commission, the Police force

and the National Defence force. The chapter also interrogates the various peace initiatives adopted in Zimbabwe from the time the country gained its independence up to date. It questions whether such initiatives have resulted in women's peaceful existence.

### **Chapter 5**

This chapter examines the institutional and legal framework under APSA. It questions the efficacy of the institutional structure of APSA in protecting women's right to peace. It also interrogates how APSA structures have been inclusive of women's voices. The Chapter also examines how APSA has interact with Zimbabwe in its mandate to maintain peace in the continent.

### **Chapter 6**

Human rights institutions have an obligation to collaborate with the PSC in maintaining peace and stability on the continent. The African Commission has a twofold mandate to protect and promote human rights. Similarly, the court reinforces the protective mandate of the Commission by passing binding, and enforceable judgements on human rights cases brought before it. In addition to the adjudicatory role, the court has an obligation to offer an advisory opinion to any organ of the AU. This chapter questions how the Commission and the Court have carried out such mandates in protecting women's right to peace.

### **Chapter 7**

This is the conclusion and recommendation of the study. The Chapter is divided into two parts. The first part is the overall conclusion of the research on the implementation of women's right to peace. The study concludes that APSA adopts a militaristic approach in its implementation of women's right to peace. Such approach does not transform women's social and economic status. The interpretation that the PSC and African Commission has adopted restricts the right to peace to the elimination of physical violence and participation. Issues of social justice, structural violence, and poverty that also constitute positive peace are not adequately reflected in how APSA implements the right to peace. The second part of the chapter provides the recommendations guided by the findings.

## Chapter 2: Theoretical Perspectives

### 2. Introduction

This chapter interrogates the conceptual understanding of peace in the African continent. It is important to note that though the definition of peace differs from one context to another, there are common elements ascribed to the concept in the African culture. The conceptual meanings ascribed to peace from the African continent are presented in this chapter as the background basis for studying the right to peace and highlighting the importance of understanding the right from a holistic approach. Further, these perspectives also provide an analytical framework for understanding the right to peace in different contexts. The perspectives of peace presented here are not from the whole of Africa, but selected sub regions such as East Africa, West Africa and Southern Africa will be used as representative of the African perspectives on peace. With specific reference to Zimbabwe as a case study, the research will not present the diverse and multi-cultural perspectives from all ethnic groups of Zimbabwe but mainly focus on the Shona and Ndebele tribes. The two tribes are the dominant ones which represents the majority of the population of Zimbabwe.

Understanding rights in their context recognises the pluralistic nature of the law. The pluralist approach to law is important in this regard because the law does not operate in isolation. Law is shaped by the plurality of religion, culture, and political factors. The way laws present the right to peace and package it in human rights instruments and domestic legislation has to align with the way people perceive peace. The African concept of peace is broader than just the elimination of physical conflict. African culture perceive peace as harmony, co-existence , inclusivity and equitable sharing of resources.<sup>1</sup> The Shona and Ndebele concept of peace also

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<sup>1</sup> G Hansen 'Africa: perspectives on peace and development' in E McCandless E & T Karbo (eds) *Peace, conflict, and development in Africa: A reader* (2011) 3.; E McCandless 'Synopsis of major concepts' in E McCandless & T Karbo (eds) *Peace, conflict, and development in Africa: a reader* (2011) 24; W Sibanda 'An Analysis of the significance of myths and proverbs as African philosophies of peace and justice: cases of the Ndebele, Shona and Tonga tribes from Zimbabwe and the Igbo from Nigeria' (2015) 20(4) *Journal of Humanities and Social Science* 1 6; J C Asike 'The Philosophical concept of "ubuntu" as dialogic ethic and the transformation of political community in Africa'(2016) 12 *Ogirisi: A New Journal of African Studies* 12; E Shoko & M Naidu (2018) 'Peace-based Informal Practices around Shared Communal Water Resources in Tyrone Village of Mhondoro-Ngezi'(2018) *Zimbabwe, International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity*, 13:2, 77-91, T Murithi 'An African perspective on peace education: ubuntu lessons in reconciliation' (2009) 55(2/3). *International Review of Education* 223 227



aligns with the general African perspectives on peace. The Shona and Ndebele perceive peace not only in terms of elimination of physical conflict but also the equitable sharing of resources. Peace is also viewed in this context as living in harmony, coexistence and mutual development.<sup>2</sup>

The ACHPR and the Maputo Protocol package peace more in terms of participation, independence, self-determination and freedom from conflicts. However, what then needs to be interrogated is whether this package resonates with women's view of what peace is and what it should be in terms of the African culture? It needs to be questioned whether political participation is a central concern for women when it comes to the realisation of their right to peace. In other words, are participation and self-determination integral aspects of the right to peace in women's lived realities? If we list the concepts of peace hierarchically, will political participation be the main concern for women? Will issues of power and political participation be the top priority for them? What would be the value attached to issues of access to resources and access to health, which are also key aspects of peace? This study will answer these questions in Chapter 5 when it examines how APSA implement peace.

## 2.1 Defining peace

There is no single agreed definition of peace. This is because the meaning of peace is always situated in the context.<sup>3</sup> According to Rummel, peace derives 'its meaning and qualities within a theory or framework.'<sup>4</sup> Consequently, states, religions or groups have their own conceptions of peace because of a particular framework. Peace is strongly associated with social and political contexts.<sup>5</sup> Any discourse on peace and conflict resolution should include how peace

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<sup>2</sup> E Shoko & M Naidu 'The conceptualisation of peace in the Zimbabwean rural water sector' (2020) 15(1) *Journal of Peacebuilding & Development*, 31-44.

<sup>3</sup> EKV Jacobsen 'Friðr: a Northern European perspective' in W Dietrich (ed) *The Palgrave handbook of peace studies a cultural perspective* (2011) 70.

<sup>4</sup> R J Rummel *The just peace* (1981) 3.

<sup>5</sup> F Munoz & B Molina 'Pax: a Mediterranean perspective' in W Dietrich (ed) *The Palgrave handbook of peace studies a cultural perspective* (2011) 51.

manifests in various cultural settings.<sup>6</sup> The meaning of peace is therefore derived from people's realities.<sup>7</sup>

Peace is also a term that is in constant flux, and as a result, what might be described as peaceful today might be viewed as violence, depending on the evolving nature of the concept. An example is the minimum definition of peace as the absence of an armed conflict. The end of fighting and hostility can be described as attaining peace for a country that has just experienced civil war. However, a few years down the line, the same condition without subtracting anything from it might not be described as peaceful because of the evolving nature of peace. Peace embodies certain characteristics that assist in defining it. These are discussed below:

### **2.1.1 Peace as a social contract**

Rummel argues that peace is a product of the social contract. The World Government of World Citizens also defines peace as a 'result of a codified social contract between equally sovereign humans living in the same geographical environment.'<sup>8</sup> People in a society determines the acceptable conduct that creates a peaceful environment. This social contract is at different international, national, and individual levels.<sup>9</sup> At the international level, the social contract is reflected in the treaties and conventions that have peace provisions. At the national level, the social contract for peace is defined by the dominant group or political party. The dominant groups define peace. The dominant group's perspective may conclude that the state of affairs is peaceful, yet the minority groups might be experiencing violence.<sup>10</sup> Lastly, at the individual level, peace is both internal and external. When it is internal, an individual determines what it means to have inner peace. External peace is determined by the environment in which that individual exists. Therefore, an individual defines what peace means to him/her both internally and externally.

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<sup>6</sup> A Haneef 'Salaam: a Muslim perspective' in W Dietrich (ed) *The Palgrave handbook of peace studies a cultural perspective* (2011) 121.

<sup>7</sup> Rummel (n 4 above) 3.

<sup>8</sup> World Government of World Citizens (2007) <https://worldservice.org/wcwfqa.html?s=1> accessed 3 November 2020.

<sup>9</sup> Rummel (n 4 above).

<sup>10</sup> Rummel (n 4 above).

### **2.1.2 Peace as a dichotomous concept**

Peace is dichotomous.<sup>11</sup> Either it is there, or it is not. Peace and violence cannot exist at the same time. This is despite the various forms of violence, such as physical or structural. This is also despite the fact that peace is defined as negative or positive. Peace cannot co-exist with violence. Hence peace is defined in contrast to violence.

### **2.1.3 Peace as a passive and/or active concept**

Peace can be passive or active, depending on the context. Rummel argues that if peace is viewed as a social contract, it becomes active. This is because a social contract is a product of negotiation, decision making, and adjustment.<sup>12</sup> As a result, peace evolves depending on the current reality. Galtung argues that the ‘definition of peace should be fluid in order to immediately steer one's attention towards problems that are on the political, intellectual, and scientific agenda of today, and tomorrow.’<sup>13</sup> Hence peace is an active concept that changes meaning based on the prevailing environment and time.

However, peace can be passive if described as the absence of violence.<sup>14</sup> Peace becomes passive in the sense that the state of affairs should be maintained in order for a situation to remain peaceful. As long as what society perceives as peaceful existence remains undisturbed, peace attains a passive character. Rummel gives an example that even a desert without human life can be termed peaceful as long as the same conditions are maintained.

## **2.2 The African concept of peace in general**

As highlighted in the above discussion, peace is defined in terms of a contextual framework. It can therefore be passive or active depending on the social reality. As pointed out by Hansen, ‘the perspective which a group brings to the peace problematic depends on its history and material conditions and the position of the group within the power structure of the national or

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<sup>11</sup> Rummel (n 4 above).

<sup>12</sup> As above.

<sup>13</sup> J Galtung ‘Violence peace and peace research’ (1969) 6(3) *Journal of Peace Research* 167 191.

<sup>14</sup> Rummel (n 4 above).

international system one brings to.’<sup>15</sup> African countries share a history of colonialism by the British, Portuguese and the French. The painful effects of the colonisation of Africa seem to be the reason behind the recognition of peace as a human right. Article 23 of the ACHPR provides for the right to peace at the national and international levels. This shows that the right is expanded beyond the jurisdiction of Africa and relates to the violation of the right by non-African states, hence the use of the term ‘international.’ Article 23 of the ACHPR places more emphasis on the self-determination of countries.

According to Hansen, the general African view is that peace refers to the harmonious relationship between the communities.<sup>16</sup> It has been argued that all African cultures attach greater value to the community and communal living.<sup>17</sup> Hence, peace is said to exist in communities that are living in harmony. In Africa, relationships with the community matter more than individual interests. Sometimes, people sacrifice their individual interests for the greater common good. However, it remains debatable whether sacrificing individual personal interests over communal ones violates the right to peace.

This interrogation is necessary for highlighting how normative orders like culture and religion impact the way people exercise their right to peace. Peoples’ beliefs may reign supreme over the law such that compliance with social beliefs at the expense of individual interests might not be out of free volition. It might be as a result of the fear of consequences that may befall those who act contrary to the values of the whole community. Further, in Africa, peace is also pursued as a moral value because every human being is expected to have good conduct to maintain harmony and equilibrium.<sup>18</sup>

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<sup>15</sup>G Hansen ‘Africa: perspectives on peace and development’ in E McCandless E & T Karbo (eds) *Peace, conflict, and development in Africa: A reader* (2011) 3.

<sup>16</sup> Hansen (n 15 above) 3.

<sup>17</sup> KA Opoku ‘*Asomdwoe*: West African perspective’ in W Dietrich (ed) *The Palgrave handbook of peace studies a cultural perspective* (2011) 418.

<sup>18</sup> D F Puyana ‘Analysis of the international debate on the right to peace in the context of the human rights and intergovernmental bodies of the United Nations’ Unpublished Doctoral Thesis University of Pompey Fabra Barcelona 2014 60.

Hansen argues that ‘for Africa, peace cannot be separated from the struggle for social and democratic rights and human dignity.’<sup>19</sup> Peace is therefore related to the issue of existing social and political conditions and the distribution of power.<sup>20</sup> Hansen further argues that peace has to be defined in two aspects. These include positive and negative peace. It is argued that peace should not only be conceptualised in the negative sense of minimising or resolving conflicts but also in the positive sense of ‘creating material conditions of security, economic welfare, political efficacy and psychic well-being’.<sup>21</sup> According to Hansen, the African perspective sees peace and development as intimately related. The perspective views peace in its transformation aspect, focusing on social systems at both national and international levels.<sup>22</sup> The history of colonisation could be the main reason why Africa sees peace and development as immensely linked. Therefore, according to Hansen, the African continent perceives peace as a broader concept that embraces communal living in harmony, human dignity and equal distribution of resources to achieve development.

Mikki van Zyl argues that peace in Africa must be linked to social justice and human security.<sup>23</sup> This author further argues that in order to achieve positive peace in Africa, there is a need to go beyond the political arena to address human security issues that are social and economic.<sup>24</sup>

For McCandless, the African perception of peace is based on societal relationships and harmony.<sup>25</sup> According to this author, African conception of peace is measured by the well-

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<sup>19</sup> Hansen further argues that the minimum interpretation of peace to concentrate on absence of conflict does not apply to Africa and is unacceptable because ‘it leaves the social and material conditions which cause tension and lead to conflict intact.’ See Hansen (n 15 above) 5.

<sup>20</sup> As above.

<sup>21</sup> Hansen further states that for Africa, the minimalist condition of peace which focuses on management of conflict leaving ‘the social and material conditions which cause tension and lead to conflict intact, is unacceptable.’ Hansen (n 15 above) 6.

<sup>22</sup> Hansen (n 15 above) 6.

<sup>23</sup> Mikki van Zyl ‘Peace in Africa’ available at <http://www.quaker.org/capetown/report01/pia.htm>, accessed 10 March 2017.

<sup>24</sup> Mikki van Zyl (n 23 above).

<sup>25</sup> E McCandless ‘Synopsis of major concepts’ in E McCandless & T Karbo (eds) *Peace, conflict, and development in Africa: a reader* (2011) 24.

being of the individual and his or her community.<sup>26</sup> The assertions that peace is associated with societal relationships find support in the work of Sibanda, who also argues that peace in Africa relates to tolerance, harmony coexistence and positive use of power without suppressing one another.<sup>27</sup>

Murithi argues that the African concept of ‘*ubuntu*’ has a strong bearing on peace.<sup>28</sup> This concept of *ubuntu* emphasises the importance of peace-making through the principles of reciprocity, inclusivity and a sense of shared destiny between people.<sup>29</sup> Although the concept of *Ubuntu* seems to have originated in South Africa as a result of Nelson Mandela’s views on forgiveness, Murithi argues that *ubuntu* is a concept found in East, Central and Southern Africa.<sup>30</sup> According to Murithi, the concept of *ubuntu* recognises the interconnectedness of everyone in the web of humanity.<sup>31</sup> *Ubuntu* is, therefore, an enabler to peace.

Murithi, however, warns that because Africa is not a monolithic continent, we should avoid generalisations of the extent to which African cultures have or lack progressive norms that enable the realisation of peace. He further argues that we should not romanticise indigenous approaches to resolving disputes because most African indigenous systems are exclusionary on gender. As will be discussed later in this chapter, some of the cultural perspectives on peace emanating from Africa are exclusionary and contravene human rights principles.

What can be concluded from the authors’ views discussed above is that the general perspective of peace in Africa is based on positive peace. Emphasis is placed on communal living in

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<sup>26</sup> McCandless (n 25 above).

<sup>27</sup> W Sibanda ‘An Analysis of the significance of myths and proverbs as African philosophies of peace and justice: cases of the Ndebele, Shona and Tonga tribes from Zimbabwe and the Igbo from Nigeria’ (2015) 20(4) *Journal of Humanities and Social Science* 1 6.

<sup>28</sup> T Murithi (a) ‘African approaches to building peace and social solidarity’ (2006) 6(2) *African Journal on Conflict Resolution* 9 14.

<sup>29</sup> T Murithi (b) ‘An African perspective on peace education: ubuntu lessons in reconciliation’ (2009) 55(2/3). *International Review of Education* 223 227.

<sup>30</sup> Murithi (b) (n 29 above).

<sup>31</sup> As above.

harmony and the equal distribution of power and resources. The next part discusses the conceptualisation of peace in specific parts of Africa.

### **2.2.1 West African concept of peace**

The work of Opoku discusses the West African view of peace.<sup>32</sup> Opoku argues that ‘African life and culture need to be understood to understand the meaning of peace, particularly looking at the principles that undergird them.’<sup>33</sup> The rationale for that approach is that peace in African societies is not based on established theories but is borne out of the experiences and reflections on life in all dimensions and the daily lives of the people.<sup>34</sup> The West African views on peace as presented by Opoku reflect the fact that peace is achieved when life is without any hindrance, constraints, impediments and threats, and ‘when all that is required to make life happy, prosperous and meaningful is attained.’<sup>35</sup> For West Africans, peace is a state where all forms of violence have been eliminated. Under the West African culture, peace cannot be achieved without the full co-operation of other community members.

This is revealed through proverbs that highlight the inclusive and cooperative nature of peace. For instance, there is a proverb that says, ‘it is better to build bridges than walls.’<sup>36</sup> Another proverb states that ‘if one does not like heat and others do not like cold, make it tepid and remain friends.’<sup>37</sup> These proverbs emphasise the importance of compromise to cater for the needs of everybody. The West African perspective views justice and peace as inseparable such that those who seek peace should not violate other people’s rights.<sup>38</sup> The Akan proverb that says that ‘if you trample on another person’s property in looking for your own, you will never find your own,’ emphasises this aspect.<sup>39</sup>

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<sup>32</sup> Opoku (n 17 above).

<sup>33</sup> Opoku (n 17 above).

<sup>34</sup> Opoku (n 17 above).

<sup>35</sup> Opoku (n 17 above) 417.

<sup>36</sup> As above.

<sup>37</sup> Opoku (n 17 above) 423.

<sup>38</sup> Opoku (n 17 above) 424.

<sup>39</sup> As above.

### 2.2.2 The East African concept of peace

Gebrewold brings out an East African perspective on peace among the Kambaata people of Ethiopia.<sup>40</sup> Peace is called *t`u`mmu* in the Kambaata language. According to Gebrewold, peace is viewed from three related terms. First, there is *t`u`mmu* which means peace in general. Secondly, peace is also termed *t`umu*, which means good, well, kind, and generous. The last term is *tu`mat* which means goodness and justice.<sup>41</sup> *T`u`mmu* is not only the absence of political conflicts but also includes economic and sociological satisfaction. Scarcity of livelihood, death of a relative, or a neighbour can be considered as the absence of peace. Therefore, peace does mean not only the absence of conflict but also the elimination of everything that disturbs the lives of human beings.<sup>42</sup> The “*Tu`mat*” principle, which represents justice, can be equated to civil and political rights. This includes political participation, freedom of speech and the right to administrative justice.

In the Kambaata culture, the shortage of cattle fodder is also viewed as the absence of peace.<sup>43</sup> Although it appears that the Kambaata perspective of peace might be too ideal and utopian in character, it reflects the expansive definition of peace. From a human rights perspective, this concept of peace symbolises a situation where political, economic, social and cultural rights are protected. The absence of cattle fodder reflects a negation of the state’s duties to provide for community development by supporting their source of livelihoods. Further, it also relates to the state’s duty to provide social security and assistance to its citizens. Suppose cattle farming is a source of livelihood for such communities, in that case, it means that the state should ensure that laws, policies, practical measures and strategies are put in place so that the source of living is not disrupted by the shortage of cattle fodder.

The Kambaata community equates peace to justice. The major shortcoming of their view on justice and peace is that justice is not applied universally. Justice varies according to social status. The degree of justice is affected by several variables such as one’s clan, age and gender.

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<sup>40</sup> B Gebrewold ‘*T`u`mmu: an East African Perspective*’ in W Dietrich (ed) *The Palgrave handbook of peace studies a cultural perspective* (2011) 428.

<sup>41</sup> As above.

<sup>42</sup> Gebrewold (n 40 above).

<sup>43</sup> Gebrewold (n 40 above) 429.



They believe that everyone has a share of justice equivalent to their status. Notions of justice for the commoners and the kings are totally different. The Kambaata perspectives of peace are in contravention of the right to equality and the right to the equal protection of the law. Gebrewold further states that the Kambaata perspectives do not, however, reflect the way Ethiopians or East African citizens as a whole conceptualise peace.

### 2.2.3 The African concept of *Ubuntu* and its contribution to defining peace

The concept of *Ubuntu* was popularised in South Africa. However, *Ubuntu* is a widely acknowledged concept across East, West Africa and Southern Africa.<sup>44</sup> The word *Ubuntu* comes from Bantu language which is common across Africa. The meaning of the term *Ubuntu* is the same in all languages.<sup>45</sup> *Ubuntu* concept places emphasis on solidarity, unity, communalism and mutual development.<sup>46</sup> The essence of *Ubuntu* is to provide a culture of peace, tolerance, peaceful co-existence and mutual development.<sup>47</sup> Asike states that *Ubuntu* is an all embracing African interpretation of both negative and positive peace.<sup>48</sup> In the Zimbabwean concept *Ubuntu* is called *unhu* which translate to good morals. <sup>49</sup> According to Shoko and Naidu, the concept of *unhu* discourages members of the community from engaging in behaviour that would hurt others. *Unhu* “aids a society to exhibit psychological and emotional objectivity, which plays a role in nurturing peace as a state of mind.”<sup>50</sup>

The concept of *Ubuntu* provides huge insights into the implementation of women’s right to peace. *Ubuntu* postulates peace that is all encompassing all aspects of humanism. *Ubuntu* is

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<sup>44</sup> J C Asike ‘The Philosophical concept of “ubuntu” as dialogic ethic and the transformation of political community in Africa’ (2016) 12 *Ogirisi: A New Journal of African Studies* 3; M Gerwin 1991. “Peace, Honesty, and Consent: A Hobbesian Definition of ‘Peace’.” (1991) 23(2/3) *Peace Research* 23 75–85.

<sup>45</sup> Asike (n 44 above).

<sup>46</sup> As above.

<sup>47</sup> Asike (n 44 above) 7.

<sup>48</sup> Asike (n 44 above) 3.

<sup>49</sup> E Shoko & M Naidu(a) ‘Peace-based Informal Practices around Shared Communal Water Resources in Tyrone Village of Mhondoro-Ngezi, Zimbabwe’ (2018) 13:2, *International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity*, 77, 82.

<sup>50</sup> E Shoko & M Naidu as above

an inclusive concept which in human rights terms refers to the right to equal participation. *Ubuntu* promotes respect for human dignity. It also speaks to elimination of social and economic inequality on the basis that Ubuntu concept places value on everyone. Ubuntu acknowledges the competence of everyone through the “I am because of who we are” mantra.<sup>51</sup>

### *Zimbabwean concept of peace*

In Zimbabwe, research by Africa Community Publishing Development Trust (ACPD)<sup>52</sup> reveals that Zimbabwean languages have many words for peace. The local languages define peace as *runyararo* in Shona and *ukuthula* in Ndebele. This means calmness and tranquillity. The calmness can be internal, external or both. The Zimbabwean concept of peace also includes words like “*kunzwirana*, or *ukuzwelana* in Ndebele, which means empathising and feeling for each other. This part of peace is geared towards ensuring harmonious relationships among individuals and community members. The Shona and Ndebele languages have rich proverbs to describe peace. One such proverb states that ‘*ngoma hairidzwe nedemo*’ literally translates as ‘don’t beat a drum with an axe.’ The proverb emphasises the fact that one should not use excessive force in responding to situations. Reasonableness should prevail in every situation. The proverb also means that you do not beat a drum which is a source of entertainment by using a destructive object. If you use an axe, you take away the entertainment. You also destroy the drum. This concept implies that one should not disrupt with peaceful situations.

There is also a Shona proverb that encourages co-existence amongst individuals. It states that ‘*chura kugara mumvura sandi mwana wegarwe*’ translates to mean a frog may live in the same pool as the crocodile, even though it is not a child to the crocodile.<sup>53</sup> This proverb encourages participation, co-existence, and the embracing of diversity in communal living. It also highlights the fact that one can access certain spaces and co-exist with the earlier occupants of those spaces despite the diverse differences. The Zimbabwean concept of peace includes calm,

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<sup>51</sup> Asike (n 44 above) 7.

<sup>52</sup> Africa Community Publishing and Development Trust (ACPD) ‘*Peace building an introduction for communities*’ (2002) 9.

<sup>53</sup> ACPD (n 52 above).

harmonious relationships and mutual understanding and compassion.<sup>54</sup> This conceptualisation of peace goes beyond negative peace and includes social justice.

ACPD describes peace as an inclusive concept that not only focuses on the absence of violence but on the active search for justice and the work of building a good society.<sup>55</sup> This good society has been defined as a society that possesses the following attributes:

- a) Positive relationships at all levels that are based on equity and understanding;
- b) A society that meets the minimum needs of everyone. It fulfils the social and economic rights;
- c) Strengthening of the social security for women;
- d) Respects of rights in compliance with the constitution, ensuring that both positive and negative obligations are met;
- e) Sense of belonging;
- f) Strong committed leadership which has strong institutions; and
- g) Fair distribution of power and resources.

The Zimbabwean concept of peace has been further portrayed as understanding peace not to be passive but as an ‘active search for justice and the work of building society.’<sup>56</sup> What can be deduced from the Zimbabwean perspectives of peace is that it is a concept centred on creating a good society based on the development of individuals and communities, equality and free from institutionalised violence.<sup>57</sup>

Shoko and Naidu’s research on conceptualisation of peace by rural communities indicated that rural communities perceive peace in terms of harmony, cooperation, sharing of natural

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<sup>54</sup> As above.

<sup>55</sup> ACPD (n 52 above) 45.

<sup>56</sup> ACPD (n 52 above) 15.

<sup>57</sup> The ACPD study revealed what a good society would encompass as a result of peace. This includes a sense of belonging, equality, fair distribution of power and resources and respect of citizen’s rights. ACPD (n 52 above) 15.

resources, elimination of corruption and inclusion.<sup>58</sup> Members of the community identified the characters of peaceful environment to include, living in harmony, absence of fear, empathy, inclusivity and equal access to resources.<sup>59</sup> The community also stated that corruption is a threat to peace. According to Shoko and Naidu's research eighty-nine percent of the respondents indicated that absence of corruption contributes to peace through adequate service provision.<sup>60</sup> The views were based on the fact that corruption results in exclusion from key decision making processes pertaining to service provision.

Research by Peace direct also revealed that Zimbabweans perceive peace not only in terms of political stability but also in relation to social and economic conditions.<sup>61</sup> The research further highlighted that the current state of economy which is unstable results in violation of peace.<sup>62</sup> Further it was also pointed that lack of respect for human rights violate peace.<sup>63</sup>

### **2.3 Peace as a legal concept**

Peace can be categorised into two classes that are internal and external peace.<sup>64</sup> External peace refers to the condition outside the human psyche. It also refers to human relations between individuals and institutions and the world at large. This external peace can also include issues of poverty, social justice, exclusion and direct violence. On the other hand, internal peace refers to one's inner sense of contentment. The legal conceptualisation of peace does not differentiate between inner and external peace. Rather, peace is just provided as an amorphous right.

The legal meaning of the right to peace is unascertained. Scholars have divided views on the legal entitlements of the right to peace. Therefore, the research's main thrust is to interrogate

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<sup>58</sup> E. Shoko and M. Naidu(b) 'The Conceptualisation of Peace in the Zimbabwean Rural Water Sector' (2020) 15(1) *Journal of Peacebuilding & Development* 31 44

<sup>59</sup> Shoko and Naidu (n 58 above) 32-34

<sup>60</sup> Shoko and Naidu (n 58 above) 38.

<sup>61</sup> Peace direct 'Local Voices for Peace in Zimbabwe Civil society perspectives on peace and conflict issues in Zimbabwe.' 2017 6.

<sup>62</sup> As above.

<sup>63</sup> Peace direct as above (n 61 above) 6.

<sup>64</sup> Rummel (n 4 above).

the concept of peace as a human right. In unpacking the main research question, what is the normative content of the right to peace? The following sub-questions are posed.

First, what does the right to peace entail? Secondly, what are the states' obligations pertaining to this right? Are there any advantages of having peace as a standalone right, or rather, should it be subsumed in the already existing rights? Lastly, is it not better to adopt a rights-based approach to peace instead of conceptualising peace as a human right?

Due to the difficulties of ascertaining the legal elements of the right to peace, scholars such as Wabel and Bolanos have argued that 'peace can only be described through its violations.'<sup>65</sup> Wabel argues that 'while it is difficult to define peace, it is rather easier to recognise its absence.'<sup>66</sup> This view is also supported by Bolanos, who argues that 'it is easy to acknowledge violations to peace and as a result, the evolution of the concept of peace relies on its breaches or threats posed to it.'<sup>67</sup> In essence, the elements of peace can be inferred from its violations, for example, physical, economic and social violence.

Peace is an undermined legal concept.<sup>68</sup> There has been no single legal definition of what the concept encapsulates, more so, what it means to women. Several scholars have therefore dismissed the recognition of peace as a human right. Barash argues that peace can never be achieved but can be approached.<sup>69</sup> Therefore, he argues that peace cannot be recognised as a human right. This is so because to argue strongly that the right to peace has been violated, the starting point would be to understand whether peace is defined accurately and agreed to by all. There should be a consensus among duty bearers, rights holders and enforcing judicial and quasi-judicial bodies on what peace means.

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<sup>65</sup> C Webel, 'Towards a philosophy and metapsychology of peace' in C Webel & J Galtung *Handbook of peace and conflict studies* (2007) 6.

<sup>66</sup> Webel (n 65 above).

<sup>67</sup> LRZ Bolanos 'The right of peace' (2010) 56 *Socialist Lawyer* 32 33.

<sup>68</sup> Bolanos (n 67 above).

<sup>69</sup> DP Barash *Approaches to peace: A reader in peace studies* (2000) 1.

Galtung's definition of peace not only provides a philosophical understanding of peace but its elements can be imported to gain a legal meaning.<sup>70</sup> Galtung postulates that peace should no longer be viewed in the negative terms as the absence of war but in a positive sense, which excludes structural violence.<sup>71</sup> Structural violence does not have persons or actors that can be pin-pointed as perpetrators but rather, the violence is rooted in the structures and manifests through inequalities in the distribution of power and life opportunities.<sup>72</sup> So if structures are designed in a manner that is not inclusive, it follows that the right to peace is being violated.

Galtung further argues that the most common element in the definition of peace is the absence of violence.<sup>73</sup> The absence of violence is not only confined to physical and tangible violence. Violence is 'present when human beings are being influenced so that their actual somatic and mental realizations are beyond their potential realisations.'<sup>74</sup> For Galtung, the difference between 'the potential and the actual, between what could have been and what is present, is violence.'<sup>75</sup>

This extended definition of violence questions the narrow definition of peace that equates peace to non-availability of physical violence on the basis that if it is to be accepted, 'highly unacceptable social orders would still be compatible with peace.'<sup>76</sup> These include cases where there is no physical conflict in a country, but people languish in poverty. Galtung's argument resonates with Amartya Sen's capability approach, which postulates that if human suffering is caused by factors that can be avoidable, then people's freedom is violated.<sup>77</sup> If women's

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<sup>70</sup> Pankhurst argues that Galtung's concept of positive and negative peace is subject to wide use by peace researchers. D Pankhurst 'The 'sex war' and other wars: towards a feminist approach to peacebuilding' (2003) 13(2&3) *Development in Practice* 154 156.

<sup>71</sup> J Galtung, 'Violence and peace' in P Smoker et al (eds) *A reader in peace studies* (1999) 9.

<sup>72</sup> Galtung further explains how intersectionality of factors such as poverty, lower status, and illiteracy aggravate the imbalance of power due to structural violence.

<sup>73</sup> Galtung (n 71 above)

<sup>74</sup> Galtung (n 71 above).

<sup>75</sup> Galtung (n 71 above).

<sup>76</sup> The author further argues that it is therefore, necessary to have an expanded definition of peace, but that definition should be logical and not merely a list of 'undesirables'. Galtung (n 106 above).

<sup>77</sup> A Sen *Development as freedom* (1999) 3.

poverty, discrimination, and limited access to resources are human-made, that violates the right to peace. Violence is therefore present when people cannot exploit their full potential if the state of affairs is avoidable.

Galtung further argues that positive peace should be the main definition of peace.<sup>78</sup> This kind of peace excludes structural violence. It is a condition of social justice that results in egalitarian distribution of power and resources.<sup>79</sup> This scholar, however, warns that the definition of peace should ‘depict a state of affairs,’ which at the end of the day does not reflect utopia.<sup>80</sup>

Galtung’s concept of positive peace has been criticised as having a utopian character.<sup>81</sup>

Bonisch criticises Galtung’s analysis of positive peace for its insufficient investigation of how the concept depends on social orders.<sup>82</sup> It has been argued that the concept has failed to address the problem of dangers to peace.<sup>83</sup> Bonisch argues that peace is an ideal that can only be achieved by changing class struggles.<sup>84</sup> Besides that, it remains an ideal. Bonisch’s criticism of positive peace cannot be ignored. For surely, peace depends and is influenced by social structures and relationships, means of production, control, and ownership. When conceptualising peace, one cannot afford to ignore the social environment because the failure to do so will result in recurrent conflicts. The social causes of violence or conflict need to be analysed.<sup>85</sup>

However, Bonisch’s criticism seems to be misplaced and has been made under the misinterpretation of Galtung’s peace theory. An analysis of the peace theory propounded by Galtung reveals that the relationship between peace and social orders has been taken into

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<sup>78</sup> Galtung (n 71 above).

<sup>79</sup> Galtung (n 71 above).

<sup>80</sup> Galtung (n 71 above) 168.

<sup>81</sup> A Bonisch ‘Elements of the modern concept of peace’ (1981) 18(2) *Journal of Peace Research* 165 167.

<sup>82</sup> Bonisch (n 81 above) 167.

<sup>83</sup> Bonisch (n 81 above) 167.

<sup>84</sup> Bonisch (n 81 above) 171.

<sup>85</sup> Pankhurst (n 70 as above) 156.

account. The issue then would be the extent to which the contribution of social orders has been taken into account in the legal definition of peace.

As Pankhurst argues, ‘the absence of analysis of the social causes of violent behaviour also paves the way for peace agreements which leave major causes of violent conflict completely unresolved.’<sup>86</sup> Further, Pankhurst opines that discussions on the causes of the conflict, particularly issues of management of the economy, social divisions, and social celebration of violent masculinities, are necessary if peace is to be truly achieved.<sup>87</sup> Pankhurst argues that normally these discussions ‘tend to be closed off, for the sake of ‘ending the violence.’<sup>88</sup>

Chaudhri has argued that the definition of peace differs according to the development in the country.<sup>89</sup> He states as follows:<sup>90</sup>

To the affluent society, peace means more directly the absence of nuclear war and disarmament, the maintenance of higher standards of living, and the protection of individual freedom. To people in the developing countries, on the other hand, peace means, first of all, the absence of social injustice and political instability, and escape from misery, poverty, and hunger.

As a result, it becomes very difficult to develop a single definition of peace. Garbutt then opts for what he termed ‘everyday peace.’<sup>91</sup> The concept of everyday peace acknowledges the complexity and fluidity of peace. As a result, Garbutt argues that the right to participation is therefore critical in defining peace in its everyday context.<sup>92</sup>

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<sup>86</sup> As above Pankhurst further argues that the failure to analyse the social causes of conflict will result in ‘negative peace which may not prolong and leave people in a worse state of affairs than that which motivated them to fight in the first place.’

<sup>87</sup> Pankhurst (n 70 above) 156.

<sup>88</sup> Pankhurst (n 70 above) 156.

<sup>89</sup> MA Chaudhri ‘Peace research and the developing countries’ (1968) 5(4) *Journal of Peace Research* 365 370.

<sup>90</sup> Chaudhri (n 89 above). Chaudhri’s view somehow explains the resistance behind the Northern countries towards the adoption of the Declaration on the right to peace. See Bailliet ‘s analysis of the resistance behind the adoption of the Declaration on right to peace. C Bailliet, ‘Untraditional approaches to law: teaching the international law of peace’ (2014) 1 *Santa Clara Journal of International Law* 1 1.

<sup>91</sup> R Garbutt ‘Everyday peace, human rights, belonging and local activism in a ‘peaceful’ nation’ in B C Goh et al (eds) *Activating human rights and peace, theories, practices and contexts* (2012) 144.

<sup>92</sup> Garbutt (n 91 above) 144. For Garbutt, peace is a cultural production and is in constant dialogue with one’s sense of belonging within a community and society.



Like Galtung, Shtromas and Anderson have broadened the definition of peace to include the absence of war or conflict and that economic exploitation is a violation of the right to peace.<sup>93</sup> They argue that if there is free trade and private ownership of the means of production, there will be no motivation to initiate war. As a result, people have sustainable peace. Other scholars such as Boulding,<sup>94</sup> McCandless<sup>95</sup> and Martin<sup>96</sup> have also borrowed from Galtung's work and expanded the definition of positive peace to include social justice and equal distribution of power and resources. McCandless argues that peace is a situation where there is 'peaceful, just structures' and reduction of physical and structural violence. Furthermore, peace is also connected to issues of social and economic development.<sup>97</sup> Tomasevski argues that peace is the supreme value of international law.<sup>98</sup> Tomasevski argues further that peace is not measured by avoiding violent conflicts but by eliminating the institutionalised violation of human rights and fundamental freedoms.<sup>99</sup>

Porter argues that in order to protect women's peace, different conceptualisations of insecurity need to be taken into account so that the root cause of such insecurities are addressed.<sup>100</sup> This author's analysis is very useful as it brings out the importance of context analysis before coming up with any possible solutions and strategies to achieve women's right to peace. Porter's argument requires us to look at security from a wider perspective, including personal,

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<sup>93</sup> A Shtromas & GL Anderson 'What is peace and how could it be achieved?' (1995) 12(1) *International Journal on World Peace* 15 16.

<sup>94</sup> KE Boulding *Stable peace* (1978) 3.

<sup>95</sup> McCandless (n 25 above).

<sup>96</sup> FE Martin 'Critical analysis of the concept of peace in international relations' (2005) (37(2) *Peace and Research Journal* 45.

<sup>97</sup> McCandless (n 25 above) 39.

<sup>98</sup> K Tomasevski 'The right to peace' (1982) 5(1) *Current Research on Peace and Violence* 42 44.

<sup>99</sup> Tomasevski (n 98 above) 45.

<sup>100</sup> E Porter 'Women, peace and securing human rights' in B Goh et al *Activating human rights and peace, theories, practices and contexts* (2012) 204. This author further argues that a multi-dimensional view of security is necessary so as to analyse how such insecurities arise, and also how people respond to such insecurities are they are able to defend their rights.

state security and social and economic security. Porter, just like Garbutt, believes that sustainable peace has to be grounded in the immediacy of fulfilling ordinary daily needs.<sup>101</sup>

The right to peace has various underlying determinants. Fried argues that co-operation, freedom, independence, national sovereignty, equality, human rights and a fair and equitable distribution of resources are the determinants of peace.<sup>102</sup> Fried's view is reflected in article 23 of the ACHPR, which provides for the need to preserve international relations and co-operation in order to achieve peace. Przetacznik argues that sustainable peace is based on the observance of human rights, prohibition of all forms of oppression, protection of the right to self-determination and abolition of colonisation.<sup>103</sup>

An analysis of all the definitions of peace concludes that although peace is a fluid concept, it has to be expanded to include the elimination of structural violence, marginalisation and exclusion of other groups in a society. As aptly pointed out by Bolanos, 'we all have a notion of what peace entails in general terms, yet definitions will always be insufficient.'<sup>104</sup> What can be concluded from the above scholarly work is that the realisation of human rights results in peace. The right to peace includes respect for the following fundamental human rights principles: participation, equality, non-discrimination and dignity. Only when people participate can they influence the legal meaning of peace and how they want to exercise that right. Equality is central in ensuring that all people are included in peace and conflict resolution processes.

Lastly, the right to dignity is a prerequisite for the realisation of all other rights and is therefore instrumental in implementing the right to peace. The definition of peace differs from country

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<sup>101</sup> Porter (n 100 above) 205.

<sup>102</sup> E Fried 'The United Nations' effort to establish a right of the peoples to peace' (1990) 2 *Pace Yearbook of International Law* 21 23.

<sup>103</sup> F Przetacznik 'The philosophical concept of peace as a basic collective human right' (1987) 26 *Military Law & the Law of War Review* 361 364. This author defined peace as 'an existence of internal tranquillity within a state based upon the recognition, guarantee and strict observation of the basic human rights of all individuals living in such a State and normal relations with other States based upon mutual recognition and observation of the rights and vital interests of each other.' 361.

<sup>104</sup> Bolanos (n 67 above).

to country. Hence, this study will adopt a concept of peace that takes into account human rights principles of participation, human dignity and equality as the ‘foundation of positive peace.’<sup>105</sup>

Can it then be said that African countries that are generally underdeveloped are not peaceful? The answer would be in the negative. A general situation of underdevelopment does not automatically lead to a violation of the right to peace. Scholars have argued that positive peace is a situation where there is equal distribution of resources and the elimination of structural violence.<sup>106</sup> So, if a country is generally poor, but its citizens do not experience structural violence, unfair distribution of resources and social injustice, the country can still be identified as peaceful. The argument is that negative peace simply focuses on security breaches, whereas positive peace is broader. It includes situations where inequalities, social injustice, exploitation, and exclusions are absent. An argument can be made that despite the nonexistence of a benchmark on positive peace, countries that struggle economically may not be violating the right to peace if the fundamental principles of human rights such as equality, human dignity, and participation are observed in the ailing countries. States that do not achieve ideal standards of democratization can be said to be violating the right to peace. It should be noted that the ideal standard of democracy differs. However, the minimum ideal of democracy is provided in human rights instruments. It is that standard that we can use to measure a violation of the right to peace.

#### **2.4 Feminist perspective on peace**

Feminism is a tool that tackles women’s oppression and highlights the inequalities perpetrated on women due to their sex. According to Reardon, feminism argues that peace has always been viewed from the masculine perspective.<sup>107</sup> This argument is based on the fact that the focus on peace has been on eliminating conflict through the use of weapons to defend the state’s

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<sup>105</sup> In relation to peace as a foundation for positive peace see C Bailliet ‘Untraditional approaches to law: teaching the international law of peace’ (2014) 12(1) *Santa Clara Journal of International Law* 5 20.

<sup>106</sup> Hansen (n 15 above); Galtung (n 13 above), MacCandless (n 25 above).

<sup>107</sup> B Reardon ‘Feminist concepts of peace and security in P Smoker et al (eds.) *A reader in peace studies* 138.

interests.<sup>108</sup> It is now agreed among feminists that peace and security need to be redefined to include positive peace.<sup>109</sup>

Positive peace is broader than state security and includes the conditions of social justice, economic equality, and ecological balance.<sup>110</sup> Reardon argues that social justice, economic equality, and ecological balance are conditions that are enablers of peace because they are more ‘life-affirming and less likely to produce the types of conflicts which lead to armed violence and war.’<sup>111</sup> This is because physical violence normally erupts due to unfulfilled social and economic needs. Therefore, the feminist view on peace is mainly based on equality between men and women.<sup>112</sup>

According to feminists, peace is defined as ‘a condition of social justice and equality but mostly equality between women and men as the foundation for equality among all peoples.’<sup>113</sup> This understanding of peace is common among the different strands of feminism. Equality then enables women to participate in all spaces where they can influence decisions that have a bearing on the enjoyment of their right to peace. Equality and social justice principles are important in the feminist fight for liberation from male subordination.

However, the method of attaining equality might differ. For liberal feminism, legislation that levels the playing field enables equality between the sexes.<sup>114</sup> For radical feminists, a complete overhaul of structures that perpetuate patriarchy and male dominance is the only way to achieve true equality.<sup>115</sup> In addition, the radicals argue that as long as technology on reproduction has

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<sup>108</sup> Reardon (n 107 above).

<sup>109</sup> Reardon (n 107 above) 136.

<sup>110</sup> Reardon (n 107 above) 138.

<sup>111</sup> Reardon (n 107 above).

<sup>112</sup> Reardon (n 107 above).

<sup>113</sup> As above.

<sup>114</sup> H Barnett ‘Schools of feminist jurisprudential thought’ in H Barnett *Introduction to feminist jurisprudence* (1998) 121.

<sup>115</sup> Barnett (n 114 above).

not come to the rescue of women, women's oppression will never cease. Women's reproductive roles of childbearing and wifehood are seen as creating conditions for perpetual oppression. The black feminist thought advocates for an analysis of interlocking oppressions.<sup>116</sup> They argue that women's lives are a web of oppression caused by discrimination, gender, race and class.

According to a black feminist thought, laws and policies should respond to women's various interlocking oppressions. African feminists have dissociated themselves from the term feminism. They felt that feminism did not respond to their concerns as black women. Black feminists, therefore, prefer to be referred to as womanists. The term 'Africana womanism' has been adopted to explain black women's theorising of oppression. 'Africana womanism' rejects feminist grand theorising of patriarchy as the only oppressive factor in women's lives. Hudson-Weems argues that 'feminism historically focused monolithically on patriarchal oppression, failing to acknowledge the intersectional nature of both womanhood and gender-based oppression.'<sup>117</sup>

Hudson further argues that 'Africana womanism highlights and expresses the unique beliefs, values and oppressions of Africana women.'<sup>118</sup> For black women, 'race' is an oppressive factor and affects women's social and economic rights. Black women suffer from the effects of colonisation together with African men. Africana womanism argues that before we move to gender, issues of racial discrimination should be addressed. Unequal bargaining powers at international markets between developed and developing countries affect both men and women. So, instead of fighting men, Africana womanism's approach is that we need to hold hands with men and fight racial discrimination. Issues of gender equality should be tackled by both men and women working together and not as antagonists.

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<sup>116</sup> See K Crenshaw 'Mapping the margins: intersectionality, identity politics, and violence against women of color.' (1991) 43(6) *Stanford Law Review* 1241 1245; P Hill-Collins *Black feminist thought: knowledge, consciousness, and the politics of empowerment* (1991) 10.

<sup>117</sup> C Hudson-Weems 'Africana womanism. the flip side of the coin' (2001) 25(3:2) *The Western Journal of Black Studies* 137 140.

<sup>118</sup> Hudson-Weems (n 117 above).

Reardon argues that emphasis on the military over other forms of security results from the fact that men determine these matters.<sup>119</sup> According to Reardon, a masculine view of the world tends to emphasise institutions such as corporations, universities, political parties, international organisations and how they can be run to maximise the interests or ideology of a particular group.<sup>120</sup> She further argues that a feminine view emphasises human relationships and how people behave to fulfil their human needs. The argument by Reardon is based on the assumption that women are a heterogeneous group. It is based on stereotypes of what femininity is all about, and if such conceptualisation of peace is to be taken into account, it will be problematic in the sense that it reduces women's roles in peace-making to the feminine tasks, which are undervalued. As such, their contribution to peace will be minimal. The views by Reardon do not aptly capture the different feminist views on peace. It is based on relational feminism, which argues that women are relational in nature and, as such, their decisions are based on consideration of others.

Feminism has different explanations for women's oppression. Thus, despite the differences in philosophies, whether feminism or womanism, peace should be defined from women's standpoints. Those that complain about its violation should describe peace. Scholars have argued that peace is difficult to define but easier to recognise in its absence. So, those that are victims of its violation should participate in defining it.

This research argues that discrimination against women limits their right to participate in maintaining peace and violates the right to peace, as provided in Article 10 of the Maputo Protocol. As such, the elimination of discrimination will result in positive peace. It has already been stated by the Committee on the Convention on the Elimination of all Forms of Discrimination against Women that discrimination is a form of violence against women.<sup>121</sup> Gender inequalities are often responsible for women's vulnerability.<sup>122</sup>

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<sup>119</sup> Hudson-Weems (n 117 above) 139.

<sup>120</sup> Reardon (n 107 above).

<sup>121</sup> Convention on the Elimination of all Forms of Discrimination Against Women General Recommendation Number 19.

<sup>122</sup> J A Tickner 'Introducing feminist perspectives into peace and world security courses' (1995)25(3/4) *Women's Studies Quarterly Rethinking Women's Peace Studies* 48 51.

## 2.5 Equality and peace as correlative rights

Peace and equality are correlated rights. This study argues that equality is a prerequisite to realising women's right to peace. In order to enjoy their peaceful existence, which is guaranteed in Article 10 of the Maputo Protocol, women's lives should be free from discrimination of all forms. In order to realise the right to peace, the notion of peace should move from viewing women as objects that only need protection and lack the ability to protect themselves. Women should be viewed as individuals that have the potential to shape their destiny and decide what peace means to them. In this regard, the participation of women in every aspect of decision making, i.e., political, social, and economic spaces, becomes very key.

Peaceful existence cannot come into realisation without achieving equality. As long as women are considered as the second sex or as less human beings, the right to peace will not be achieved. Gender equality should be viewed as an integral principle in every aspect of peace. In this regard, participation is integral to the realisation of the right to peace, as exclusion results in the imposition of the meaning of peace. What may be perceived as conditions necessary to realise the right to peace may not be conducive to women. Thus, it is important that participation should not just be a token but should be meaningful. It is important to interrogate the environment for participation. It has to be conducive enough to allow meaningful participation. In order for that to take place, women also need to have agency. They need to understand the problem and be clear on how to solve it, particularly the identification of structural violence that inhibits women's participation. They also need to problematise a system that shuts them out.

Article 10(2a) of the Protocol becomes very relevant as it highlights the importance of education programmes for peace and a culture of peace. A culture of peace needs to be inculcated in life such that when violations occur, everyone can point them out. The United Nations General Assembly, 2016 Declaration on the Right to Peace, provides that 'states should respect, implement and promote equality and non-discrimination, justice and the rule of law, and guarantee freedom from fear and want as a means to build peace within and between societies.'<sup>123</sup> The Declaration acknowledges that the right to equality is a pre-requisite for the right to peace. Therefore, this research argues for the kind of peace that results in the

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<sup>123</sup> Art 2.

elimination of structural violence and in ensuring that everyone, regardless of race, sex, age or marital status, can participate in determining their peaceful existence.

## **2.6 Right to dignity as a determinant of the right to peace**

This study further argues that the denial of the right to dignity is also a violation of the right to peace. Exclusion from participation strips one of dignity as it has the effect of reducing people to lesser human beings. The right to dignity is inherent in all human beings by virtue of their personhood. It is a non-derogable right. Women's dignity is central to the protection of all forms of violations. The Maputo Protocol demands that women should be protected from all forms of violence.<sup>124</sup> This study argues that the failure to protect women from all forms of violence, whether during armed conflict or during the so-called peace times, is not only a violation of the right to dignity but also a violation of the right to peace.

The Preamble to the 2016 Declaration on the Right to Peace acknowledges the relationship between human dignity and peace. It provides that 'recalling further that the culture of peace and the education of humanity for justice, liberty and peace are indispensable to the dignity of human beings and constitute a duty that all nations must fulfil in a spirit of mutual assistance and concern.'<sup>125</sup>

## **2.7 Right to peace and the right to development**

The right to development is intricately linked to the right to peace. The relationship between the right to peace and development has been emphasised in various international and regional human rights instruments such as the Universal Declaration of Human Rights (Universal Declaration), the UN Declaration on the Right to Development, the ACHPR, the Maputo Protocol, the Constitutive Act of the African Union and the PSC Protocol, and several UNGA resolutions on peace.

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<sup>124</sup> Art 3(4) of the Maputo Protocol.

<sup>125</sup> Preamble to the 2016 Declaration on the right to peace. The Declaration was adopted by the UNGA on 2 February 2017.



The Constitutive Act of AU is alive to the fact that conflicts in the region are a stumbling block to development. The Act provides that there is a need to promote peace, security and stability as prerequisites for the implementation of development.<sup>126</sup>

The objectives of the PSC also highlight the relationship between peace and development. Article 3 of the PSC Protocol provides that the objective of the PSC is to

‘Promote peace, security and stability in Africa, in order to guarantee the protection and preservation of life and property, the well-being of the African people and their environment, as well as the creation of conditions conducive to sustainable development.’

Article 28 of the Universal Declaration provides that everyone is entitled to a social and international order in which the rights and freedoms can be fully realised. The obligation under article 28 requires all states to contribute towards creating order that enables peaceful existence and development. The Universal Declaration also provides that education should be comprehensive, all-encompassing and focus on development and the maintenance of peace.<sup>127</sup>

Article 3(2) of the Universal Declaration provides that ‘the realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations.’ Article 3 of this Declaration advances the right to peace amongst states by promoting friendly relations.

The UNGA 2016 Declaration on the right to peace provides that ‘peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being.’<sup>128</sup> It further provides that ‘development, peace and security and human rights are interlinked and mutually reinforcing.’<sup>129</sup>

UN Resolution 67/173 of 2013 also provides that peace and development are mutually reinforcing.<sup>130</sup> The resolution further states that ‘human rights include social, economic and

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<sup>126</sup> Preamble to the African Union Constitutive Act.

<sup>127</sup> Art 26.

<sup>128</sup> Preamble to the 2016 Declaration on the right to peace.

<sup>129</sup> Preamble to the 2016 Declaration on the right to peace.

<sup>130</sup> Preamble to the resolution.

cultural rights and the right to peace, a healthy environment and development, and that development is in fact the realization of those rights.’<sup>131</sup>

## **2.8 Power and peace discourses: A need to interrogate power relations to achieve peace**

‘We have to achieve gender equality in society. We will then acquire power which will give us the means to achieve sustainable peace.’<sup>132</sup>

The above statement highlights the importance of power in the discourse of peace. It also aptly describes the conditions that are necessary to achieve peace. Discourses on peace are shaped by power. Those that have power determine what is considered peaceful. Therefore, equality and participation are central tenets in the realisation of the right to peace. In order for women to have meaningful participation, the power issue needs interrogation. When one has power, regardless of its nuances, he or she can determine the agenda.

According to UN Women, very few peace agreements include any reference to gender or deal with gender-related issues.<sup>133</sup> The major reason is that women are excluded from the peace table. In cases where they are included, women rarely have the power to influence the agenda. Access to power is revealed by being able to set the agenda. If women are to gain access and be able to participate in peace processes fully, there is a need to understand the power dynamics that fuel exclusions.<sup>134</sup> According to Carlman, ‘analysis of power must therefore investigate the power used to prevent issues, individuals or groups of people from being considered relevant in the first place.’<sup>135</sup> It needs an interrogation on the relationship between structural violence that women face and the distribution of power.

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<sup>131</sup> Preamble to the resolution.

<sup>132</sup> A Carlman (ed) *Equal power lasting peace. obstacles for women 's participation in peace process* (2012) 13

<sup>133</sup> UN Women ‘*Nations Entity for Gender Equality and the Empowerment of Women paper*’ (2010) 6.

<sup>134</sup> Carlman (n 132 above) 13. Carlman further argues that we should learn to recognise the way power travels through formal and informal settings. Such appreciation assists in coming up with interventions and strategies for overcoming exclusion.

<sup>135</sup> Carlman (n 132 above). This author further argues there is a need for an examination of ‘gender power relations that uphold the status quo and investigate the process by which certain issues are put on the peace agenda and others not.’

The exclusion of women from Zimbabwe's peace negotiating discussions over the years is a clear example of the unequal power relations in this society. It reflects the fact that the women in Zimbabwe lack the power to decide the contents of the peace that they want despite falling victims of endured political violence and also having a history of participating with men side by side in the struggle. After independence, women were side-lined, and the power that was conveniently and temporarily awarded during the liberation struggle was stripped off.<sup>136</sup>

Carlman correctly argues that gender roles in times of war may become less fixed, and women sometimes manage to gain more influence, but this often decreases once the war is officially over.<sup>137</sup> As a result, power gained in one space may be held back by substantial exclusion in another.<sup>138</sup> Zimbabwe's history clearly reveals this position. Women fought side by side with men during the liberation war, and once it was over, the women's role was under-rated. As a result, women's access to public life was blocked. They were relegated to the kitchen.

With the aid of Lukes' theory of power, it is important to understand what kind of power acts as a barrier to the realisation of the right to peace.<sup>139</sup> There is a need to strategise on how oppressive power can be neutralised to achieve the right to peace.<sup>140</sup> According to Lukes, there are three dimensions of power. These are the visible, invisible and hidden power.<sup>141</sup> Visible power is transparent and normally exercised in 'situations of transparent exchange and interaction, inclusive of legal and legitimate process of decision-making.'<sup>142</sup> Visible power can manifest in all spaces, such as political, religious and social.

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<sup>136</sup> Carlman (n 132 above) 8.

<sup>137</sup> Carlman (n 132 above) 8.

<sup>138</sup> Carlman (n 132 above) 112.

<sup>139</sup> S Lukes *Power: a radical view* (2005) 4.

<sup>140</sup> It is critical to note that not every form of power is oppressive. There is the power that is supportive and inclusive.

<sup>141</sup> Lukes (n 139 above).

<sup>142</sup> BA Andreassen & G Crawford 'Power human rights and civic action: conclusions' in BA Andreassen & G Crawford (eds) *Human rights, power and civic action comparative analyses of struggles for rights in developing societies* (2013) 218.

Hidden power ‘entails pulling of strings behind the scenes and the execution of power to determine which issues are included in public discourse and in policy-making and which are excluded’.<sup>143</sup> Hidden power can take the form of ‘local protectionism,’ where local power agents protect their principals. Lastly, invisible power manifests itself in attitudes, life views and behavioural norms embedded in societal traditions and customs. This research will interrogate all three forms of power in order to examine the causes of women’s exclusion at the peace tables. There might be cases of nesting of power when all forms of power manifest and reinforce discrimination of women from participating in peace decision making structures.

Women have different security concerns due to the level of power they possess. Variables such as class and age determine access to power as well. Elite women may possess enough power to protect themselves from some forms of violence such as poverty and exclusion from political participation. Whereas for uneducated women, the lack of resources, rurality and poverty might render them powerless in any form of decision making, whether at the household or national level. Therefore, these two categories of women experience insecurities differently. The power to influence decision making is therefore critical at all levels. Consequently, whatever form or source of power should be interrogated in order to protect women’s right to peace.

## **2.9 The right to peace under the United Nations human rights framework**

The right to peace has not been acknowledged in a binding human rights instrument globally. There has not been any consensus on the status of peace as a human right. The United Nations General Assembly has adopted several declarations and resolutions. The first document by the United Nations General Assembly to recognise peace as a human right is the 1984 Declaration on the Right of Peoples to Peace.<sup>144</sup> This declaration provides that ‘the peoples of our planet have a sacred right to peace.’<sup>145</sup> The declaration provides that the obligation to maintain peaceful relations rests on the states. It adopts a narrow interpretation of peace. The conception of peace in this declaration is mainly directed towards eliminating conflicts among states. It provides that:

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<sup>143</sup> Andreassen & Crawford (n 142 above).

<sup>144</sup> The declaration was approved by General Assembly resolution 39/11 of 12 November 1984.

<sup>145</sup> Art 1 of the Declaration.

Ensuring the exercise of the right of peoples to peace demands that the policies of states be directed towards the elimination of the threat of war, particularly nuclear war, the renunciation of the use of force in international relations and the settlement of international disputes by peaceful means on the basis of the Charter of the United Nations.

The 1984 Declaration of the Right of Peoples to Peace was succeeded by numerous resolutions that emphasized states' obligation to maintain peaceful relations. Some of the resolutions adopted include the following:

- Resolution 39/157 adopted on 17 December 1984 entitled Implementation of the Declaration on the Preparation of Societies for Life in Peace.
- Resolution 40/11 on the right of peoples to peace adopted on 7 December 1987.
- Resolution 57/216 on the right of peoples to peace adopted on 18 December 2002.
- Resolution /65/222 adopted by the UN General Assembly on 21 December 2010, Resolution 58/192 adopted by the UN General Assembly on 22 December 2003, Resolution 60/163 adopted by the UN General Assembly on 16 December 2005 on the promotion of peace as a vital requirement for the full enjoyment of all human rights by all.
- Resolution 67/173 adopted on 22 March 2013 on promoting peace as a vital requirement for the full enjoyment of all human rights by all.

The 2013 Declaration highlights the connection between peace and development. It states that-

... the deep fault line that divides human society between the rich and the poor and the ever-increasing gap between the developed and developing world's pose a major threat to global prosperity, peace and security and stability.<sup>146</sup>

### ***2016 Declaration on the Right to Peace***

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<sup>146</sup> Art 4 of the Declaration.

The 2016 Declaration on the right to peace is more elaborate in terms of grounding the right to peace in the human rights instruments.<sup>147</sup> The 2016 Declaration refers to the Universal Declaration, the CCPR, CESCR and other UN member states' commitments that promote the realisation of peace, such as the Declaration on the Right to Development, the United Nations Millennium Declaration, 2030 Agenda for Sustainable Development, the Sustainable Development Goals, and the 2005 World Summit Outcome.

This Declaration provides the right to enjoy the peace and not the right to peace. In essence, it affirms other previous declarations on the right to life in peace. The right to enjoy the peace and the right to peace are fundamentally two different rights. The difference lies in the sense that the right to enjoy peace simply refers to creating a condition that enables one to enjoy peace. This can be in the form of promoting human rights principles provided under the various UN instruments. This is expressed in Article 1 of the Declaration, which states that 'everyone has the right to enjoy peace such that all human rights are promoted and protected, and development is fully realized.' The right to peace recognises peace as a standalone human right. It accords rights holders the entitlement to whatever they term 'peace'. Despite the difference in semantics, the end result is the realisation of peace for citizens of this world.

The 2016 Declaration is more progressive because it provides a human rights framework to peace, unlike its predecessor, the 1984 Declaration on the Right of Peoples to Peace. Further, the 2016 Declaration treats the right to peace as both a group right and an individual right, unlike the narrow conception of the right to peace as a group right as provided in the 1984 Declaration.

### ***United Nations Security Council resolutions on women and Peace***

Several resolutions have been passed that provide for women's protection and participation in peace and conflict resolutions. These are-

Resolution 1325 of 2000 adopted by the Security Council on 31 October 2000.

Resolution 1327 (2000) adopted by the Security Council on 13 November 2000.

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<sup>147</sup> The Declaration on the Right to Peace was adopted by the General Assembly Resolution 71/189, on 17 December 2016 available at: <http://www.refworld.org/docid/589c72134.html> accessed 25 August 2018.

Resolution 1366 (2001) adopted by the Security Council on 30 August 2001.

Resolution 1408 (2002) adopted by the Security Council on 6 May 2002.

Resolution 1820 (2008) adopted by the Security Council on 19 June 2008;

Resolution 1888 (2009) adopted by the Security Council on 30 September 2009.

Resolution 1889 (2009) adopted by the Security Council on 5 October 2009.

Resolution 1960 (2010) adopted by the Security Council on 16 December 2010.

Resolution 2106 (2013) adopted by the Security Council on 24 June 2013.

Resolution 2122 (2013) adopted by the Security Council on 18 October 2013.

Resolution 242 (2015) adopted by the Security Council on 13 October 2015.

Resolution 2272 (2016) adopted by the Security Council on 11 March 2016.

Resolution 2331 (2016) adopted by the Security Council on 20 December 2016.

However, all these resolutions do not provide for peace as a human right. They, however, focus on the protection and participation of women in conflict and post-conflict societies, which also guarantees the realisation of the right to peace.

## **2.10 Meaning of peace that can be deduced from AU instruments.**

The AU has various instruments that provide for peace. These instruments include the Constitutive Act of AU, Protocol Relating to the Establishment of the Peace and Security Council of the African Union, African Charter on Democracy, Elections and Governance, ACHPR and the Maputo Protocol.

Except for the ACDEG, a reading of the AU instruments concludes that the AU is more aligned to the negative peace. The ACHPR captures the right to peace from a security point of view. It seeks to protect states from invasion terrorism and emphasises solidarity among states on peace and security issues.

The AU Constitutive Act has provisions that promote the peaceful resolution of conflicts among members, the prohibition of the use of force and the non-interference in internal members of the AU. Article 4(i) specially provides for the 'peaceful co-existence and the right

to live in peace and security.’ The Maputo Protocol focuses on the participation of women in peace and conflict resolution processes. Article 10 of the Maputo Protocol is only limited to conditions that necessitate negative peace such as conflict prevention, post-conflict reconstruction, and participation in structures for the management of asylum seekers.

The ACDEG has provisions that necessitate the realisation of peace in its expansive form. These include the duty of states to focus on human security,<sup>148</sup> the alleviation of poverty,<sup>149</sup> and the provision of basic social services.<sup>150</sup>

It is argued that the framing of women’s right to peace under the African Human Rights Architecture is limited to issues of participation and elimination of physical conflicts, yet from the African perspective, peace is understood to include more than the elimination of physical violence. Peace translates to social and economic equality. The ACHPR and the Maputo Protocol adopt a military approach to peace. In as much as the Maputo Protocol introduces the concept of inclusion, that is not enough. Including women in a limited peace framework will not transform the unequal social and economic inequalities which violate women’s right to peace.

### **2.10.1 Right to life in peace**

Given the lack of consensus on the status of peace as a human right, there have been arguments that a human rights-based approach (HRBA) to peace should be adopted instead of recognising peace as a human right. Another alternative argument is to have a right to life in peace on the basis that it is being derived from an already existing right that is backed by international law. Despite the difference in approach, what is clear is that a peaceful environment is desirable for all nations. The manner and content of that peaceful existence, however, differs.

It has been argued that ‘the legal basis of peace as a basic human right emanates from the right to life.’<sup>151</sup> The right to life in peace can be interpreted in multiple ways. First, it can mean that a person has the right to life in the general sense of being able to live. The right to life has both

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<sup>148</sup> Art 37.

<sup>149</sup> Art 40.

<sup>150</sup> Art 41.

<sup>151</sup> Puyana (n 18 above).



negative and positive obligations on states. The negative obligations denote that states should refrain from taking away human life save for exceptional circumstances provided by the law.

The positive obligation entails that the state, other than refraining from taking life, should take more action to ensure an adequate standard of living. In this regard, an adequate standard of living, the right to dignity and the right to the highest attainable standard of health become elements of the right to life in peace. This right simply means you need to live your life free of any hindrances or obstacles that negatively affect the enjoyment of the right to life.

The right to life in peace differs from the right to peace because the right to peace implies that an individual or groups have the right to a life of tranquillity measured by the total elimination of all forms of violence. In the second approach, the right to life becomes an element of the right to peace. You need to live in order to enjoy the right to peace. The right to life becomes a prerequisite of the right to peace. In the first approach, peace is passive, and in the second approach, peace becomes active. It becomes the subject being acted upon. In the first approach, life is the subject, and peace enables the right to life. Peace is dependent on one having a life. The right to life in peace is more applicable to individuals than states, while the right to peace includes individual and state relationships. It involves issues of self-determination, sovereignty and international relationships.

The right to life in peace is recognised by the United Nations Charter, the Declaration of the Programme of Action on a Culture of Peace and the UDHR. The Declaration of Human Rights and on Preparation of Societies for life in Peace provides for the right to life in peace.<sup>152</sup> It provides that ‘every nation and every human being, regardless of race, conscience, language or sex, has the inherent right to life in peace.’<sup>153</sup>

Article 1 of the UDHR provides that

Every nation and every human being, regardless of race, conscience, language or sex, has the inherent right to life in peace. Respect for that right, as well as for the other human rights, is in the common interest of all mankind and an indispensable condition of advancement of all nations, large and small, in all fields.

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<sup>152</sup> Declaration was adopted by the United Nations General Assembly resolution 33/73 on the 15 December 1978.

<sup>153</sup> Art 1 of the Declaration.

The Declaration and Programme of Action on a Culture of Peace provides that

A culture of peace is a set of values, attitudes, traditions and modes of behaviour and ways of life based on:

- a. Respect for life, ending of violence and promotion and practice of non-violence through education, dialogue and cooperation.<sup>154</sup>

### **2.10.2 The right to live in peace**

The right to live in peace is derived from the right to life, which is provided in the UDHR,<sup>155</sup> the CCPR,<sup>156</sup> the CESCRC<sup>157</sup> and the ACHPR. The Committee on Civil and Political Rights' General Comment Number 6 of 1982 on the right to life pointed out the need to live in peace.<sup>158</sup> The General Comment stated a connection between the right to life as provided in Article 6 and the prohibition of propaganda for war as provided in Article 20. The General Comment notes that strengthening international peace and security constitutes the most important condition and guarantee for the safeguarding of the right to life.<sup>159</sup>

The Committee on Civil and Political Rights General Comment No. 14 of 1984 on the right to life also emphasises the right to live in peace.<sup>160</sup> The General Comment condemns the designing, testing, manufacturing, possession, and deployment of nuclear weapons since this disrupts the peace and threatens the right to life.<sup>161</sup> However, the two General Comments limit their scope of peace to state relations and the prohibition of war.

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<sup>154</sup> The Declaration and Programme of Action on a Culture of Peace was adopted by the United Nations General Assembly on 13<sup>th</sup> September 1999.

<sup>155</sup> Art 3.

<sup>156</sup> Art 6.

<sup>157</sup> Art 11 of the ICESCR. Art 11 provides for the right to an adequate standard of living translate to the right to life.

<sup>158</sup> The General Comment was adopted by the Human Rights Committee on 27 July 1982 16<sup>th</sup> session.

<sup>159</sup> Para 2 of the General comment.

<sup>160</sup> General Comment No. 14: Article 6 (Right to Life) Nuclear Weapons and the Right to Life was adopted at the Twenty-third Session of the Human Rights Committee, on 9 November 1984.

<sup>161</sup> Para 4 of the General Comment.

The United Nations Charter implores all states to ‘practice tolerance and live together in peace with one another as good neighbour and maintain international peace and security.’<sup>162</sup> It further outlines the fact that the purpose of the United Nations is mainly to maintain peace and security through collective measures. These will result in a peaceful environment.

Puyana argues that ‘the right to live in peace is more acceptable to states than the right to peace.’<sup>163</sup> This argument is based on Puyana’s perception that the right to live in peace is more linked to human rights than the right to peace in both its individual and collective dimensions.<sup>164</sup> This author insists that the right to live in peace is supported by human rights law than the right to peace which continues to be ‘the context of the relationship among States without referring properly to human rights and fundamental freedoms.’<sup>165</sup> Puyana’s views fail to consider the fact that the lack of a binding instrument at the global level does not remove the fact that the right to peace remains a recognised right.

### **2.11 A human rights-based approach to peace?**

In general, a right-based approach entails the application of the human rights framework to the programming. Principles of human rights embodied in human rights Conventions guide the programme design and execution. The human rights-based approach has the following elements, as outlined by the UNDG:<sup>166</sup>

- a) All programmes should further the realisation of human rights guaranteed in international human rights instruments.

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<sup>162</sup> Preamble to the United Nations Charter.

<sup>163</sup> Puyana (n 18 above).

<sup>164</sup> Puyana (n 18 above).

<sup>165</sup> As above.

<sup>166</sup> United Nations Development Group (UNDG) 2003 The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies available at <https://undg.org/wp-content/uploads/2016/09/6959>  
[The Human Rights Based Approach to Development Cooperation Towards a Common Understanding among UN.pdf](#) accessed 15 May 2018.

The overall aim of the human rights-based approach is to contribute to the realisation of human rights.<sup>167</sup> In this regard, adopting a human rights-based approach to peace means that all processes designed to achieve peace should contribute to the fulfilment of human rights.

- b) Fundamental human rights principles and standards contained in various international human rights instruments must guide all programming. These principles include universality, inalienability, indivisibility, interdependence, the interrelatedness of human rights, non-discrimination and equality, participation, empowerment and inclusion, accountability, transparency and the rule of law.<sup>168</sup>
- c) Development of the capacities of duty-bearers to meet their obligations and of rights-holders to claim their rights.

In order to ensure the realisation of rights, duty bearers need to be empowered to understand their obligations under human rights law. At the same time, rights holders need to be aware of their rights so that they can hold duty bearers to account.

From the above, it can be concluded that a rights-based approach to peace relies on the realisation of other human rights to achieve peace. In the end, the right to peace will still be realised if the human rights-based approach is adopted. A rights-based approach to peace has the advantages of empowering communities by creating entitlements. The rights-based approach takes people from their victim position as they demand their rights as rights holders.<sup>169</sup> Also, participation in programming on peace allows citizens to shape the course of their lives through the determination of context-specific programming on peace.

### **2.11.1 Challenges of adopting the human rights-based approach to peace**

Adopting a human rights-based approach to peace may seem to be a viable solution to the challenges presented by the lack of unanimous recognition of the right to peace. This is so because a human rights-based approach implies that peace is not recognised as a human right,

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<sup>167</sup> As above.

<sup>168</sup> United Nations Development Group (n 166 above).

<sup>169</sup> E Filmer-Wilson 'The human rights-based approach to development: The right to water' *Netherlands Quarterly of Human Rights* (2005) (23) (2) 213 242.

but rather international human rights standards and norms are adopted in protecting and promoting peace. This argument seems plausible given the fact that the result is to achieve peace despite the approach adopted.

However, the human rights-based approach also presents some problems and may not necessarily deliver the expected result. The rights-based approach sets broad objectives which are difficult to achieve.<sup>170</sup> This argument is premised on the fact that the human rights-based approach is based on many human rights principles such that implementing them together ‘as an indivisible whole is unfeasible and ineffective in programming practice.’<sup>171</sup>

Wilson argues that the human rights-based approach presents a challenge of evaluating the extent of its impact on the programmes. The author states that assessing the impact or measuring the success of the human rights-based approach is problematic because human rights goals, in particular, social and economic rights, are long-term. Further, the author argues that principles such as participation, empowerment and non-discrimination are difficult to translate into quantitative data.<sup>172</sup> As a result, the recognition of peace as a human right remains a necessity so that duties of rights holders and obligations of duty-bearers are clearly laid out.

## **2.12 Conclusion**

After outlining the definitions of peace from cultural and legal perspectives, it can be concluded that peace has since departed from the minimalist approach that viewed peace as disarmament, the end of hostilities and truce. Modern conceptualisations of peace substantially depart from the old perspective and postulate that peace is present when there is economic stability, equality, justice, strong institutions, human and economic development and finally, respect for the rule of law. The realities that women face in the 21<sup>st</sup> century have seen the necessity to expand the scope of violence to economic, social and political violence. The absence of physical violence and strife does not amount to peace. A situation where people live in abject

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<sup>170</sup> Filmer-Wilson E (n 169 above).

<sup>171</sup> Filmer-Wilson (n 169 above).

<sup>172</sup> Filmer-Wilson (n 169 above) 226.

poverty and fail to access the basic decencies of life violates the right to peace. As highlighted by Ohlson<sup>173</sup>

The lack of physical violence in a relationship may mask a latent conflict that may surface at any time. The lack of such violence between peoples may not imply the absence of deep-felt animosity and hatred among them. Moreover, a lack of direct violence may result from powerlessness on the part of some of the actors, i.e., whatever stability exists may be a product of that highly unacceptable social orders.

As such, it is important to interrogate the meaning of peace from a wider perspective.

When it comes to women's peace, they should be the ones to define the elements that constitute peace. The definitions should not remain static but should evolve as society changes. Equality and participation are the common denominators of all peace initiatives. The Maputo Protocol emphasises equality in participation, which is a guarantor to women in defining the kind of peace they need. Participation ensures that there is no one size fit all conceptualisation of peace or blueprints. It is important that peace be defined from the standpoint of those that are normally victims of its absence. They know what it means to be peaceful. They can explain the kind of peace they envisage.

Given the fact that the definition of peace as propounded by scholars discussed above has moved from the conservative approach, it follows that peace should be inclusive of social justice, economic empowerment, access to resources such as land, freedom from sexual exploitation and trafficking, with the major consideration being the right to dignity. Peace should be viewed from the broader perspective without limiting it to armed conflicts or political violence cases.

The concept of peace will remain a contested issue, and consensus at the global level might be difficult to attain. However, the failure to attain consensus on conceptual clarification does not reduce the status of peace as a human right. The African Human Rights System has recognized the right to peace despite its ambiguity. What is needed is to devise ways of enforcing it in a manner that is context-specific and considers the lived realities of women. What is clear is that peace differs with time and context. It is not a static concept. As a result, participation, equality and non-discrimination enable the realisation of peace that responds to the root causes of

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<sup>173</sup> T Ohlson 'Conflict resolution in Southern Africa' in I Mandaza (ed) *Peace & security in southern Africa* (1996) 1 56.

violence. The ensuing chapters will discuss the AU peace frameworks and implementation of the right to peace by the APSA, the African Commission and the African Court.

## **Chapter 3: The African Union legal framework on women's right to peace.**

### **3.1 Introduction**

This chapter discusses the AU legal framework on women's right to peace. It analyses how the AU instruments and policies provide for women's right to peace. The instruments examined in this chapter include the Constitutive Act of AU, PSC Protocol, African Charter on Democracy, Elections and Governance, ACHPR and the Maputo Protocol. It is important to note that only the ACHPR and the Maputo Protocol provide for the right to peace. However, some of the AU instruments have norms that contribute to realising the right to peace. This chapter responds to the first question on what is the nature and 'normative content' of women's right to peace? The objective of this chapter is also to examine the extent to which the AU legal framework provides for women's right to peace.

### **3.2 AU instruments on peace**

#### **3.2.1 Protocol Relating to the Establishment of the Peace and Security Council of the African Union (PSC Protocol)**

The PSC Protocol established the African Union Peace and Security Architecture (APSA). The Protocol created the PSC, which is the central organ responsible for implementing AU's agenda for peace and security. Article 2 of the PSC Protocol provides that:<sup>1</sup>

There is hereby established, pursuant to Article 5(2) of the Constitutive Act, a Peace and Security Council within the Union, as a standing decision-making organ for the prevention, management and resolution of conflicts. The Peace and Security Council shall be a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa.

The Protocol created the African Peace and Security Architecture which, in terms of article 2, comprises the PSC, POW, CEWS, Peace Fund and African Stand-by Force. The Protocol outlines the role of the APSA in preventing conflicts in the continent.

The PSC's primary function is to promote peace and security in Africa.<sup>2</sup> It does so through prevention of conflicts where possible. If prevention fails, the PSC has the role to engage in

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<sup>1</sup> Art 2 of the PSC Protocol.

<sup>2</sup> Article 6(a) of the PSC Protocol



mediation during conflict<sup>3</sup> and also engage in post conflict peace building.<sup>4</sup> The Protocol also grants the PSC the power to intervene in any member country through the ASF for purposes of maintaining peace<sup>5</sup> Article 7(m) of the PSC Protocol, gives the PSC the power to protect human rights and fundamental freedoms.

The PSC Protocol makes the PSC the overseer of the implementation of women's right to peace through its coordination role. The PSC coordinates the work of the POW, the ASF and CEWS and all regional economic communities such as SADC and ECOWAS. The PSC also collaborate with the African Commission on Human and People's rights. The Commission is mandated to bring to the attention of the PSC any issues relating to peace and security. This provision enables the Commission to bring to the attention of the PSC critical issues pertaining to women's right to peace. As will be discussed later, this provision has not been fully used to promote women's right to peace.

Article 20 of the PSC Protocol creates a framework for PSC to engage with women's organisations to protect women's right to peace and security. Article 20 provides as follows-

The Peace and Security Council shall encourage non-governmental organizations, community-based and other civil society organizations, particularly women's organizations, to participate actively in the efforts aimed at promoting peace, security and stability in Africa. When required, such organizations may be invited to address the Peace and Security Council.

This provision is a platform for women's organisations to bring their peace and security concerns to the PSC directly. In order to give effect to Article 20 of the PSC Protocol, an initiative for the CSOs and the PSC to interact on the issues of peace was adopted in 2008.<sup>6</sup> It's called the Livingstone Formulae.

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<sup>3</sup> Article 6 (c)

<sup>4</sup> Article 6(e)

<sup>5</sup> Article 6(d) and Article 13 of the PSC Protocol

<sup>6</sup>Abdullah H, 'Women and the African Peace and Security Architecture, African peace building network APN working papers: no. 12 (2017) 8.

Section 16 of the Formulae gives room for CSOs to monitor the implementation of the decisions of the PSC. This provision creates much-needed accountability in terms of implementing normative and legal frameworks on women's right to peace. This provision also creates an opportunity for CSOs that advocate for women's rights to directly engage with the PSC on women's right to peace.

Article 3(f) of the PSC Protocol mandates the PSC to protect human rights and fundamental freedoms. This implies that the PSC has the power to implement women's right to peace. However, the PSC has implemented peace from a political perspective. The PSC's work has mainly focused on military conflicts. Adequate attention has not been placed to non-military issues that affect women's rights. Chapter 5 will provide an in-depth examination of how APSA implement the provisions in the PSC Protocol and other AU instruments on women's right to peace.

### **3.2.2 Common African Defence and Security Policy (CADSP)**

The AU adopted the CADSP in Libya on 24 February 2004. Its objective is to ensure an integrated and collective approach to secure peace and security in Africa. The CADSP aims to identify common security threats and adopt a collective response to achieve the AU's aim. According to Touray, the CADSP is a common understanding among African states about their defence and security challenges and a set of measures they seek to take collectively to respond to those challenges.<sup>7</sup>

CADSP was developed pursuant to article 4 of the PSC Protocol, which stipulates that the AU's principle of operation is establishing a common defence policy for the African Continent. CADSP also reiterates the principles of the AU's operations as provided in article 4 of the Constitutive Act of the AU. CADSP was adopted after the realisation that the security of the states is indivisible.<sup>8</sup> Any threat to the security of one African country affects another. As such, the policy recognises the need to share the burden of security and assist each other as African states.<sup>9</sup> The PSC Protocol also stipulates that the PSC was established to develop and implement

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<sup>7</sup> O Touray 'The Common African Defence and Security Policy' (2005) 104 *African Affairs* 635 642.

<sup>8</sup> Para 12(i).

<sup>9</sup> Para 12(ii).

CADSP. CADSP acknowledges the various threats to security that are more than military threats but are also inclusive of social and economic aspects.<sup>10</sup> Paragraph 12(iii) of the CADSP provides that the basis of establishing the policy is the ‘the fundamental link and symbiotic relationship that exists between security, stability, human security, development and co-operation, in a manner that allows each to reinforce the other.’<sup>11</sup>

The CADSP acknowledges the important role that women play in the collective response to the security of Africa. Paragraph 13(w) of the CADSP provides that one of the policy's objectives is to establish a framework for the participation of women in conflict prevention, management and resolution activities. It also provides the framework for the operations of civil society organisations. The establishment of the network of African women in Prevention of Conflicts, also known as FEMWISE-Africa, directly implements paragraph 13(w) of the CADSP. Similarly, the PSC developed the framework of interacting with non-governmental organisations called the Livingstone Formulae. The formulae lay out the eligibility of CSOs to interact with the PSC.

The CADSP enables the implementation of APSA. It stipulates that the AU Assembly, the PSC, the AU Commission, and the RECs are responsible for implementing the Policy.<sup>12</sup> However, the primary role of implementation and coordination mainly rests on the PSC. The PSC coordinates the security efforts of regional mechanisms in peace and security issues. The PSC has an obligation to ensure that the activities of regional mechanisms are harmonised with those of the AU.<sup>13</sup> The PSC also has an obligation to work with the United Nations Security Council and the UN Secretary-General on international peace and security issues. It is obliged to have regular meetings and consultations with the UN on peace and security issues in Africa.<sup>14</sup>

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<sup>10</sup> Para 5 and para 6.

<sup>11</sup> Para 12(iii).

<sup>12</sup> Part IV.

<sup>13</sup> Para 31.

<sup>14</sup> Para 39.

### 3.2.3 The right to peace under the ACHPR

Article 23 of the ACHPR provides for the right to peace. The right to peace falls under the solidarity or group rights provided in articles 19 to 24 of the ACHPR. Some of the solidarity rights provided for are the right to dispose of wealth and natural resources,<sup>15</sup> the right to development<sup>16</sup> and the right to a satisfactory environment favourable to development.<sup>17</sup> Article 23 provides that all people have the right to national and international peace and security. It further provides that state relations shall be governed by the principles of solidarity and friendly relations enunciated by the OAU.

Article 23 does not stipulate the content of the right to peace but only the obligations of the states on the right under sub-article 2. Article 23(2) provides that states have an obligation to ensure that individuals with the right to seek asylum do not engage in subversive activities internally or externally. Article 23 provides for the right to peace as follows:

1 All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between states.”

2 For the purpose of strengthening peace, solidarity and friendly relations, State parties to the present charter shall ensure that:

Any individual enjoying asylum under article 12 of the present charter shall not engage in subversive activities against his country of origin and other state party to the present Charter.

Their territories shall not be used as bases for subversive or terrorist activities against the people of any state party to the present charter.

The ACHPR does not define the term ‘peoples’ rights’, and this concept has been the subject of contestation among African writers. Ugochukwu and others argue that the drafters of the ACHPR deliberately omitted to define the term ‘peoples’ to which rights are granted in the treaty.<sup>18</sup> The authors argue that the African Commission has given the term three meanings.<sup>19</sup> First, the term means ‘the entire people of a country as a collective, for example, the citizens

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<sup>15</sup> art 21.

<sup>16</sup> art 22.

<sup>17</sup> art 24.

<sup>18</sup> B Ugochukwu et al ‘Group rights under the African Charter on Human and Peoples’ rights: concept, praxis and prospects’ in M Ssenyonjo *The African human rights system 30 years after the African Charter on Human and Peoples’ Rights* (2012) 107.

<sup>19</sup> C Baldwin & C Morel, ‘Group rights’ in C Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights the system in practice 1986-2006*(2008) 247.

of a country.<sup>20</sup> The second meaning implies that a specific ‘group of people within a state who see themselves as distinct.’<sup>21</sup> This second meaning is rather confusing and leaves room for further interpretation, for instance, who defines the distinctiveness. Is it the people themselves, others or the Commission itself? The third interpretation refers to indigenous people. There is also no ‘global consensus about a single final definition’ of the term indigenous people.<sup>22</sup> However, common characteristics can identify indigenous people, such as isolation, marginalization, and dependency on the traditional land and natural resources.<sup>23</sup>

These three meanings become confusing as to which category women, as a group, fall. Do they qualify as a distinct group, and what would be the basis of their distinctness? If we adopt that approach, would it not again patronise women as a group that needs protection, and if women are clamouring for equality, would the need to pursue distinctness detract from the call for equality? However, we can still interpret that women as a group in society, based on distinctness, qualify to claim the protection of group rights. What it means is that the group should share something in common, e.g. ethnicity, race, religion. In this case, for women, it will be sex and vulnerability to gender inequality.

Sadly, the African Commission has not elaborated the elements of this right or the state’s obligations. Baldwin and Morel argue that the right to peace is a potentially wide-ranging right. The observation by these authors is quite accurate given the fact that peace on its own is a concept that is capable of contentious interpretations and varies with cultural perceptions. As such, the interpretation of this right would be relevant. Case-law on this right has been very minimal. This is quite shocking given the unending conflicts in the continent.

Baldwin and Morel outline the elements of the right to peace and security as provided for under Article 23 of the ACHPR. According to these authors, the first element of the right is peace

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<sup>20</sup> Ugochukwu (n 18 above) 108.

<sup>21</sup> Ugochukwu (n 18 above) 108.

<sup>22</sup> Report of the African Commission’s Working group of Experts on Indigenous Populations/Communities. (2005) 87.

<sup>23</sup> As above.

and security.<sup>24</sup> The authors argue that peace relates to freedom from violence, although the violence might not be directed against people or a side effect arising from other activities.<sup>25</sup> The authors do not distinguish between peace and security. They argue that the right to security is the right to peace.

The second element relates to the term ‘national and international.’ Article 23 provides that peoples have the right to national and international peace. There is no definition of the terms ‘national and international.’ It is not clear how the two terms are different regarding the enjoyment of the right to peace. Baldwin and Morel argue that the term ‘national’ in this context refers to a situation where the state is the violator of the right to peace. They further argue that this is the approach that the African Commission took in the Mauritanian case when it held that the attack on villagers violated the right to peace. It is further argued that states should not only refrain from violating this right but should also take positive steps to ensure that the peoples of Africa enjoy this right. This includes protection from third parties. The authors further argue that the right could include protection from forced evictions and displacements, which lead to insecurity.<sup>26</sup>

The right to peace is not only confined to national boundaries but has an international element. The influence of the drafters to include an international dimension stem from article 2(4) of the United Nations Charter, which obligates states to conduct their affairs in peace and non-interference in the affairs of others. The violation of the international right to peace was found in the DRC case where the Commission dismissed the respondent states’ defence that they were safeguarding their interests by deploying their armies in the DRC.<sup>27</sup> However, in the case of *Association Pour La Sauvegarde de la Paix au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*<sup>28</sup>, the Commission did not rule on the alleged violation of the right to peace even though the complainant state alleged its violation.

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<sup>24</sup> Baldwin & Morel (n 19 above) 247.

<sup>25</sup> Baldwin & Morel (n 19 above)

<sup>26</sup> Baldwin & Morel (n 19 above) 247.

<sup>27</sup> *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19

<sup>28</sup> Communication No 157/96

What can be deduced from Article 23 is its central focus on states rather than individuals. States' interests are of paramount importance under Article 23. Of course, people in a country would benefit from a peaceful environment if their countries maintain friendly relations. The right to peace portrayed in Article 23 can be defined as negative peace. This kind of peace simply focuses on eliminating armed conflicts or threats to it. Even the cases that have been brought before the African Commission were based on negative peace.

The general import of Article 23 is an emphasis on two issues. The first one is the protection of asylum seekers. This provision is quite important and depicts the state of affairs when the ACHPR was drafted. Some of the African countries were still under colonial rule and apartheid. As a result, their citizens would seek asylum in other countries. The provision ensured brotherhood and collaboration in protecting refugees from other countries.

The second issue emphasised by Article 23(2) (b) is the need to ensure collaboration and unity on peace and security issues. The provision was mainly geared towards ensuring solidarity among African countries in terms of protecting states' interests. Oneness in protecting the African continent was therefore crucial in securing peace on the continent. What is clear from the term 'peoples' in article 23 is that this is a group right. Women can also qualify as a group that benefit from this provision. Women have a right to seek asylum in other African countries. However, the challenge with article 23 is that it does not take into account the gender dimensions in issues of asylum. It does not deal comprehensively with women's right to equal treatment with men in seeking asylum. Article 23 (1) simply provides that all peoples have a right to seek asylum. The gap in the ACHPR has been filled by the Maputo Protocol which provides for women's right to participate in decision making structures in management of camps and settlement of asylum seekers.

### **3.2.4 The Maputo Protocol**

Article 10 of the Maputo Protocol provides that-

1. Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace. 2. State parties shall take all appropriate measures to ensure the increased participation of women:
  - a) In programmes of education for peace and a culture of peace.
  - b) in the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels.
  - c) In the local, national, regional, continental and international decision-making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular, women.

- d) In all levels of the structures established for the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons, in particular, women.
- e) In all aspects of planning, formulation and implementation of post-conflict reconstruction and rehabilitation

Article 10 of the Maputo Protocol differs from Article 23 of the ACHPR because this article focuses on women as individuals and a group. Article 23 emphasises relationships between states, whereas Article 10 of the Maputo Protocol is centred on the participation rights of women in programmes of peace at different institutional levels. While it is acknowledged that participation is the key to the realisation of all aspects of peace, there might be several challenges if women are to participate in the limited framework of peace provided in Article 10 of the Maputo Protocol and article 23 of the ACHPR.

Article 10 is only limited to conditions that necessitate negative peace such as conflict prevention, post-conflict reconstruction, and participation in structures for the management of asylum seekers. However, a generous interpretation of Article 10(2) (b) can create an avenue for positive peace. Conflict prevention structures can include dealing with social and economic issues that normally trigger armed conflicts. It involves eliminating poverty and focusing on human and economic development so that everyone can meet the minimum needs of life.

A close reading of article (10) (2) of the Maputo Protocol concludes that Article 10 is an extension of participation rights elaborated in Article 9. Article 9 provides as follows:

- ‘State Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that:
- a) Women participate without any discrimination in all elections.
  - b) Women are represented equally at all levels with men in all electoral processes.
  - c) Women are equal partners with men at all levels of development and implementation of State policies and development programmes.
2. States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.’

Article 10 simply provides for the right to participation in decision making and governance in peace issues. The same issues that Article 9 provides for also result in realising the right to peace. In as much as providing for peace as participation right is admirable, challenges can be faced in implementation. It is argued that a reading of this provision can lead to an assumption that once women participate in decision making, then the right to peace is realised, which assumption would be wrong. The participation of women alone without an enabling environment is not enough to guarantee the right to peace.



The pertinent questions that Miranda poses are crucial in determining the realisation of women's right to peace. She states that:<sup>29</sup>

Can we presume that women in politics would be more predisposed than men to give priority to social concerns and to the relatively disadvantaged population groups because women are usually socialized into more nurturing values?' Can we expect women to have a stronger sense of fairness and justice, and to be less prone to corruption than men because women usually have a greater role in rearing their children in the moral values of society and hence would try to be models of morality, themselves? Can we presume that women, being nurturers, would favour the use of peaceful means over force for resolving conflict?

In reality, participation on its own is not enough. There is a need to eliminate structural violence in every institution to ensure women realise their right to peace.

According to Banda, Article 10 recognises women as autonomous beings and not appendages of any family head.<sup>30</sup> Banda states that Article 10 incorporates the UNHCR Gender Guidelines in relation to women's acquisition of refugee status. The Guidelines provide that women's refugee status should not be based on their relationship with men but should be considered in their individual capacities.<sup>31</sup>

The Maputo Protocol brought out two dimensions on the right to peace. The first aspect is the substantive nature of peace, termed peaceful existence. The second dimension is the procedural aspect, that is, the participation of women in conflict prevention and management. The term peaceful existence can be defined by context. Therefore, the procedural right of participation is crucial to enable women to define what constitute peaceful existence in their context. Article 10(2) of the Maputo Protocol places an obligation on states to increase the participation of women in different conflict management processes such as asylum situations, refugees, conflict resolution mechanisms, both formal and informal. If meaningful participation is considered, women will be able to influence the process and define the kind of peace that they want. The participation of women should not be seen as a way of legitimising processes to meet the requirements of development agencies or human rights treaties. It should not be seen as a way

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<sup>29</sup> LRT Miranda 'Impact of women's participation in decision-making' *Expert Group Meeting on Equal participation of women and men in decision-making processes, with particular emphasis on political participation and leadership 24 to 27 October 2005*.

<sup>30</sup> F Banda 'Blazing a trail: the African protocol on women's rights comes into force' (2006) 50(1) *Journal of African Law* 72 75.

<sup>31</sup> Banda (n 30 above).

of integrating women into the spaces that men have already defined. Participation should be *bona fide* and with the objective of improving women's lives.

It is critical to interrogate if the inclusion of women is a formality to comply with legal provisions, yet substantially, they are severely crippled in decision making. Another factor is the interests that women represent in those structures. There should never be an assumption that once women are in decision-making positions, they will advance their fellow women's interests. In some cases, women are more aligned to ethnic and party alliances than sisterhood. If there is such a conflict, participation of women in those structures will not bring any changes to the *status quo*.

Lastly, Article 10(3) imposes an obligation on states to reduce military expenditure in favour of social spending, in particular for the benefit of women. This provision enables the realisation of women's social-economic rights. Most of the military budgets are not accounted for because of the need to maintain national security. National security is conveniently used as an excuse to abuse state funds. The involvement of women in the formulation of military budgets helps to control the processes. It is therefore important that women participate in important institutions like the army, but at the same time, they should have the power to determine the agenda. Without power, women again are used to rubberstamp decisions already made, and their presence becomes an act of tokenism.<sup>32</sup>

### **3.2.5 The Constitutive Act of the AU**

The Constitutive Act of the AU was adopted in 2002 in Lome, Togo. The Act established the African Union, formerly known as the Organisation of the African Union. The Act's objectives can be summarised as the unification of the continent by defending common African interests, promoting peace, security and stability in Africa, and promoting human rights as guaranteed under the ACHPR and other human rights instruments. Article 5(1) of the Constitutive Act establishes the following organs of the AU whose mandates seek to further the various interests of the Union, among which are the promotion of peace, security and stability.

These are:'

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<sup>32</sup> The formation of the government of national unity total excluded women from participating in the negotiations.

‘The AU Assembly, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Committee, the Specialized Technical Committees, the Economic, Social and Cultural Council, and the Financial Institutions.

Although the Act does not expressly provide for the roles of these institutions concerning the right to peace, these can be implied in the AU peace framework. As highlighted in the previous chapter, peace is not confined to the absence of conflict, but it is broad enough to include issues of economic development, social security and access to justice. The nine institutions established by the Act clearly contribute towards the realisation of the right to peace in its broader perspective. For instance, the African Court adjudicates disputes, contributing to peace and stability in the region. The financial institutions contribute to the economic development of the Union. Development is a corollary of peace.

The AU Constitutive Act makes specific reference to peace in the objectives of the Union and the principles upon which the continent operates. Article 3(f) provides that the objectives of the AU are to promote peace, security, and stability on the continent. Article 4 of the Act provides some of the principles that have a bearing on peace. These include the peaceful resolution of conflicts among members, the prohibition of the use of force and the non-interference in internal members of the AU. Article 3(f)(i) specially provides for the ‘peaceful co-existence and the right to live in peace and security.’ It is interesting to note that the Constitutive Act provides for the right to live in peace, which is fundamentally different from the right to peace provided under the ACHPR.

### **3.2.6 The African Charter on Democracy, Elections and Governance (ACDEG)**

The ACDEG was adopted in Ethiopia in 2007. It entered into force in 2012. As of June 2019, 34 African countries had ratified the ACDEG. The ACDEG’s main objectives are promoting democracy, the rule of law, human rights, free and fair elections, and promoting sustainable development and human security. While the ACDEG does not have express provisions on the right to peace, it has fundamental principles necessary for realising the right. These principles are outlined in article 3 as follows: respect for human rights, observance of the rule of law, regular holding of free and fair elections, participation of citizens in decision making and gender equality. Several provisions, directly and indirectly, address the concept of peace.

Article 11 obligates states to promote a culture of democracy and peace by adopting legislation and necessary policies. Article 12 outlines some of the activities that states should take to uphold peace. These include ensuring transparent and accountable administration, strengthening political institutions and creating conducive environments for civil society organisations to operate. Article 13 further highlights the importance of dialogue in promoting democracy and peace. It obligates the state to undertake inclusive dialogues on social and political issues. These dialogues enhance public trust in the government, which assists in promoting good governance. The ACDEG forbids unconstitutional change of government. It empowers the PSC to suspend a state from participating in AU activities if its government gets in power through unconstitutional means. However, despite suspension from AU activities, the suspended state remains with the obligation to respect human rights.

The ACDEG provides several punitive measures in situations where there is an unconstitutional change of government. Some of the punitive measures include:

- a) Barring those who participate in the unconstitutional change of government from participating in future elections to restore legitimacy.
- b) The imposition of sanctions on those who instigate or support an unconstitutional change of government.
- c) Arraignment before the courts.

Article 25(8) of the ACDEG prohibits the harbouring of perpetrators of unconstitutional change of government. This article is analogous and reinforces article 23(2) of the ACHPR, which stipulates that all states that offer asylum should not allow their territories to be used in subversive activities against the asylum seekers' country of origin. The ACDEG further obligates states to undertake bilateral agreements that allow the extradition of perpetrators of unconstitutional change of government.

The ACDEG has provisions that necessitate the realisation of peace in its expansive form. These include the duty of states to focus on human security, the alleviation of poverty, and the provision of basic social services. Furthermore, the ACDEG recognises the central importance of democracy in ensuring peaceful existence. Article 38 provides that states 'shall promote peace, security and stability in their respective countries, regions and in the continent by

fostering participatory political systems with well-functioning and, if need be, inclusive institutions.’

Article 29(2) of the ACDEG highlights the role of women in the realisation of peace. It stipulates that states should ensure that women participate in all decision-making processes at all levels in ensuring a democratic culture. Just like article 9 of the Maputo Protocol, article 29(3) of the ACDEG provides that states should take measures to ensure the participation of women in political processes, including the legislature. The AU Commission is the central organ responsible for implementing the ACDEG. The AU Commission has the duty to coordinate the implementation of the ACDEG in the region in collaboration with the PSC, the African Human Rights Commission, the Economic, Social and Cultural Council and the regional economic communities. States should submit periodic reports every two years highlighting how they are implementing the ACDEG. These reports are submitted to the AU Commission, which then tables them before the AU Assembly Committee that has been set up to consider the reports.

Despite the adoption of the ACDEG, African countries still experience challenges in upholding democracy and credible election processes. Countries such as Cameroon, Gambia and Mali have ratified the ACDEG but have a bad record on democracy. Mali had an unconstitutional change of government in August 2020. The African Union suspended Mali’s membership in the organisation pending restoration of civilian rule and constitutional order.

### **3.3 State obligations and women’s entitlements under right to peace**

Under the human rights framework, it is an agreed principle that states are the duty bearers of rights. They have a four-fold obligation: the obligation to respect, protect, promote, and fulfil the human right to peace.<sup>33</sup> In relation to peace, the obligation to fulfil entails taking action to ensure that the right is known so that rights holders can claim it. States have an obligation to take legislative measures to ensure that the right to peace is recognised in national constitutions and subordinate legislation. This ensures that the right is justiciable.

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<sup>33</sup> This is in accordance with paragraph 6 of the Maastricht guidelines on implementation on economic social and cultural rights. The guidelines are not binding but has persuasive value. International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* 26 January 1997 available at: <http://www.refworld.org/docid/48abd5730.html> accessed 26 August 2018.

Article 1 of the ACHPR imposes an obligation on states to take legislative measures to give effect to the rights contained in the Charter. This means that national constitutions and subordinate legislation should guarantee women's right to peace. The right to peace is rarely codified as a human right. The Constitutions of Burundi, Democratic Republic of Congo are some of the few constitutions that explicitly recognize peace as a human right. Most constitutions perceive peace as an important value in nation-building and interstate relations. It has been argued that the panel of the wise should carry out an audit to assess the constitutionalisation of the human right to peace.<sup>34</sup> This audit will aid in implementing the right to peace by member states. Peace should be viewed as a human right and, therefore, should be part of the national bill of rights.

The right to protect ensures that states adopt legislative measures to criminalise violations of the right to peace. The obligation to fulfil requires states to take positive actions to ensure that the right is realised. This involves setting up institutional frameworks to give effect to the right. This can be in the form of national peace and reconciliation commissions, human rights commissions or the public protector's office, which are responsible for monitoring and enforcing the implementation of the right to peace. Lastly, the obligation to respect entails non-interference with the right. States should not be stumbling blocks in realising the right to peace. Article 23 of the ACHPR emphasises the obligation to respect the right to peace by ensuring that asylum seekers do not engage in subversive activities that harm other states. The hosting country should not be used as a base for subversive or terrorist activities against other states

### **3.4 Codification of the right to peace in national constitutions**

Very few states have explicitly provided for the right to peace in their national constitutions. This is because of the lack of international consensus on recognising peace as a standalone right. Although there are various resolutions adopted by the UN General Assembly, the Human Rights Council and UNESCO, states have not warmed up to the idea of domesticating the right to peace in the national constitutions. The African Human Rights Architecture recognises the right to peace in the ACHPR and the Maputo Protocol only despite the existence of other human

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<sup>34</sup> A Jegede 'The African Union peace and security architecture: can the Panel of the Wise make a difference?' (2009) *African Human Rights Law Journal* 409 450.

rights instruments. Even at the African regional level where the right is recognised, very few African countries have incorporated the right in the bill of rights in national constitutions.

This is despite the fact that all African countries ratified the ACHPR except for Morocco.<sup>35</sup> Peace has been provided in some constitutions as guiding principles,<sup>36</sup> objectives or founding values.<sup>37</sup> This approach makes justiciability of the right to peace problematic because litigating on a right that is not provided for in a bill of rights would mean reliance on the courts for an expansive interpretation of other rights existing in the constitution.

Secondly, all the constitutions that provide for the right to peace have adopted peace from a narrow perspective. As pointed out by Puyana, all the national constitutions that have explicitly provided for the right to peace have done so to conceptualise peace based ‘only on the relationships between States and without referring to human rights issues.’<sup>38</sup> They have not adopted peace as provided by the Maputo Protocol, which regulates the relationship between state and individuals and amongst individuals themselves. The Maputo Protocol considers the fact that women interact with various actors and institutions, of which participation in these institutions will guarantee peace. The various African countries with constitutions that provide the right to peace will be examined below. These countries have been selected on the basis that they are the only ones that have constitutions that explicitly provide for the right to peace either as a standalone right or as part of national objectives and guiding principles.

### **3.4.1 African Constitutions that explicitly provide for the right to peace**

The constitutions of Burundi and the Democratic Republic of Congo (DRC) are the only ones in Africa that explicitly provided for the right to peace. The 2005 Constitution of Burundi explicitly provides for the right to peace. It stipulates that ‘all Burundians have the right to live in Burundi within peace and within security. They must live together in harmony, while

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<sup>35</sup> See ratification table the African Charter on Human and Peoples’ Rights available at <http://www.achpr.org/instruments/achpr/ratification/> accessed 6 February 2022.

<sup>36</sup> The Constitution of Guinea Bissau incorporate peace in the state principles under article 5.

<sup>37</sup> The Constitution of Burundi provides for peace as a fundamental value under art. 14 of the Constitution.

<sup>38</sup> D F Puyana ‘Analysis of the international debate on the right to peace in the context of the human rights and intergovernmental bodies of the United Nations’ Unpublished Doctoral Thesis University of Pompey Fabra Barcelona (2014) 15.

respecting the human dignity and tolerating their differences.’<sup>39</sup> Adopting peace as a human right in the constitution seems to have been triggered by the internal conflicts that troubled the country for years. The Preamble acknowledges the past violence that the country grappled with. It states that:

Reaffirming our unwavering determination to put an end to the deep-rooted sources of the continued ethnic and political violence, of genocide and exclusion, of bloodshed, political insecurity and instability that has plunged our people into distress and suffering and gravely compromises the perspectives of economic development and the realization of equality and social justice in our country.

The Constitution of Burundi clearly affirms the country’s commitment to the values of Africa as stipulated in the Constitutive Act.<sup>40</sup> Further, the constitution highlights the linkage between the right to peace and the right to dignity.

Article 52 of the DRC Constitution provides that-

All Congolese have the right to peace and to security, both on the national as well as on the international level. No individual or group of individuals may use a part of the national territory as a base of operation for subversive or terrorist activities against the Congolese State or any other State.

Despite such a guarantee of peace as a human right, DRC has been experiencing internal conflicts which have seen huge internal displacements. Incidences of sexual abuse of women are rampant. Even peacekeepers have been accused of perpetrating violence against women in the refugee camps. The government of the DRC is failing to implement Article 10 of the Maputo Protocol. DRC ratified both the ACHPR and the Maputo Protocol. The USAID 2018 fact sheet on sexual and gender-based violence stated that more than 57 percent of women in the DRC experienced physical or sexual violence at some point in their lives.<sup>41</sup> The USAID fact sheet noted that the ‘continued population displacement, insecurity, and conflict in Eastern DRC perpetuate the cycle of violence against women and girls, although most perpetrators are community members not associated with armed groups.’

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<sup>39</sup> Article 14 of the Burundi Constitution of 2005.

<sup>40</sup> Preamble to the Burundi Constitution of 2005.

<sup>41</sup> USAID *Sexual and Gender-Based Violence Fact Sheet* (2018) available at <https://www.usaid.gov/democratic-republic-congo/fact-sheets/usaid-drc-fact-sheet-sexual-and-gender-based-violence> accessed 28 July 2018.



Further, it was noted that there is under-reporting of gender-based violence despite laws that prohibit gender-based violence. This is attributed to the fear of stigma and abandonment, weak law enforcement, and poor judicial infrastructure.<sup>42</sup>

The CEDAW Committee's concluding observation on DRC's sixth and seventh combined reports noted that sexual violence and sexual slavery is being used as a weapon of war by the armed forces of the Democratic Republic of the Congo and other armed groups.<sup>43</sup>

In its report to the African Commission, the government of DRC admitted that the representation of women in the peace processes as stipulated by Article 10 of the Maputo Protocol is poor.<sup>44</sup> It further noted that on all the peace deals signed from 2002 to 2013, women constituted less than 15% per cent of the participants.<sup>45</sup> There was no female representation at all in some of the agreements. In the Pact on Security, Stability and Development in the Great Lakes Region, which was signed in 2006 and the Peace Pact between the Congolese Government and the Congress for the Defence of the People (CNDP), which was signed on 23 March 2009, no female representation was reported.<sup>46</sup>

### **3.4.2 Constitutions that provide for peace as a duty**

The Constitutions of Benin, Burundi, Togo and Equatorial Guinea view peace as a duty that all citizens must uphold. The Constitution of Benin provides that every citizen 'has the duty to respect and to consider his own kin without any discrimination and to keep relations with others that shall permit the dialogue and reciprocal tolerance with a view to peace and to national cohesion.'<sup>47</sup> Article 73 of the Constitution of Burundi provides that 'everyone has a duty to contribute to the preservation of peace, democracy and social justice.' The Constitution of

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<sup>42</sup> USAID (n 41 above).

<sup>43</sup> Concluding observations on the combined sixth and seventh periodic reports of the Democratic Republic of the Congo Committee on the Elimination of Discrimination against Women 2013 available at <http://evaw-global-database.unwomen.org/-/media/files/un%20women/vaw/country%20report/africa/democratic%20republic%20of%20the%20congo/democratic%20republic%20of%20the%20congo%20cedaw%20co.pdf?vs=3812>.

<sup>44</sup> Concluding observations Democratic Republic of the Congo report (n 43 above).

<sup>45</sup> As above.

<sup>46</sup> Para 416.

<sup>47</sup> Art 36.

Equatorial Guinea emphasises the citizens' duty to live peacefully and observe the values that promote peace.<sup>48</sup> Finally, the Constitution of Togo imposes an obligation to preserve peace on everyone.<sup>49</sup> It stipulates that every citizen has an obligation to 'preserve the national interest, the social order, peace, and national cohesion.'<sup>50</sup>

### **3.4.3 Constitutions that adopt a human rights-based approach to peace**

Some Constitutions adopt a rights-based approach to peace. This approach emphasises the obligations of duty-bearers and entitlements of rights holders to observe human rights standards and principles in a manner that creates a peaceful environment. The human rights-based approach considers that human rights are related, indivisible and inherent in everything. As such, the human rights-based approach to peace entails that all peace programming should consider the core principles of human rights, such as participation, equality, and non-discrimination.

The Constitution of the Central African Republic provides that the recognition of human rights is the basis of peace.<sup>51</sup> The Constitution of Senegal recognises the 'existence of sacred and inalienable human rights as the basis of any human community, of peace and of justice in Senegal and the world.'<sup>52</sup> The Constitution of Seychelles views human rights as the 'foundation for freedom, justice, welfare, fraternity, peace and unity.'<sup>53</sup> The Namibian Constitution recognises that all human family members' human dignity and rights are indispensable for freedom, justice, and peace.<sup>54</sup>

Liberian Constitution recognises that the exercise of human rights establishes a framework that promotes peace. It provides that 'exercising our natural, inherent and inalienable rights to establish a framework of government for the purpose of promoting unity, liberty, peace,

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<sup>48</sup> Art 17.

<sup>49</sup> Art 48.

<sup>50</sup> Art 48.

<sup>51</sup> Art 1 of the Constitution.

<sup>52</sup> Art 7.

<sup>53</sup> Preamble to the Constitution.

<sup>54</sup> Preamble to the 'Constitution of Namibia, 1990.'

stability, equality, justice and human rights under the rule of law.<sup>55</sup> The Liberian Constitution further highlights the state's commitment to its obligations to promote international peace and security under the African Union framework.<sup>56</sup>

#### **3.4.4 Constitutions that provide for peace as a foundational principle and value of a constitution**

Peace is an enshrined value and principle that necessitates the implementation and enjoyment of rights. It has been argued that peace is a 'pre-requisite for the implementation of human rights,' and at the same time, the 'implementation of human rights is conducive to peace.'<sup>57</sup> Some African countries' constitutions do not provide for the right to peace but view peace as a foundational principle and important value of a nation. The Guinea Bissau Constitution of 1984 recognises peace as a founding value of the nation.<sup>58</sup> This constitution also acknowledges the contribution made by freedom fighters in claiming the right to peace.<sup>59</sup>

The Constitution of Eritrea emphasises the need to build a strong and developed Eritrea based on freedom, unity, peace, stability and security. Kenya's Constitution promotes unity and living in peace concerning ethnic, cultural and religious diversity.<sup>60</sup> Ghana's Constitution provides for the 'spirit of friendship and peace with all peoples of the world.'<sup>61</sup> The Constitution of Liberia recognises that the exercise of human rights establishes a framework that promotes peace.<sup>62</sup> The Constitution of Uganda indicates the commitment of Uganda to build a 'better future by establishing a socio-economic and political order through a popular and durable

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<sup>55</sup> Preamble to the 'Constitution of Liberia, 1986.'

<sup>56</sup> Preamble to the Constitution.

<sup>57</sup> K Nordquist *The crossroads of human rights and peacebuilding- an ongoing debate* (2008) 1(2) research paper series.

<sup>58</sup> Guinea Bissau's constitution was adopted in 1984 has been amended three times in 1991, 1993 and 1996 respectively.

<sup>59</sup> Art 5.

<sup>60</sup> Preamble to the 'The Constitution of Kenya, 2010.'

<sup>61</sup> Preamble to the 'Constitution of Ghana, 1992.'

<sup>62</sup> Preamble to the constitution.

national constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress.’<sup>63</sup>

The Preamble to the Nigerian Constitution also provides the importance of peace as a sacred value. It stipulates that ‘we... having firmly and solemnly resolved to live in unity and harmony as one indivisible and indissoluble sovereign nation under God, dedicated to promoting inter-African solidarity, world peace, international co-operation and understanding.’<sup>64</sup>

The Constitution of Somaliland brings out the connection between peace and social and economic rights. It provides that ‘.... recognizing that lasting stability and peace can be achieved through a synergy between the economic system and the aspirations of the nation.’<sup>65</sup>

The Constitution of Swaziland also recognises the value of peace in order to achieve progress. It stipulates that ‘whereas as a Nation we desire to march forward progressively under our own constitution guaranteeing peace, order and good government, and the happiness and welfare of all our people.’<sup>66</sup> The Constitution of South Sudan views peace as a political objective. Section 36 of the constitution provides for the political objectives of a country and stipulates that all government levels shall inculcate a culture of peace in people.<sup>67</sup>

The Constitution of the Republic of South Africa provides for peace in the national principles.<sup>68</sup> It places an obligation on institutions to ‘preserve the peace, national unity and the indivisibility of the Republic.’<sup>69</sup> Lastly, the Zimbabwean Constitution provides the right to peace as a national objective. It provides that ‘the state and every person including juristic persons, and

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<sup>63</sup> Preamble to the ‘Constitution of Uganda, 1995.’

<sup>64</sup> Preamble to the ‘Constitution of Ghana, 1999.’

<sup>65</sup> Preamble to the ‘Constitution of Somaliland, 2000.’

<sup>66</sup> Preamble to the ‘Constitution of the Kingdom of Swaziland, 2005’

<sup>67</sup>Section 36(2) (c) of ‘Constitution of South Sudan, 2011.’

<sup>68</sup> Section 41(a) of the ‘Constitution of the Republic of South Africa ,1996.’

<sup>69</sup> As above.

every institution and agency of government at every level, must promote national unity, peace and stability.’<sup>70</sup>

### **3. 5 Conclusion**

The Chapter has discussed how the AU Human Rights Architecture provides for women’s right to peace. The main argument advanced in the chapter is that the African Human Rights Architecture does not adequately provide for women’s right to peace in terms of the modern conceptualisation of peace. The Architecture presents peace in militarised context which does not change the social and economic status of women.<sup>71</sup> Save for the ACHPR and the Maputo Protocol; all the other instruments do not provide for the right to peace. However, they emphasize the interdependence between peace and human rights. The Constitutive Act of the AU clearly stipulates that one of the objectives of the AU is to maintain peace in the continent. The PSC Protocol also established the APSA, whose role is to prevent conflicts, respond to conflicts, and assist rehabilitation in post-conflict situations. The chapter also discussed recognising the right to peace in national constitutions. It observed that only a few countries provide for peace as a human right in their national constitutions. The majority of the constitutions view peace either as a national objective, a duty on citizens, or a principle and national value.

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<sup>70</sup> Article 10 of the ‘Constitution of Zimbabwe, 2013.’

<sup>71</sup> H Kezie-Nwoha *Feminist Peace and Security in Africa*, Oxfam 2020 10.

## Chapter 4: Zimbabwe's peace architecture

### 4.1 Introduction

Peace architecture or peace infrastructure is defined as 'a fairly wide variety of coordinated and focused peacebuilding strategies at all levels of society with the aim of creating a more effective system to prevent violence.'<sup>1</sup> In this study violence is not only limited to physical but also structural violence which results in inequalities between men and women. The objective of a peace architecture is to eliminate all forms of violence. In this chapter, the term peace architecture is used to mean legal norms, policies and institutional frameworks that have a bearing on the protection and promotion of the right to peace. After examining the normative content of the right to peace in human rights instruments and the provision of the right to peace in national constitutions in chapter 3, this chapter specifically examines how Zimbabwe's constitutional and national legislation provides for the right to peace. It adopts a gendered approach of how Zimbabwe implements women's right to peace. The chapter argues that the normative framework on Zimbabwe 's peace architecture adopts both negative and positive peace. However, the provisions in the legal framework have not resulted in social and economic equality between men and women. Women in Zimbabwe still suffer from gender based violence. They are still underrepresented in key decision structures such as the judiciary, the policy service, the army and the parliament. They also do not have equal access to resources. As a result, the seemingly progressive legal framework has not resulted in transforming women's lives. The chapter responds to the following research question; how does Zimbabwe implement the right to peace? The chapter examines what each institution under Zimbabwe's peace architecture does.

In answering one of the main questions of how Zimbabwe implements the rights to peace, this chapter answers the following sub-questions:

- a) What are the norms, policies and legal frameworks that contribute to women's right to peace in Zimbabwe?
- d) How adequate is the legal and institutional framework for realising women's right to peace in Zimbabwe?

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<sup>1</sup> L Reyhler 'Peace building architecture' (2002)9 (1) *Peace and Conflict Studies* 25 25.

The peace architecture of Zimbabwe is made up of the following institutions:

- The National Peace and Reconciliation Commission (NPRC)
- The Zimbabwe Gender Commission (ZGC)
- The Police force
- Defence forces
- The judiciary
- Zimbabwe Human Rights Commission (ZHRC)

The institutions highlighted above have the mandate to protect and promote human rights in the country, resulting in a peaceful society. Zimbabwe has a solid legal framework for peace architecture. However, the non-implementation of the legal frameworks has resulted in the failure to realise women's right to peace,

#### **4.2 Legal frameworks on the right to peace in Zimbabwe**

This section discusses the norms on peace provided in the national legislation, such as the constitution, the Domestic Violence Act, The Criminal Law Codification and Reform Act and other policies. The legal framework prohibits all forms of violence. The Zimbabwean legal framework partially complies with Article 10(2) of the Maputo Protocol concerning the participation of women in conflict resolution processes. The constitution and other subordinate legislation prohibit discrimination against women in exercising their right to participate in social, political and economic spheres. However, the laws have largely remained in theory as women continue to be appendages in decision making structures and processes.

##### **4.2.1 The Constitution of Zimbabwe**

The 2013 Constitution of Zimbabwe does not explicitly provide for the right to peace but has provisions for rights that facilitate peace. These include the right to personal security,<sup>2</sup> the right to dignity<sup>3</sup> and the right to equality and non-discrimination,<sup>4</sup> and freedom from torture, cruel

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<sup>2</sup> Sec 52.

<sup>3</sup> Sec 51.

<sup>4</sup> Sec 56.

and inhuman treatment.<sup>5</sup> Section 52 of the constitution provides for the right to personal security as follows:

Every person has the right to bodily and psychological integrity, which includes the right—  
(a) To freedom from all forms of violence from public or private sources;  
(b) subject to any other provision of this Constitution, to make decisions concerning reproduction;  
(c) Not to be subjected to medical or scientific experiments, or to the extraction or use of their bodily tissue, without their informed consent.

Section 52 protects the right to peace in its extended form as it prohibits all forms of violence. This section resonates with Galtung's argument that there is a need to have an expanded definition of violence that does not focus on physical violence alone but structural violence as well.<sup>6</sup> Section 52 protects all persons' right to bodily and psychological integrity. This provision is yet to be interpreted by the Constitutional Court of Zimbabwe as no case has so far been brought before it on this right.

The right to dignity, provided in Section 51, also protects the right to peace. The right to dignity is a cross-cutting right that gives the basis for the respect and protection of all other rights. Treating persons with dignity will ensure that their voices are considered before decisions are made. In this regard, participation is an essential element of the right to dignity. The right to dignity is the common denominator of all rights and cannot be derogated at any particular moment. Hence, in terms of enforcing the right to peace, it is crucial to respect this right.

Equality and non-discrimination are also important components in maintaining and protecting the peace. Inequalities and exclusions are the gross violators of women's rights to peace. The Maputo Protocol emphasises the principle of equality by providing that women should have equal participation in all peace processes, including conflict prevention, management and post-conflict rehabilitation. Meaningful participation of women can be achieved if they are treated as equal human beings with recognised capacity. This right has remained theoretical in Zimbabwe as patriarchal attitudes strongly undermine the practical application of this right.

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<sup>5</sup> Sec 53.

<sup>6</sup> J Galtung 'Violence, peace, and peace research' (1969) 6 Journal of Peace Research 3 167 168.



Religion, in particular, Christianity, has resulted in the violation of women's right to equality on the basis that women should be submissive to their husbands.

Section 53 of the constitution provides for the right to freedom from torture, cruel, inhuman and degrading treatment or punishment. Section 53 goes beyond the prohibition of physical tortures but also prohibits psychological torture. This progressive provision protects women from emotional abuse, which also amounts to torture. Torture is mostly associated with police brutality, but in reality, torture of the mind has disastrous consequences that may be worse or similar to physical torture.

There has been recognition that torture is no longer confined to detention situations but takes place in other contexts perpetrated by private actors as well. The conceptual understanding of the term 'torture' has changed with time. According to Amnesty International, the concept of torture 'has evolved on the basis of the progressive nature of international human rights, which adapts to reflect the changing conditions and values of a society.'<sup>7</sup>

The Special Rapporteur on Torture, Cruel and Inhuman Degrading Punishment has highlighted the evolving nature of the definition of torture to include other dimensions such as abuse in healthcare settings.<sup>8</sup> Amnesty International argues that laws that deny abortion to women violate the freedom from torture and inhuman and degrading treatment and punishment.<sup>9</sup> In Zimbabwe, the constitution prohibits abortion beyond the three grounds allowed by the law. Abortion is only allowed under three conditions. First, abortion is allowed if the pregnancy places the mother's life at risk; second, if there is a higher chance that the child would be born with serious physical or mental defects; lastly, if the pregnancy is a product of unlawful sexual

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<sup>7</sup> Amnesty International *The state as a catalyst for violence against women and torture or other ill-treatment in the context of sexual and reproductive health in Latin America and the Caribbean* (2016) 6.

<sup>8</sup> J E Mendez 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2013) report available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf) accessed 20 August 2017.

<sup>9</sup> Amnesty International (n 7 above) 6.

intercourse, such as rape or incest.<sup>10</sup> The termination of pregnancy for social and economic reasons or personal choice is totally prohibited.

The constitution provides that ‘an Act of Parliament must protect the lives of unborn children, and that Act must provide that pregnancy may be terminated only in accordance with that law.’<sup>11</sup> The Criminal Law Codification and Reform Act criminalises termination of pregnancy that is undertaken outside the circumstances provided by the Termination of Pregnancy Act, as discussed above.<sup>12</sup> However, terminating a pregnancy even in permissible circumstances has been difficult for women. This has seen the state being sued for negligence in failing to terminate the pregnancy of a rape survivor in the case of *Mildred Mapingure v Minister of Health & Others*.<sup>13</sup> Institutional violence based on religious and moral beliefs resulted in Mildred Mapingure giving birth to a product of rape, which has caused psychological trauma to her.<sup>14</sup>

Besides the limited access to abortion, ill-treatment of patients by healthcare services is one factor that amounts to torture in Zimbabwe. Due to the run-down of state hospitals in Zimbabwe, services at health facilities have become a nightmare. Patients are made to pay for basic services like medicines, sterile equipment and fuel for ambulances.<sup>15</sup> Maternity fees are still beyond the reach of many women. This is in spite of the fact that the government declared that maternal health fees were scrapped. In reality, women still pay for other maternal related costs such as ultrasound scans and card fees.

In addition to the unaffordable maternal health fees, state hospitals have poor service delivery. In some hospitals, pregnant women are forced to carry buckets of water to bath because of

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<sup>10</sup> Sec 4 of the Termination of the Pregnancy Act, 1997.

<sup>11</sup> Sec 48(3) of the constitution.

<sup>12</sup> Sec 60 of the Criminal Law Codification and Reform Act 2004.

<sup>13</sup> 2014 SC 22/14.

<sup>14</sup> It took a long time for Mildred to get a termination order due to bureaucracy in the justice delivery system. When she got the termination order the doctor refused to terminate on the basis that his conscience could not allow him.

<sup>15</sup> Amnesty International “I never thought I could get healed from this” barriers to treatment and human rights abuses against women and girls with obstetric fistula in Zimbabwe (2021) 18. Available at <https://www.amnesty.org/en/documents/afr46/4112/2021/en/> Accessed 20 February 2023.

persistent water cuts in the city of Harare.<sup>16</sup> A Zimbabwe Women Lawyers client revealed that she lost her child in the hospital due to the non-availability of medication.<sup>17</sup> She was denied permission to leave her ailing child in the hospital so that she could get the urgent medication for the child outside the state hospital. Zimbabwe still has high maternal mortality rates. The Zimbabwe Demography Health survey revealed that the maternity mortality rates are at 0.90 maternal deaths per 1,000 women, which is high.<sup>18</sup>

The failure by the Government of Zimbabwe to provide adequate maternal health care is a violation of women's right to peace. Article 10(3) of the Maputo Protocol imposes an obligation on states to reduce military expenditure in favour of spending on social development and the promotion of women. There has been consistent failure by the Government of Zimbabwe to fund the health services. The Amnesty International Report observed that since 2012, the budget for health has been decreasing.<sup>19</sup>

#### **4.2.2 Domestic Violence Act**

The Domestic Violence Act is an important piece of legislation that promotes women's right to a peaceful existence.<sup>20</sup> The Act adopts an expansive approach to peace. It prohibits all forms of violence which includes physical, economic and emotional violence. The provisions of the Act are instrumental in ensuring that women enjoy peace in its fullest sense.

The Act defines domestic violence as, 'any unlawful act that results in direct physical and mental injury to the complainant. Domestic violence includes physical abuse, sexual abuse;

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<sup>16</sup> In 2016, the baseline survey conducted by Action Aid, Zimbabwe Women Lawyers Association, and SAYWHAT revealed that citizens faced a lot of harassment from health workers in Government hospitals. The baseline also revealed that one of the state hospitals in Chitungwiza was de facto privatized and as a result medication was no longer affordable. Baseline report on file with author.

<sup>17</sup> The woman revealed that she lost her two weeks old baby at Chitungwiza General Hospital when the nurses denied her the permission to seek medication outside the hospital. This permission was denied despite the fact that the hospital did not have the required medication.

<sup>18</sup> Zimbabwe Demography Healthy Survey (ZDHS) 2015.

<sup>19</sup> Amnesty International (n 15 above). Amnesty International's report, Lost without knowledge Barriers to sexual and reproductive health information in Zimbabwe 2018 13. Available at <https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR4677002018ENGLISH.pdf> Accessed 20 February 2023.

<sup>20</sup> The Domestic Violence Act, 2007.

emotional, verbal and psychological abuse; economic abuse, intimidation, harassment and stalking.<sup>21</sup>

The Act also protects women's proprietary rights by prohibiting the unreasonable disposal of matrimonial property. This provision is progressive as it protects women from cases where men would want to dispose of matrimonial property without the consent of another spouse. However, the major challenge that limits the protection afforded by this provision is that if the property is registered in one person's name, it can easily get disposed of without the other party's knowledge. Also, one cannot stop the disposal of property registered in one person's name unless there is a claim of a share of the property that is pending before the court. Depriving a person of accessing the place of residence is also outlawed by the Act.

The Act also criminalises harmful cultural practices such as child marriages, virginity testing without consent, incest, forced widow inheritance, and pledging of girls and women as compensation.<sup>22</sup> The influence of cultural practices negatively affects the implementation of this provision.

However, the Act does not criminalise emotional and economic abuses.<sup>23</sup> Victims of these abuses can use remedies provided by the civil law, such as applications for maintenance in cases of economic abuse and protection orders in cases of emotional abuse. The Act provides protection orders for domestic violence victims, which is valid for five years and can be renewed or varied depending on the existing circumstances. Despite the protection afforded by this piece of legislation, women continue to face domestic violence mainly because of the patriarchal perceptions that sanction women's abuse as a way of discipline.<sup>24</sup>

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<sup>21</sup> Sec 3 of the Act.

<sup>22</sup> Sec 3 of the Act.

<sup>23</sup> The Domestic Violence Act defines economic abuse as the unreasonable deprivation of economic or financial resources to which a complainant is entitled under the law or which the complainant requires out of necessity, including household necessities, medical expenses, school fees, mortgage bond and rent payments, or other like expenses." Emotional abuse is defined under section 3(2)(c) of the DVA as any conduct that results in degrading or humiliation of the complainant.

<sup>24</sup> ZDHS (n 18 above).

Victims of domestic violence also are not reporting abuse due to cultural beliefs that dictate that what happens in marriage should remain in the private sphere. Reporting abuse is seen as disclosing private family matters, which is frowned upon. The 2015 Zimbabwe Demography Health Survey also noted that ‘educated women and women from wealthy families are less likely to report instances of domestic violence than women from poor families.’<sup>25</sup> Mawire’s study also highlighted that ‘power relations are so embedded deeply into the fabric of the Zimbabwean society such that even the well-intentioned laws and policies cannot reach them.’<sup>26</sup>

One of the issues that also affect the implementation of this Act is the lenient sentences that courts have passed. These have not been deterrent enough to curb domestic violence. Judicial officers are part of society, and their socialisation reflects in their work. Society still views domestic violence as an issue that should not be within the purview of the courts but should rather be solved at a family level.

Some judicial officers do not view domestic violence as a serious offence and therefore pass lenient sentences that leave victims exposed to more abuse. In the case of *State v. Ivhurinosara Ncube*,<sup>27</sup> the magistrate, gave a lenient sentence to the accused person who was convicted of having sexual intercourse with a young person. The magistrate suspended 8 months’ imprisonment on the condition that the accused person marries the complainant. The accused person had sexual intercourse with his wife’s 15-year-old sister. Although the magistrate’s findings were to the effect that there was a love relationship, the facts indicated a forced relationship. In this case, the accused, who was responsible for paying the minor’s school fees, sneaked into the minor’s bedroom at night. He requested sexual intercourse with the minor, and his requests were turned down. After constant attempts, it is reported that the minor subsequently succumbed to the requests. She then became pregnant.

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<sup>25</sup> ZDHS (n 18 above).

<sup>26</sup> L Mashiri & P Mawire ‘An assessment of the effectiveness of interventions against gender-based violence in Zimbabwe: a case study of Gweru Urban District (1986-2011)’ (2013) 14 *Journal of Humanities and Social Science* 13 21.

<sup>27</sup> HH 335/ 13.

This case clearly depicts a pattern of abuse by a 30-year-old man responsible for the minor's upkeep. He took advantage of the relationship of trust and impregnated a minor, thereby ruining her education and career opportunities. The judgement was overturned at the High Court on review. The review judge noted that 'in sanctioning an impermissible marriage, the Magistrate effectively cast aside the protective function of the law on sexual intercourse with young persons.'<sup>28</sup> The magistrate in this case firmly believed that his decision was in the best interest of the victim because the perpetrator was now marrying the impregnated girl. The failure to appreciate that this is a forced marriage which is likely to have negative consequences on the complainant depicts how social attitudes sometimes affect the judicial officer's sense of justice. The judgement was based on cultural consideration that a wife's sister is equally a wife to the same man. As aptly stated by the review judge, 'the age discrepancy and its attendant power dynamics should have been central in interrogating the unlikelihood of a truly consensual relationship.'<sup>29</sup> The decision was motivated by how society perceives marriage as an achievement such that the need to balance the interests of the complainant was overlooked.

Various reasons reduce the effectiveness of the Act. One such reason is the unprofessional conduct of the police officers at the Victim Friendly Unit at the police stations. This deters victims from reporting as they fear adverse police attitudes. Another challenge that affects the implementation of the Act is the misunderstanding that domestic violence is limited to physical and sexual abuse yet harmful cultural practices also constitute domestic violence.<sup>30</sup> However, despite the protective provisions of the Act, its effectiveness is reduced because gender equality is still strongly opposed by men, who are the major beneficiaries of the inequality.<sup>31</sup>

Enforcement of protection orders has also been a challenge. In practice, the application for a protection order is supposed to be served by a police officer instead of the messenger of court in order to assist the victims of violence who normally cannot afford messenger of court fees.

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<sup>28</sup> *Ivhurinosara* (n 27 above).

<sup>29</sup> *Ivhurinosara* (n 27 above).

<sup>30</sup> S Mtetwa 'Examining the effectiveness of the Domestic Violence Act in Zimbabwe: police and community perspectives in Bindura' (2017) 6 *Research Journal of Sociology* 1 10.

<sup>31</sup> M Chuma & B Chazovachii 'Domestic Violence Act: opportunities and challenges for women in rural areas: The case of Ward 3, Mwenezi District, Zimbabwe' (2012) 3(4) *International Journal of Politics and Good Governance* 1 4.

Police officers view this process as extra duties and therefore do not effectively carry out their mandate.<sup>32</sup>

Inadequate funding and support for structures that implement the Act negatively affect the impact of the Act on the lives of victims of domestic violence. The Council with the mandate to monitor the Act's implementation has not been fully operating because of limited funding.<sup>33</sup> The lack of awareness of the Act is another reason behind its ineffectiveness.<sup>34</sup> Legal literacy as a tool to fight the abuse of women is limited by the social and economic situations of the victims that make them stay longer in abusive relationships which threaten their lives.

Societal attitudes and religious beliefs also exacerbate the situation as women are expected to persevere in marriage. Research by Chuma and Chazovachii highlighted that women had developed coping mechanisms to survive the abuse instead of relying on the law.<sup>35</sup> These include joining networks that provide emotional support, using love potions, and seeking spiritual help.<sup>36</sup> Research by the ZYWNP highlighted that women in apostolic sects (despite being vulnerable to abuse) are unwilling to leave such arrangements because of poverty.<sup>37</sup>

Women are also blamed if the marriage fails. There is a Shona proverb that says '*musha mukadzi*,' literally meaning a woman is a homemaker and is responsible for the success of the marriage. Contradictory societal attitudes about the role of men are applied to oppress women. There is also a Shona proverb that states that '*Varume ipwere*' means men are like toddlers. The proverbs imply that a woman should be the reasonable partner in a marriage and must ensure that the marriage is intact. This proverb is mainly applied in cases of infidelity where men are compared to toddlers who do not know what they want and run from one woman to another. This proverb is conveniently and selectively applied in cases that disadvantage women. When men are wrong, their behaviour is excused, yet the cultural beliefs dictate that

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<sup>32</sup> Mtetwa (n 30 above).

<sup>33</sup> Mashiri & Mawire (n 26 above) 19.

<sup>34</sup> Chuma & Chazovachii (n 31 above).

<sup>35</sup> Chuma & Chazovachii (n 32 above).

<sup>36</sup> Chuma and Chazovachii (n 31 above).

<sup>37</sup> ZYWNP *Misused and abused* (2011). 3

man is the head of the house and should be respected. As the head of the household, men possess unquestionable powers when it is convenient for them. The peaceful existence for women becomes elusive in domestic violence cases, particularly when exacerbated by oppressive cultural and religious beliefs.

While acknowledging that domestic violence is harmful to their lives, women may not see the advantages of reporting the crime because criminal law remedies do not provide a practical solution. Domestic violence attracts a penalty of a 5-year jail term depending on the gravity of the violence. Women may not want that remedy. In such circumstances, they can endure the violence so that the breadwinner is not arrested. The use of the customary justice system would bring a middle ground as the remedies provided are tailor-made and are mostly reached by consensus. Some of the remedies awarded include the payment of compensation to the woman and asking for forgiveness. Women tend to value relationships and put their interests last.

#### **4.2.3 The Criminal Law Codification and Reform Act**

Zimbabwe's criminal laws were codified in 2009 by the enactment of the Criminal Law Codification Reform Act (The Criminal Code). The Criminal Code criminalises certain acts that violate women's right to peace. Some of these acts include the crimes of rape, including marital rape, indecent assault, intimidation, coercion or inducing a person to engage in prostitution, assault, robbery, criminal insult and pledging of persons. Some of the offences in the Criminal Code overlap with the Domestic Violence Act, but the latter is applicable if the complainant has a relationship with the perpetrator or shares the same place of residence.

#### **4.2.4 Gender policy**

The Gender Policy is a guiding framework for addressing gender inequality in the country. It guides state and private actors on the steps to take in implementing gender equality. The Ministry of Women Affairs Community, Small and Medium Enterprises, is responsible for coordinating the implementation of the Policy. The Policy sets out eight priority thematic areas of intervention on gender issues which consequently contribute to the right to peace. These are 'constitutional and legal rights, economic empowerment, politics and decision making, health, education and training, gender-based violence, environment and climate change and media and ICTs.'



In relation to the gender-based violence thematic area, the policy outlines several strategic interventions that seek to eradicate all forms of violence, which enables the realisation of the right to peace. Some of the interventions include:

- a) The implementation of programmes that eliminate harmful cultural practices that fuel abuse.
- b) Advocating for the strengthening of institutions that enable a safe environment.
- c) ‘Instituting mechanisms for conducting gender safety audits and gender-responsive evidence-based research and documentation on all forms of gender-based violence.’
- d) Capacitating the coordination of mechanisms that address gender-based violence.
- e) Mainstreaming gender-based violence in the educational curriculum at all levels.
- f) Facilitating discussions on gender-based violence, which is inclusive of men.

The Policy further sets out specific strategies that promote women’s participation in politics. These include the following:

- a) Developing monitoring and evaluation systems for gender audits.
- b) Alignment of policies with the gender parity principle in order to achieve equal representation.
- c) Designing capacity building programmes for women that aspire to leadership positions.
- d) Lobbying for affirmative action measures and eradicating gender-based violence as a result of culture.

Despite the noble strategies, the lack of implementation hampers the realisation of the vision and goals of the National Gender Policy. Inadequate financial resources from the state are the major reason for policies to remain on paper unless donor funds are received. It is clear from the status quo in Zimbabwe that these strategies have not worked as women still suffer from violence. The participation of women in public life is still minimal and is still far from reaching the 50% threshold provided for in the constitution. Non-governmental organisations normally fill in the gap of implementing women’s rights, but they are not the duty bearers. The duty bearer, in this case, is the Ministry of Women Affairs Community, Small and Medium

Enterprises, which is mainly an advocacy and lobbying mechanism that is largely underfunded and relies on UN Agencies to implement women's rights provisions. The Ministry also has a research component in its agenda, but it is hardly utilised due to the lack of resources.

### **4.3 Institutional frameworks on the right to peace**

The Constitution of Zimbabwe is the normative framework upon which the peace architecture is founded. The constitution establishes institutions with a mandate to maintain peace and outlines their functions. As argued by Fombad, the first phase of implementation of the constitution involves setting up institutions provided in the constitution.<sup>38</sup> Zimbabwe has institutions established in terms of the constitution, whose roles include the protection of the right to peace. The next part will analyse the extent to which these institutions realise their mandates as established in the constitution. While acknowledging that peace is a broad concept covering every facet of life, this part will limit the institutional analysis to institutions with a human rights mandate, focus on women, or directly deal with peace and reconciliation issues.

#### **4.3.1 The National Peace and Reconciliation Commission (NPRC)**

The NPRC was established in terms of section 252 of the constitution. It is composed of eight members who are selected using an independent process. These members are selected because of their relevant experience in peacebuilding. The commission has nine members, inclusive of the Chairperson. The functions of the commission are as follows:

- a) Ensuring post-conflict justice, healing and reconciliation.
- (b) Developing and implementing programmes that promote national healing and resolution of disputes.
- (c) Facilitating truth-telling about past events.
- (d) Developing procedures and institutional framework for national dialogues.
- (e) Developing programmes that ensure that support victims of violence receive support.

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<sup>38</sup> C Fombad 'The implementation of modern African constitutions: challenges and prospects (2016)11. Fombad defines implementation of a constitution as 'a process designed to ensure the full, effective and continuous working of a constitution by promoting, enforcing and safeguarding it.'<sup>5</sup>.

- (f) Receiving and considering complaints from the public.
- (g) Developing mechanisms for early detection of conflicts and disputes.
- (h) Taking any action enables the NPRC to prevent conflicts and maintain peace.
- (i) Undertaking peacebuilding strategies such as conciliation.
- (j) Making recommendations for an appropriate legal framework

The Commission has prevention and protecting roles. Under the prevention of conflict role, the Commission has an obligation to develop strategies for early detection of conflicts. It also has broad powers to undertake any action that assists in maintaining peace and preventing conflicts. It is yet to be seen how the commission utilises this provision.<sup>39</sup> The Commission has the power to recommend the enactment of legislation that protects peace in Zimbabwe. It also has the power to recommend the assistance of people affected by conflicts and pandemics.<sup>40</sup>

The NPRC 's roles include conducting dialogues among different institutions such as political parties and communities at individual and group levels. The commission also receives complaints from members of the public. The commission is empowered to take any action in addressing the complaints. This includes recommending prosecution working with the police and other entities of the government to ensure that the complaints are addressed. However, the NPRC does not have the power to execute its recommendations. It solely depends on the good will of the police force and other stakeholders. The NPRC Act has been criticised for its lack of a victim-centred approach. It has been argued that the NPRC Act does not have adequate protective measures for victims.<sup>41</sup>

However, the NPRC's work indicates a very good grasp of the expansive nature of the concept of peace. The NPRC has successfully adopted a very broad understanding of peace which response to women's social and economic needs. The NPRC's work indicates that it does not only focus on political issues in implementing its mandates. The NPRC developed Conflict

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<sup>39</sup> Sec 252(h) allows the commission to do anything incidental to the prevention and maintenance of peace.

<sup>40</sup> Sec 252(j) of the Constitution.

<sup>41</sup> The National Transition Working Group 'NPRC Watch' (2018) 13.

Early Warning and Early Response (CEWER) which identifies various indicators that point to issues that the system should monitor to prevent disturbance of peace.<sup>42</sup> These indicators include social-cultural, economic, security, political, and access to resources issues. The NPRC report indicates that the NPRC is alive to the fact women's right to peace can be violated by none political factors. It stated that "socio-economic issues such as, WASH, poverty, unemployment, unequal access to resources and corruption are key source of conflict, insecurity and threat to peace, particularly among women, hence accelerated action to address such socio-economic challenges is recommended."<sup>43</sup> The NPRC even conducted trainings on positive peace.<sup>44</sup> The NPRC successfully adopts equal representation of men and women in the composition of commissioners. There are equal numbers of male and female commissioners. Its secretariat even have more females than men.<sup>45</sup>

The NPRC is currently facing the challenge of inadequate funding. Its work has been supported by donors. This reduces its impact on prevention and managing conflicts in Zimbabwe. The NPRC started functioning when the National Peace and Reconciliation Act (NPRC Act) was gazetted in 2018.<sup>46</sup> The constitution limits the life of the NPRC to only ten years after the enactment of the constitution. The constitution was enacted in 2013, and the commission started functioning in 2018. It lost five years of its lifespan through setting up structures, which means that it will only work for five years. The limit to the commission's existence is a depiction of the lack of prioritisation of the right to peace.

The NPRC Act also gives extensive power to the executive, which affects the commission's independence. The NPRC Act does not clearly highlight the minister's role concerning the commission. Section 16 of the Act simply provides that the report of the NPRC shall be tabled

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<sup>42</sup> National Peace and Reconciliation Commission Annual Report 2021.

<sup>43</sup> National Peace and Reconciliation Report (n 42 above) 99.

<sup>44</sup> National Peace and Reconciliation Report (n 42 above) 85.

<sup>45</sup> 67 percent of the managers are women. The other subordinate staff has 63 percent female representation. National Peace and Reconciliation Report (n 42 above) 77.

<sup>46</sup> The NPRC Act, 2018 was promulgated on the 5<sup>th</sup> of January 2018.

before parliament through the Minister. It is not clear whether the Minister has to consent to the contents of the report first before it is tabled to parliament.

#### **4.3.2 Zimbabwe Human Rights Commission (ZHRC)**

The ZHRC was established in terms of section 242 of the constitution. The ZHRC replaced the ombudsman's office, which primarily dealt with complaints against administrative authority. The ZHRC's mandate is mainly aimed at the protection of human rights. It monitors independent and government institutions' compliance with the bill of rights. It also carries out fact-finding missions and investigates human rights abuses. The ZHRC also has an obligation to inspect detention centres.

The majority of the commissioners for ZHRC are female. However, the Commission has been headed by a man since its inception. The Commission 's activities have the potential to contribute towards the realisation of women's right to peace. The Commission has trained the Parliamentary Portfolio Committee on Peace on the relationship between peace and human rights. The Commission's five-year strategic plan for 2021-2025 indicates that peace and security is one of the prioritised issues.<sup>47</sup>

The 2021 report by the Commission indicated that the ZHRC has handled complaints that include political, economic and social issues.<sup>48</sup> The Report however does not indicate the nature of reports submitted by women. It also noted that men submitted more complaints than women.<sup>49</sup> The Commission also faces the challenge of funding which limits its ability to reach out and raise awareness on human rights to the wider population.

#### **4.3.3 The Zimbabwe Gender Commission (ZGC)**

The ZGC began its operation in 2015. Since the swearing-in of commissioners in 2015, its impact is not yet felt to assess the commission's effectiveness. The ZGC comprises eight commissioners, of which seven are appointed from a shortlist of candidates by the

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<sup>47</sup> Zimbabwe Human Rights Commission five-year strategy 2021-2025.

<sup>48</sup> Zimbabwe Human Rights Commission Report 2021.

<sup>49</sup> The report indicated that complaints received from males constituted 65% of the total complaints received.

Parliamentary Committee on Standing Rules and Orders. One of the commissioners is nominated by the President from the National Council of Chiefs.<sup>50</sup>

The ZGC has five females, and the chair is a female. The function of the ZGC includes the monitoring and handling of complaints in relation to gender. The ZGC also conducts research concerning gender. The ZGC has an advisory role. It assists the state and private entities to ensure the implementation of gender provisions. It has the power to recommend prosecution of offenders concerning violation of rights relating to gender.<sup>51</sup>

The ZGC has broad powers to take any action necessary to promote gender equality. The roles of the ZGC overlap with the ZHRC as both institutions have the power to research and monitor human rights violations. The only difference lies in the fact that the ZGC only focuses on rights related to gender only. A duplication of roles is foreseeable given the fact that gender cuts across all aspects of the human rights framework. In order to save resources, collaboration on some of the investigations of complaints and monitoring visits is necessary. The collaboration will strengthen the recommendations and has the potential of steering the state to act on the two commissions' recommendations.

The ZGC commission is a strong mechanism for protecting women's right to peace. If adequately resourced, the commission plays a crucial role in facilitating the participation of women in the maintenance of peace and participation in conflict prevention processes as envisaged by Article 10 of the Maputo Protocol. The ZGC advocates for participation of women in political, social and economic spheres. It created a database of professional women as a mechanism to have a pool of potential women to be appointed in boards.

The ZGC launched an observatory unit for the 2018 elections. The purpose of the observatory unit was to gather evidence and document women's experiences throughout the electoral cycle.<sup>52</sup> In its report after the elections, the ZGC identified the following situations that perpetuated the violation of women's right to peace;

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<sup>50</sup> Sec 245(1) (b) (ii).

<sup>51</sup> Sec 246 (g).

<sup>52</sup> 263 Chat Gender Observatory for Elections Launched 20 June 2018 available at <https://263chat.com/gender-observatory-for-elections-launched/>. Accessed 5 August 2021.

- a) Female voters and candidates were subjected to cyberbullying and hate speech in the media and at campaign rallies.
- b) Fewer women occupied decision making positions at polling stations as compared to men.
- c) Female presidential candidates were subjected to unfair media and public scrutiny compared to their male counterparts.
- d) There was a lack of legislation to compel political parties to comply with gender equality provisions to ensure that women constitute 50% representation of candidates in political parties at elections.
- e) Women constituted the majority of the assisted voters who were alleged to be illiterate or had eyesight challenges. The Commission noted that the issue of assisted voters needed further interrogation.
- f) Sanitation facilities did not take into account women's specific needs.

The ZGC gave a recommendation to the Zimbabwe Electoral Commission, political parties and all stakeholders to take necessary measures to ensure equal participation and representation of women in elections.

#### **4.3.4 Zimbabwe Defence Forces (ZDF)**

A national army is one of the key institutions that protects and maintains peace in the country. The army's role is to protect national interests and defend the country from any threats. The ZDF is constituted in terms of section 211 of the constitution. The Defence Forces consist of the army and the air force.<sup>53</sup> The constitution mandates the Defence Forces to 'respect the fundamental rights and freedoms of all persons and be non-partisan, national in character, patriotic, professional and subordinate to the civilian authority.'<sup>54</sup> The function of the Defence

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<sup>53</sup> Sec 211 of the Constitution.

<sup>54</sup> Sec 211 of the Constitution.

Forces is to ‘protect Zimbabwe, its people, its national security and interests and its territorial integrity and to uphold the Constitution.’<sup>55</sup>

Traditionally, the army has a role in protecting national interests, public security, and warding off all security threats. Civilian protection is also one of the mandates of the army. The army is obliged to respect the civilian population all the time. The army’s functions go beyond defence but also include human rights protection.<sup>56</sup> This is because security is a ‘fundamental right since it is a requisite for enjoying freedoms and narrowing gaps resulting from inequality.’<sup>57</sup>

The army has been involved in numerous operations that have violated the right to peace over the years in Zimbabwe.<sup>58</sup> The Zimbabwe National Army and the Korean trained special unit in the army called the Five Brigade is alleged to have massacred at least 20 000 people in Matabeleland province from 1982-to 1987.<sup>59</sup> The national army’s operation, which resulted in the Gukurahundi massacre, was sanctioned by the government of Zimbabwe led by the then President of ZANU- PF, Robert Mugabe. The army committed many atrocities on the civilian population. The ICCJP report highlighted the horrific incidences of violence that occurred in Matabeleland.<sup>60</sup> Specific acts of violence committed against women included the following:

- a) Forcing young girls and boys to have sex in the presence of the soldiers.
- b) Beating and shooting of villagers.

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<sup>55</sup> Sec 212 of the Constitution.

<sup>56</sup> Office of the High Commissioner for Human Rights and the Commission of the Council of Federation on International Affairs of the Federal Assembly of the Russian Federation. *The traditional role of the armed forces. Seminar on Human rights and the armed forces.* Moscow, 5 – 6 December 2002 available at <https://www.refworld.org/pdfid/425cd67a4.pdf> accessed 20 March 2019.

<sup>57</sup>Office of the High Commissioner for Human Rights and the Commission of the Council of Federation (n 56 above) 2.

<sup>58</sup> K Chitiyo ‘The case for security sector reform in Zimbabwe’ (2009) *The Royal United Services Institute (RUSI)* 11.

<sup>59</sup> Catholic Commission for Justice and Peace in Zimbabwe & The Legal Resources Foundation *Breaking the silence, Building Peace: A Report on the disturbances in Matabeleland and Midlands, 1980-1988.* (1997)

<sup>60</sup> CCJP & LRF (as above n 59)



- c) Bayoneting of pregnant women exposing their foetuses.
- d) Shooting of women and their children strapped at the back.
- e) Raping of women, including school children.
- f) Extreme physical and sexual torture, which included beatings and putting of sticks into women's private parts.

A commission of enquiry was constituted to investigate the violent incidences that took place in Matabeleland Province.<sup>61</sup> However, the outcome of the commission's findings was never made public. Further, no army member was prosecuted and held accountable for the violence perpetrated against women during the Gukurahundi massacre. Rather, an amnesty was proclaimed, and all persons involved in the massacre were never brought to book.<sup>62</sup>

Members of the army were also identified as perpetrators in the election violence that took place in the 2000, 2002, and 2008 elections. It has been argued that since the year 2000, the country has been treated as an operational zone by the army.<sup>63</sup> Military force has been used to thwart any opposition popularity.<sup>64</sup> The Human Rights NGO Forum reported that senior army officials had been involved in acts of politically motivated violence and intimidation to opposition party members and their supporters.<sup>65</sup> During the 2008 election period, 424 cases of violence perpetrated by the army were reported.<sup>66</sup> The Crisis Coalition reported that the army was leading in violently campaigning for the ruling party by deploying soldiers in all the ten provinces to intimidate voters.<sup>67</sup>

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<sup>61</sup> CCJP & LRF (n 59 above).

<sup>62</sup> CCJP& LRF (n 59 above).

<sup>63</sup> Chitiyo (n 58 above) 19.

<sup>64</sup> Chitiyo (n 58 above).

<sup>65</sup> Zimbabwe Human Rights NGO Forum *Torture by state agents in Zimbabwe* (2002) 2.

<sup>66</sup> Crisis in Zimbabwe Coalition 'Footprints of abuse, MDC violence statistics' available at <http://www.crisiszimbabwe.org/> accessed 20 May 2019.

<sup>67</sup> Crisis in Zimbabwe Coalition *The military factor in Zimbabwe's political and electoral Affairs* (2011) 13.

The Zimbabwe Defence Forces also violated the right to peace on the 1<sup>st</sup> of August 2018 when they brutally murdered protestors in the streets of Harare. The President deployed the army to assist the Police Force, which had been overwhelmed by the protesters. In terms of the constitution, the President's power to deploy the defence forces are only exercised in cases of emergency or support of the Police Force in the maintenance of public order.<sup>68</sup> This occurs in situations where members of the Police Force are overpowered. The Constitution of Zimbabwe provides that the President should inform parliament as soon as possible after deploying the Army.<sup>69</sup> The President should also advise parliament about the reason for deployment and the place where they are deployed.

The army fired live ammunition to unarmed protestors without even giving warning shots. The brutal killing of protestors led to a commission of inquiry led by the former Deputy President of South Africa, Mr Kgalema Motlanthe. The Motlanthe Commission found out that the shooting of unarmed civilians was unjustified and of disproportionate force.<sup>70</sup> It also found that 'the use of sjamboks, baton sticks and rifle butts to assault members of the public indiscriminately was also disproportionate.'<sup>71</sup> The Defence Forces were accused of raping women in residential areas when they were deployed to quell mass protests that had erupted in the high-density residential areas in Harare in 2018.<sup>72</sup> Not even a single member of the army was arrested for the crime of rape. The army held a press conference and reported that rogue elements had unlawfully obtained access to the army uniforms and had gone on the spree of sexually abusing women.<sup>73</sup>

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<sup>68</sup> Sec 213(2) of the Constitution.

<sup>69</sup> Sec 214 of the Constitution.

<sup>70</sup> Report of the Commission of Inquiry into the 1 August 2018 Post-Election Violence Available at <http://www.postelectionviolencecommission.gov.zw/wp-content/uploads/2018/12/Final%20Report%20of%20the%20Commission%20of%20Inquiry%2018%20%20DEC%2018.pdf> 47.

<sup>71</sup> Report on the Commission of Enquiry (n 70 above).

<sup>72</sup> Sec 214 of the Constitution.

<sup>73</sup> Pindula News Breaking: 'Civilians Stole Our Uniforms' – Zimbabwe Police & Army Say In Joint Press Conference 10 January 2019 available at <https://news.pindula.co.zw/2019/01/19/civilians-stole-our-uniforms-zimbabwe-police-army-say-in-joint-press-conference/>.

The army has been accused of heavy-handedness and abuse of civilians whenever they are invited for joint operations with the police. The army has for a long time played a major role in Zimbabwean politics through instilling fear when it is conveniently used to maintain peace.<sup>74</sup>

#### **4.3.5 Police Service Commission (PSC)**

The PSC is constituted in terms of section 219 of the constitution. The Police Service's mandate is crucial when it comes to protecting the right to peace. Article 1 of the United Nations Code of Conduct for Law Enforcement Officials provides that 'law enforcement officials shall at all times fulfil the duty imposed upon them by the law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.'<sup>75</sup> Police officers also have a duty to respect the human dignity of the people they serve. Overall, they have an obligation to abide by human rights standards.<sup>76</sup>

The Police Service is part of the executive organ of the state, which is responsible for implementing the law. The functions of the Police Service are outlined in section 219 of the constitution as follows:

- (a) Maintaining the security of Zimbabwe.
- (b) Safeguarding the lives and property of citizens.
- (c) Maintaining law and order through crime investigation and prevention.
- (d) Impartially upholding the constitution.

The Police Service has violated the right to peace on numerous occasions. Reports by independent institutions and non-governmental organisations have indicated a pattern of abuse

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<sup>74</sup> Chitiyo (n 58 above) 19.

<sup>75</sup> Adopted by General Assembly resolution 34/169 of 17 December 1979.

<sup>76</sup> Art 2 United Nations Code of conduct for Law Enforcement Officials and Article 1 of the Harare Resolution on the SARPPCO Code of Conduct for Police Officials.

of power by the Police.<sup>77</sup> The Police Service unjustifiably uses extreme force in dispersing mass protests and has caused injuries to civilians on numerous occasions.<sup>78</sup>

The Zimbabwe Police Service has been on record for violating women's right to peace, particularly women's rights activists. The Research Advocacy Unit Report of 2011 revealed that 'women have encountered torture, assault, harassment, intimidation, and imprisonment at the hands of the police.'<sup>79</sup> Individual and activist groups have been subject to police brutality when they demonstrate.<sup>80</sup>

The Police Service is also violating women's right to peace by omission. The Police Service is accused of failing to properly handle domestic violence cases despite the existence of a victim-friendly unit system. Police officers have a general reluctance to pursue domestic violence matters due to their prejudices and stereotypes about women.<sup>81</sup> Research has also shown that very few cases of harassment of women in public spaces have been reported because women have experienced hostility and judgemental attitude by the police when they report such cases.<sup>82</sup> The Police Force has also been reluctant to investigate cases of politically motivated rape. As a result, very few cases were reported.<sup>83</sup>

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<sup>77</sup> Research Advocacy Unit et al , 'Preying on the "weaker" sex: political violence against women in Zimbabwe' (2010); The International Federation of Red Cross and Red Crescent Societies (IFRC) 'Zimbabwe country case study: effective law and policy on gender equality and protection from sexual and gender-based violence in disasters'(2017) Report available at <https://www.state.gov/wp-content/uploads/2019/03/Zimbabwe-2018.pdf>; International Bar Association 'Partisan policing: an obstacle to human rights and democracy in Zimbabwe'(2007) *Human Rights Institute Report*.

<sup>78</sup> Zimbabwe Human Rights NGO Forum report (n 65 above).

<sup>79</sup> RAU 2010 (n 77 above) 11.

<sup>80</sup> According to the RAU 2010 report, some of the activists that have experienced police brutality are the Women of Zimbabwe Arise (WOZA), a female director of the Zimbabwe Peace Project, Women from the National Constitution Assembly and Secretary-General of the General Agriculture and Plantation Workers Union of Zimbabwe RAU 2010 (n 88 above) 2.

<sup>81</sup> RAU 2010 (n 77 above) 2.

<sup>82</sup> P Mukumbiri 'A social- legal analysis of the harassment of women on the basis of their dressing in Harare' Unpublished LLM dissertation University of Zimbabwe (2014).

<sup>83</sup> RAU 2010 (n 77 above)11.

The research by RAU found that only 23% of female victims of politically motivated violence filed reports to the police.<sup>84</sup> The report further indicated that some women did not report because of the fear of reprisals by the Police.<sup>85</sup> Some women did not report because the police were involved in the ‘violence against them or what they witnessed.’<sup>86</sup> The research also found that most victims of politically motivated rape were members of the opposition parties who were raped as punishment for supporting the opposition party.<sup>87</sup> However, there were also female supporters of the ruling party who were sexually abused during the campaign period when they used make-shift shelters at night. The make-shift shelters were centres established by the ruling party where they met for night vigils that were meant to boost morale and support for the party during the campaign period.

The IFRC report of 2017 revealed that the Police Force lack the will to implement laws related to violence against women.<sup>88</sup> Participants in the research highlighted that Police Officers sometimes chose to offer mediatory remedies or advise that they should solve their disputes within the family homes, which has proved to be disastrous for the victims.<sup>89</sup> Feltoe’s research has also reviewed that the police have a record of failure to deal with domestic violence cases seriously. Hence, this author recommends that there is a need for further training of the police to change their attitudes to such cases.<sup>90</sup>

The Police Force has a victim-friendly system that operates in all the provinces in the country. The VFU started operating in 1995 in response to GBV that takes place in the domestic

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<sup>84</sup> RAU 2010 (n 77 above).

<sup>85</sup> RAU (2010) (n 77 above) 11.

<sup>86</sup>RAU (2010) (n 77 above)11

<sup>87</sup> Research Advocacy Unit and Zimbabwe Association of Doctors for Human Rights *No hiding place: politically motivated rape of women in Zimbabwe* (2010) 5.

<sup>88</sup> International Federation of the Red Cross and Red Crescent (IFRC) *Zimbabwe Country Study Effective law and policy on gender equality and protection from sexual and gender-based violence in disasters* (2017) 13.

<sup>89</sup> As above.

<sup>90</sup> G Feltoe ‘The role of the criminal law in the protection of women against gender-based violence’ (2018) III *Zimbabwe Electronic Law Journal*.

spaces.<sup>91</sup> Incidences of corruption in the system have been recorded.<sup>92</sup> The IFRC report revealed that sometimes dockets get lost or matters are withdrawn at the court, which compromises the system and the victim's safety.<sup>93</sup> It has also been noted that despite receiving training on gender-based violence, members of the police force still exhibit biased attitudes towards survivors of rape. They adopt a dismissive attitude towards the victim, which severely reduces the confidence of the women who report.<sup>94</sup> The women will subsequently refuse to take the matter further.<sup>95</sup>

The Zimbabwe Police Force is facing many challenges that severely affect its capacity to promote peace in the country. Some of the challenges include poor working conditions, political interference and police corruption.<sup>96</sup> The Zimbabwe Police Force has been systematically used as a weapon to fight the opposition forces by unleashing violence on protestors.<sup>97</sup> The Police Force has deliberately used oppressive laws such as the Public Order and Security Act to ban demonstrations by the opposition political parties.<sup>98</sup> As observed by Chitiyo, 'politicisation and political loyalty, rather than professionalism, is the guiding ethos within the security sector.'<sup>99</sup> This is seen in the state security's response to demonstrations organised by members of the opposition party.<sup>100</sup> The police deliberately use strategies to ban opposition gatherings under the guise of state security.<sup>101</sup>

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<sup>91</sup> IFRC Report (n 88 above).

<sup>92</sup> IFRC Report (n 88 above).

<sup>93</sup> As above.

<sup>94</sup> Feltoe (n 90 above).

<sup>95</sup> Feltoe (n 90 above).

<sup>96</sup> IFRC Report (n 88 above) 15.

<sup>97</sup> Chitiyo (n 58 above) 14.

<sup>98</sup> Chitiyo (n 58 above) 14.

<sup>99</sup> Chitiyo (n 58 above) 3.

<sup>100</sup> Chitiyo (n 58 above) 3.

<sup>101</sup> As above.

#### 4.4 Peace initiatives in Zimbabwe

The Government of Zimbabwe had undertaken various peace initiatives since 1980, when the country got its independence after a violent armed struggle with the British colonisers. These initiatives include signing unity accords, establishing the peace infrastructures such as the Organ for National Healing and Reconciliation and the NPRC, national dialogues, political agreements, and lastly, granting amnesty to all perpetrators of political violence as a way of forging reconciliation. This part of the thesis will examine the peace initiatives that have taken place in Zimbabwe. It interrogates whether these initiatives effectively promoted peace and stability in Zimbabwe.

##### 4.4.1 Unity Accord

The signing of a Unity Accord is one of the peace initiatives conducted by the government of Zimbabwe. The Unity Accord was signed by the Zimbabwe African National Union-Patriotic Front (ZANU PF) and Zimbabwe African People's Union-Patriotic Front (ZAPU PF) on the 22<sup>nd</sup> of December 1987. The Unity Accord resulted from protracted incidents of violence in the Matabeleland region, which resulted in the death of over 20000 people. When the country gained independence, the two main political parties, ZANU-PF and ZAPU-PF, failed to share political space.<sup>102</sup> This resulted in incessant, often violent, conflicts between the combatants from the two main political parties.<sup>103</sup> The government then unleashed the national army and the special Russian trained Five Brigade into Matabeleland, where several atrocities were committed. Under the Unity Accord, all parties committed to having a one-party state. All the parties committed to ending violence that was taking place in Matabeleland.<sup>104</sup> The Unity Accord resulted in the establishment of ZANU PF, led by Robert Mugabe. The Unity Accord failed to address the impact of the *Gukurahundi* massacre on the ordinary lives of the communities affected by the violence.<sup>105</sup> The Unity Accord was criticised for being too elitist

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<sup>102</sup>T Mashingaidze 'The 1987 Zimbabwe National Unity Accord and its aftermath: a case of peace without reconciliation?' in C Hendricks & L Lushaba *From national liberation to democratic renaissance in Southern Africa* (2005) 82 83.

<sup>103</sup>As above.

<sup>104</sup> Zimbabwe Unity accord 1987 para 9.

<sup>105</sup> Mashingaidze (n 102 above).

and failing to consider the voices of the actual sufferers and victims.<sup>106</sup> Tshuma argues that ‘the complexities around what transpired during this period have been made worse by half-truths and an almost-persistent blame game by both parties.’<sup>107</sup>

The Unity Accord did not open platforms for victims to be heard. Its main focus was on the political leaders and the sharing of power between the elite. The government did not take responsibility for the Gukurahundi massacre. Rather it adopted a culture of silence over that issue. Up to this day, the Gukurahundi massacre is a ghost that haunts Zimbabweans’ peaceful existence. The Zimbabwean society still needs to heal from the previous human rights violations that the Army perpetrated in the early 80s in Matabeleland. The Motlanthe Commission that sat in 2019 to investigate the incident of shooting of civilians in August of 2019 highlighted that it received complaints about the *Gukurahundi* massacres.<sup>108</sup> The Commission also noted that ‘it was also clear to the Commission from the testimonies of the witnesses who appeared before it that there is at present a very worrisome degree of polarisation and bitterness within the body politic of Zimbabwe.’<sup>109</sup> Therefore the Peace Accord of 1987 did not bring any reconciliation among the Zimbabwean society.

#### **4.4.2 Global Political Agreement (GPA)**

The Global Political Agreement was an agreement among the political parties (ZANU-PF) and the two MDC formations. It resulted from the former South African head of state’s mediation effort. The 2008 election failed to produce an outright winner as both the main contestants, Morgan Tsvangirai and Robert Mugabe, failed to obtain the required majority of 50% votes to be declared the winner of the Presidential elections. A run-off was ordered. Morgan Tsvangirai pulled out from the run-off because violence was unleashed on his party supporters. He argued that the environment was very violent such that it would not be possible to conduct peaceful elections. Mugabe went uncontested and won the elections but had legitimacy challenges.

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<sup>106</sup> D Tshuma ‘Reconciliation, integration and healing efforts in Zimbabwe’ (2018) 2 *Trends Conflict* 19 26.

<sup>107</sup> Tshuma (n 106 above)

<sup>108</sup> ICCJP & LRF (n 59 above) 49.

<sup>109</sup> Report of the Commission of Inquiry (n 70 above) 55.



The GPA came against a background of huge economic decline, which resulted in severe food shortages, high inflation rates, long queues at the bank and poor health service and the death of more than 4000 people due to the cholera outbreak.<sup>110</sup> The GNU recorded some success. The period 2009 to 2013 when the GNU existed saw improvement in service delivery. Multicurrency was introduced. For a moment, the country enjoyed temporary stability in the economy due to Short Term Emergency Recovery Programmes. The price of basic goods stabilised. However, the GNU did not provide a lasting solution to Zimbabwe's political and economic crisis. It was not people-oriented.<sup>111</sup> The political leaders focused on political posts and 'self-aggrandisement as opposed to improvement of the economy and social lives of Zimbabweans.'<sup>112</sup> It did not address the major causes of conflicts in Zimbabwe. Perpetrators of political violence were never punished for their atrocities.<sup>113</sup>

According to Mukhlani, there was no change in the way the Army and the Police operated, and these institutions 'remained militarised under the GNU leading to continued impunity for human rights abuses and a partisan military and police force.'<sup>114</sup> Chitiyo argues that the GNU was the 'worst possible solution to Zimbabwe's crisis.'<sup>115</sup> The narrative of impunity to human rights violations continued under the GNU. Despite the signing of the GNU, political activists were abducted and tortured, and some have been in detention since that period.<sup>116</sup> The GNU failed to deal with political detainees, violent farm invasions, curtailment of media freedom, arrest of journalists and lawyers.<sup>117</sup> This undermined the 'whole concept of inclusive power

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<sup>110</sup> T Mukhlani 'Zimbabwe's government of national unity: successes and challenges in restoring peace and order' (2014)2(2) *Journal of Power, Politics & Governance* 169 171.

<sup>111</sup> Mukhlani (n 110 above) 171.

<sup>112</sup> Mukhlani (n 110 above) 175.

<sup>113</sup> Mukhlani (n 110 above) 177.

<sup>114</sup> Mukhlani (n 110 above) 176.

<sup>115</sup> Chitiyo (n 58 above).

<sup>116</sup> P Machakanja 'National healing and reconciliation in Zimbabwe: challenges and opportunities (2010) *Institute for Justice and Reconciliation* 1 5.

<sup>117</sup> Machakanja (n 116 above) 5.

sharing and a government of national unity assumed to have been founded on the GPA's principles of social cohesion, national healing and unity.'<sup>118</sup>

Women were completely side-lined in the GPA as only one woman out of the six negotiators was involved in the negotiations. Shaba argues that the GNU 'made no real attempt to address the numerous issues that continue to limit women's participation in politics and in the decision-making process.'<sup>119</sup> As a result, the GPA did not adequately address issues of gender equality. Under the GNU, women occupied only 8 seats out of the 50 cabinet posts.<sup>120</sup> They had 30 seats out of 210 parliamentary seats.<sup>121</sup>

#### **4.4.3 Organ on National Healing, Reconciliation and Integration (ONHRI)**

The ONHRI was established under the GNU in 2009. The Organ was created to deal with transitional justice issues in the country.<sup>122</sup> Article 7(1)(c) of the GPA established the ONHRI, whose mandate was to advise on achieving national healing. The ONHRI did not produce the desired results. It was weakened by ethnic factors that became a huge stumbling block to national healing due to animosity over the Gukurahundi massacre.<sup>123</sup> The constitution of the ONHRI was also problematic. It was composed of political actors who were protagonists for a long time.<sup>124</sup> The ONHRI had a top-down approach that failed to deal with the needs of the local communities.<sup>125</sup> Hapanyengwi-Chemhuru argues that 'it is like picking players in a football match and making them referees to the match that they are playing while the victims

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<sup>118</sup> Machakanja (n 116 above) 2.

<sup>119</sup> L Shaba 'Dreaming of equality: time to fulfil the GPA's promises to women'. (2011) OSISA available at [http://archive.kubatana.net/html/archive/women/1106301s1.asp?sector=hr&year=2011&range\\_start=511.accessed](http://archive.kubatana.net/html/archive/women/1106301s1.asp?sector=hr&year=2011&range_start=511.accessed) 4 March 2016.

<sup>120</sup> Shaba (n 119 above).

<sup>121</sup> Shaba (n 119 above).

<sup>122</sup> D Dube & D Makwere 'Zimbabwe: towards a comprehensive peace infrastructure (2012) 2(18) *International Journal of Humanities and Social Science* 297 302.

<sup>123</sup> T Mashingaidze 'Zimbabwe's illusive national healing and reconciliation processes: from independence to the inclusive government 1980- 2009' (2010)1 *Conflict Trends* 19 24.

<sup>124</sup> O Hapanyengwi-Chemhuru 'Reconciliation, conciliation, integration and national healing possibilities and challenges in Zimbabwe' (2013) *African Journal on Conflict Resolution* (2013) 79 90.

<sup>125</sup> M Mbire 'Seeking reconciliation and national healing in Zimbabwe: case of the organ on national healing, reconciliation and integration (ONHRI)' (2011) *Institute of Social Studies* 1 21.

remain spectators of activities and processes in which they should be participating.’<sup>126</sup> People wanted to discuss the issue of the Gukuruhundi Massacre, but the Organ completely blocked the topic for discussion. Hence the ONHRI failed to achieve reconciliation due to its selective approach to issues.

Murambadoro and Wielenga argue that peace initiatives in Zimbabwe adopt a ‘state-based approach to resolving conflict,’ which is divorced from the needs of local communities.<sup>127</sup> Consequently, conflicts keep recurring.<sup>128</sup> It has been argued that the ONHRI did not achieve any success because it was not an independent body but was run by the ruling party.<sup>129</sup> The ruling party was also accused of committing human rights abuses the ONHRI was supposed to deal with.<sup>130</sup> ONHRI was dissolved in 2013 and was replaced by the NPRC.

#### 4.4.4 Granting of amnesty

The granting of amnesty is one of the strategies that the government of Zimbabwe has adopted as a symbol of forgiving and moving forward in order to achieve peace. The granting of amnesty emanated from the 1980 Lancaster House Agreement, which resulted in the end of the war as part of the peace package. The amnesty granted at the Lancaster House Conference pardoned all acts of war despite the demands for a trial of perpetrators of acts of war by the black nationalists.<sup>131</sup> In 1988, after signing the unit accord, the Government of Zimbabwe granted amnesty to all perpetrators of human rights violations committed during the Matabeleland uprisings.<sup>132</sup> In 1995, the President also pardoned all politically motivated violence perpetrators who committed the offences during the 1995 elections. The elections that

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<sup>126</sup> Hapanyengwi-Chemhuru (n 124 above).

<sup>127</sup> R Murambadoro & C Wielenga ‘Reconciliation in Zimbabwe: the conflict between a state-centred and people centred approach’ (2015) 37(1) *Strategic Review for Southern Africa* 31 40.

<sup>128</sup> Murambadoro & Wielenga (n 127 above).

<sup>129</sup> Mashingaidze (n 123 above).

<sup>130</sup> Machakanja (n 116 above).

<sup>131</sup> A Magaisa The big Saturday read: Presidential amnesty & impunity in Zimbabwe 22 April 2016 available at <https://www.bigsr.co.uk/single-post/2016/04/22/The-Big-Saturday-Read-Presidential-Amnesty-A-short-history-of-impunity-and-political-violence-in-Zimbabwe> accessed 10 January 2020.

<sup>132</sup> Machakanja (n 116 above) 10.

followed in 2000 were marred by violence, and again the President granted amnesty to all suspects of human rights violations and political violence committed during and after the 2000 elections.<sup>133</sup>

In 2002, the President granted amnesty to perpetrators of violence committed prior to the 2002 Presidential election. In 2008, the President also granted amnesty again under the Clemency Order No. 1 of 2008. The amnesty covered violent acts committed during and after the 2008 elections.<sup>134</sup>

The granting of amnesty has failed to eradicate political violence in Zimbabwean society. Rather, the presidential pardons contribute to politically motivated violence during the election period because perpetrators are fully aware that they will be pardoned. As such, it has been argued that granting amnesty is one of the political acts that ‘negate the achievement of durable peace through justice.’<sup>135</sup> The granting of amnesty does not foster national healing as victims feel cheated by the system. The former Chief Justice noted,<sup>136</sup>

The effect of the amnesty created the belief that political violence will be condoned and those responsible for it are above the law and will go unpunished. This is extremely dangerous. It sends the wrong signal, suggesting that election-related violence will be tolerated a bad precedent for future elections. The clear message being given is that such crimes committed in support of the ruling party will go unpunished.

#### 4.4.5 National dialogues

National dialogues have proved to be a successful strategy in peace negotiations, post-conflict reconciliation and nation-building. National dialogues are defined as ‘nationally owned political processes aimed at generating consensus among a broad range of national stakeholders in times of deep political crisis, in post-war situations or during far-reaching political transitions.’<sup>137</sup> National dialogues can be initiated to deal with severe political deadlocks or

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<sup>133</sup> Machakanja (n 116 above) 10.

<sup>134</sup> Magaisa (n 131 above).

<sup>135</sup> Machakanja (n 116 above).

<sup>136</sup> Politics-Zimbabwe: anger at clemency for political crimes available at <http://www.ipsnews.net/2000/10/politics-zimbabwe-anger-at-clemency-for-political-crimes/> accessed 10 February 2019.

<sup>137</sup> M Blunck et al *National dialogue handbook a guide for practitioners* (2017) 21.

blocked political institutions with the ultimate aim of easing tensions, reaching a political agreement or establishing a new institutional framework.<sup>138</sup> The objective of national dialogues is to prevent and manage a crisis.<sup>139</sup> Stagnant and Murray argue that in order to be successful, national dialogue should have the following principles:<sup>140</sup>

- a) Inclusion.
- b) Transparency and public participation.
- c) A credible convener.
- d) Agenda that addresses the root causes of conflict.
- e) Clear mandate and appropriately tailored structure, rules, and procedures.
- f) Agreed mechanism for implementation of outcomes.

According to Blunck, national dialogues have three phases that need to be followed to be successful.<sup>141</sup> The three stages are preparation, process, and implementation.<sup>142</sup> The preparation stage involves ‘conflict analysis, fact-finding, establishing political will and positions, and gathering support.’<sup>143</sup> A public announcement or invitation to a dialogue can only be made after ensuring sufficient political will to participate in a dialogue.<sup>144</sup> Bodies or institutions should be set up to facilitate the national dialogue. Preparation of the dialogue is not a rushed process as the necessary environment need to be set before beginning the process.<sup>145</sup>

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<sup>138</sup> Blunck (n 137 above) 21.

<sup>139</sup> Blunck et al (n 137 above) 22.

<sup>140</sup> E Murray & S Stagnant ‘National dialogues: A tool for conflict transformation?’(2015) [Peace Brief](https://www.usip.org/publications/2015/10/national-dialogues-tool-conflict-transformation) United States Institute of Peace available at <https://www.usip.org/publications/2015/10/national-dialogues-tool-conflict-transformation> accessed 20 January 2019.

<sup>141</sup> Blunck et al (n 137 above) 21.

<sup>142</sup> Blunck et al (n 137 above) 21.

<sup>143</sup> Blunck et al (n 137 above) 22.

<sup>144</sup> Blunck et al (n 137 above) 22.

<sup>145</sup> As above.

The current President of Zimbabwe called for a national dialogue and created a platform called Political Actors Dialogue (POLAD). POLAD is a platform where leaders of different political parties contested in the 2018 election meet and dialogue on Zimbabwe's political and economic challenges. However, the platform has been snubbed by the main opposition party, the MDC Alliance. They questioned the sincerity of the convener, who was also one of the contestants in the disputed elections.<sup>146</sup> The MDC Alliance wanted regional bodies such as SADC and AU to convene the dialogue. The dialogue convened by the President did not even have any of the principles laid out by Stagnant and Murray that guarantees a successful dialogue. Mutandwa argues that the call for a dialogue by the President 'seemed half-hearted and not genuinely interested in resolving the problems bedevilling the country.'<sup>147</sup> POLAD does not have a clear structure on how the dialogue is supposed to be conducted. The cause of the current political conflict is the disputed presidential election outcome. As such, the POLAD framework is supposed to address that dispute, but the convener and the participants have decided to focus on other issues. The POLAD platform is very exclusionary. It only centres on political parties as if they are the only actors affected by the political and economic crisis. The church's umbrella organisation have been left out of the POLAD.<sup>148</sup> The Churches have been assembled under the banner of the Zimbabwe Council of Churches.

Women are severely underrepresented in POLAD. This is because POLAD is composed of contestants in the 2018 presidential election. Very few women were Presidential candidates in the 2018 election. Men became the majority members of POLAD by default. As such, there should have been a deliberate move to invite as many women as possible even though they did not contest the presidential elections.<sup>149</sup> The POLAD framework has also ignored those in business, human rights and people with disabilities.<sup>150</sup> Zimbabwe is facing an economic and

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<sup>146</sup> E Mandikwaza 'Constructive national dialogue in Zimbabwe design and challenges' (2019)1 *Conflict Trends*. 20 20.

<sup>147</sup> G Mutandwa 'Gender and national dialogue: the issues' (2019) 1 *Thinking Beyond Journal of Alternatives for a Democratic Zimbabwe* 15.

<sup>148</sup> 'Churches want stake in national dialogue' The Herald 29 November 2019 available at <https://www.herald.co.zw/churches-want-stake-in-national-dialogue/> accessed 10 February 2020.

<sup>149</sup> Mutandwa (n 147 above).

<sup>150</sup> As above.

political crisis. As such, the involvement of the business community is very crucial. Other key members of the society such as ‘academics, women, experts in rights, democracy, security, churches, civic society, media, business and ambassadors are supposed to be part of the dialogue.’<sup>151</sup>

POLAD was convened by the President of Zimbabwe, who cannot be a credible convener by any standards. The opposition parties are contesting his election to the office of the President. His legitimacy to power has been under severe criticism. As such, he lacked the legitimacy to convene a dialogue. Secondly, the dialogue did not address ‘the root causes of the crisis.’<sup>152</sup> Rather it is just a call to move forward and forget about the election disputes. The dialogue does not have a clear structure, rules and procedure. Neither does it have a defined expected outcome and manner of implementation. As part of its working modalities, the POLAD established thematic committees. Some of the committees established under POLAD are the Constitutional and Legislative Thematic Committee, the International Re-Engagement Committee and the Economic Thematic Committee. The POLAD framework is very exclusionary and cannot be termed a national dialogue. Its success is yet to be seen. The NPRC made a press release calling people to come to a dialogue. The call was in line with their constitutional mandate in terms of section 252(d) of the constitution.

The NPRC’s proposed dialogue was more focused than the dialogue initiated by the President. The call was inclusive as the invite was extended to everyone. Further, the NPRC did not dictate the agenda of the dialogue. Rather it invited everyone to a dialogue so that they could set the agenda. The NPRC’s proposed dialogue framework was premised on the following questions;

- Why are Zimbabweans not talking?
- What are the key pillars of national dialogue?
- Who should participate, how and at what level?

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<sup>151</sup> C Mabasa ‘Women’s voices matter’ (2019) 1 *Thinking Beyond Journal of Alternatives for a Democratic Zimbabwe* 17.

<sup>152</sup> Mutandwa (n 147 above).

- How should a dialogue process be structured?
- What does a successful dialogue look like?

The call also had anticipated outcomes of the dialogue. One of the anticipated outcomes of the dialogue initiated by the NPRC was the inclusion of communities.<sup>153</sup> However, the NPRC's proposed dialogue failed to commence because the President then appointed the Chairperson to be the Chairperson of the POLAD.<sup>154</sup> The President deliberately thwarted the NPRC dialogue by convening his own dialogue with political leaders and, in the process taking over the role of the NPRC. The fact that POLAD is chaired by the NPRC Chairperson undermines the independence of the process.

#### **4.5 Participation of women in peace structures in Zimbabwe**

Article 10(2) places an obligation on states to ensure increased participation of women in all aspects of peace. Article 10(2)(b) specifically provides for the increased participation of women in structures and processes for conflict prevention, management and resolution at local, national and international levels. Therefore, this section will analyse how Zimbabwean women have been participating in peace structures such as the judiciary, army, parliament and religious institutions.

##### **4.5.1 Participation of women in peace talks**

Zimbabwe has gone through peace processes three times in its lifetime. The first peace talks were at the Lancaster House Conference in 1980 when it negotiated its freedom from the British Colonial Government. The peace negotiations resulted in the adoption of Zimbabwe's first Constitution, commonly referred to as the Lancaster House Constitution. This constitution was negotiated at the Lancaster House Conference held in London.

At this conference, women's representation was invisible despite women having participated side-by-side with men in the protracted struggle against the Rhodesian forces.<sup>155</sup> Zimbabwean

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<sup>153</sup> NPRC Press Statement 31 January 2019

[http://nprc.org.zw/sites/default/files/Press%20Statement%2020190131%281%29\\_0.pdf](http://nprc.org.zw/sites/default/files/Press%20Statement%2020190131%281%29_0.pdf) accessed 13 May 2019.

<sup>154</sup> Mandikwaza (n 146 above) 20.

<sup>155</sup> Southern Rhodesia constitutional conference held at Lancaster house, London September - December 1979 Report available at <http://www.lind.org.zw/genweb/documents/lancaster.htm> accessed 20 July 2016. Report indicates that only one woman was part of the delegation that attended the Lancaster house conference. However,



women's political activism dates back to the liberation struggle.<sup>156</sup> The exclusion of women at the Lancaster House Conference resulted in having their issues side-lined; hence the agreed constitution only provided for civil and political rights.<sup>157</sup>

The Lancaster House Constitution did not provide for substantive equality between men and women.<sup>158</sup> Neither did it provide for socio-economic rights.<sup>159</sup>

A few years after independence, Zimbabwe had civil unrest, known as the Gukurahundi massacre. This massacre was carried out in the Matabeleland and Midlands provinces, which resulted in mass deaths of the Ndebele people. A Peace Accord was eventually signed in 1987 by the late Joshua Nkomo, who was a leader of ZAPU PF, representing the Ndebele people and Robert Mugabe representing ZANU PF. The Accord paved the way for the formation of ZANU PF, which is the current ruling party.

At the signing of the Unity Accord, not only were women's voices silenced but the whole population was not given an opportunity to even narrate their experiences and encounters during the violations. According to the Catholic Commission for Justice and Peace report in Zimbabwe, the people in Matabeleland just wanted 'lasting peace' and to be heard.<sup>160</sup> Unfortunately, their views on lasting peace were not considered. The perpetrators of violence were granted amnesty for the sake of maintaining unity.<sup>161</sup> Women again were invisible in this peace agreement led by two men, namely Robert Mugabe and Joshua Nkomo.

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the report does not indicate any participation from this woman. The speakers at this meeting were Robert Mugabe, Bishop Abel Muzorewa and Joshua Nkomo. These being leaders of the different delegation teams present spoke of behalf of their members.

<sup>156</sup> D Nhengu *Zimbabwean women in conflict transformation and peace building past experiences future opportunities* (2013) 5.

<sup>157</sup> Lancaster House Constitution had discriminatory provisions against women for instance section 23 allowed discrimination of women in matters of personal status and customary law.

<sup>158</sup> C Flores & PA Made 'The politics of engagement: women's participation and influence in constitution-making Processes' (2014) *UN Women, United Nations Entity for Gender Equality and the Empowerment of Women* 4.

<sup>159</sup> Flores & Made (n 158 above).

<sup>160</sup> CCJP & LRF (n 59 above)16.

<sup>161</sup> See CCJP report (n 59 above). This report later documented people's experiences of the Gukurahundi massacre.

In 2008, Zimbabwe had an election that was hotly contested by the opposition parties, namely, the Movement for Democratic Change with its two formations led by the late Morgan Tsvangirai, Arthur Mutambara and Welshman Ncube. SADC appointed a mediator who was the former head of State of South Africa, Mr Thabo Mbeki, to facilitate the peace dialogues. This saw the formation of the government of national unity, which was sanctioned by the Global Political Agreement (GPA).<sup>162</sup>

Women were underrepresented in the GPA process. There was only one female negotiator who also became part of the drafting team.<sup>163</sup> Women only became visible in the making of the constitution. The issues affecting women were primarily decided by men,<sup>164</sup> and as a result, women did not have any substantial gains under the GPA.<sup>165</sup> The Global Political Agreement has been criticised for its focus on ‘political and economic agendas,’ at the exclusion of the social agenda.<sup>166</sup> It has been argued that this focus reflects a ‘lack of appreciation of the impact of the conflict on women and a lack of commitment to reforming the post-conflict situation to advance gender equality.’<sup>167</sup> The GPA did not include sex as a ground for discrimination.<sup>168</sup>

In the three peace processes that Zimbabwe went through, women never got an opportunity to be heard. The peace that the negotiators pursued was from their standpoint. It was man-led peace that excluded women’s issues. After the formation of the GNU, the President proclaimed amnesty on all political violence suspects to facilitate national healing.<sup>169</sup> Some of the convicts

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<sup>162</sup> Global Political Agreement (Government of National Unity), 15 September 2008 hereinafter referred to as the GPA.

<sup>163</sup> Research advocacy Unit Report stipulates that although political parties had women representation in their camps, their role tended to be advisory and outside of the real process of negotiating. Research and Advocacy Unit, ‘Putting it right: addressing human rights violations against Zimbabwean women’ (2009) 2.

<sup>164</sup> Research Advocacy Unit (2009) (n 163 above).

<sup>165</sup> Z Gambahaya, Tokenism and deception: how women have been side-lined since the GPA (2011)1 *Open Space* 151 152.

<sup>166</sup>T Mugadza & H Hermann (eds.) *Gender Analysis of Zimbabwe’s Global Political Agreement* (2011).

<sup>167</sup> Mugadza & Hermann (n 166 above) 4.

<sup>168</sup> Mugadza & Hermann argues that ‘the exclusion of sex as grounds for discrimination suggests an oversight of the broad experiences of women and discrimination, in particular during the conflict, and the impact women continue to experience even after the conflict has ended’. 4

<sup>169</sup> The president of Zimbabwe has the power to proclaim amnesty and in the 2 unity accords that the President was part of, he proclaimed an amnesty for the sake of national healing and maintenance of peace. It has been the

had committed serious crimes such as rape and attempted murder. Rape was used as a weapon to punish the female members of the opposition parties. Women's bodies were used as tools to express the power and dominance of other political parties. Women were again robbed of justice by the peace process.

Zimbabwe has a history of excluding women in the decision-making process, as highlighted above. Zimbabwean women's participation in conflict management is hampered by many intersecting factors such as race, ethnicity, class, sex and culture. Sometimes the factors intertwine and form a web of oppression that entangle women. One such example is the patriarchal institution coupled with capitalistic agendas that collude to oppress women and deny them access to employment opportunities and maintain their invisibility in public. According to UN Women, the interlocking oppression in women's lives is the limited access to resources, skills and capacities.<sup>170</sup> As such, these interlocking oppressions have to be eliminated in order for women to have meaningful participation in the peace processes. If the oppressions are left unattended, women's participation will not yield any positive changes towards the lack of implementation of the right to peace.

#### **4.5.2 Participation of women in the judiciary**

This part examines the composition of women in the formal and non-formal judiciary, such as the community court. The judiciary is one of the institutions that is part of the conflict resolution processes. The adjudication of cases by courts results in creating a peaceful existence. In countries that observe the rule of law, the judiciary's role is central to realising peace. An independent judiciary protects people's rights and even becomes innovative to counter acts of suppression that are caused by broadly phrased legislation that aims to curtail human rights.

The independence of the judiciary is also determined by the appointment process. Prior to the 2013 Constitution, the appointment of judges was a process shrouded in secrecy. The then Judicial Service Commission (JSC), which was composed of presidential appointees, would

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Government of Zimbabwe's assumption that awarding amnesty on perpetrators of political violence actually preserves peace.

<sup>170</sup> UN Women 'Women make up more than one-third of Zimbabwe's new Parliament' (2013) available at <http://www.unwomen.org/en/news/stories/2013/9/zimbabwe-women-mps-sworn-in> accessed 2 September 2017.

recommend candidates for appointment. The criteria for selecting judges was unknown. There was also no guarantee that the ones recommended by JSC would be the ones to be finally appointed. The 2013 Constitution ushered in progressive provisions on the appointment of judges. Section 192 of the constitution provides for public interviews of judges. Members of the public have a right to nominate candidates and even submit comments on the nominated candidates' profiles. However, this process has not resulted in the increase of women on the bench despite it being transparent. Currently, there are 13 High Court judges out of a total of 35 judges.

The Supreme Court judges' bench has a complement of 13 judges, and 6 of them are women. The heads of these courts are men, although the High Court President was a woman at one point. In 2016, the interviews of the Chief Justice were held using the public interview system, and although one female interviewee was the strongest candidate in terms of work record and performance, a male Chief Justice was appointed.<sup>171</sup> Judges are appointed by the Judicial Service Commission (JSC). Currently, the JSC has only one female commissioner, and this imbalance does not give hope for more female appointments of judges. What is worrisome is the fact that even the female nominees for the vacancy of judges are very few compared to men.

In 2016, the JSC had its first interviews, and out of the 51 shortlisted candidates, only 15 were women. Again in 2017, the number did not improve as women remained fewer than men. Even though the constitution allows anyone to nominate a candidate and even the candidates can nominate themselves. The provisions of section 184 of the constitution concerning the appointment of members of the judiciary are yet to be realised.<sup>172</sup> Section 184 of the constitution provides that appointments to the judiciary 'must reflect broadly the diversity and gender composition of Zimbabwe.'<sup>173</sup> As argued by Ojigbo, the visibility of women on the

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<sup>171</sup>D Hofisi & G Feltoe 'Playing politics with the judiciary and the constitution?' (2017). available at SSRN: <https://ssrn.com/abstract=3274207> or <http://dx.doi.org/10.2139/ssrn.3274207> accessed 10 March 2018.

<sup>172</sup> Sec 184 provides that 'appointments to the judiciary must reflect broadly the diversity and gender composition of Zimbabwe.'

<sup>173</sup> Sec 184 of the Constitution.

bench and in leadership gives some sort of assurance that when matters involving women's rights are presented there is truly a mix of legal minds that would review it.<sup>174</sup>

The hierarchy of courts demands that local conflicts are resolved at the Community Courts before they escalate to the nearest Magistrates Courts. These Community Courts deal with customary cases only and are therefore applicable in rural areas. Due to the challenges that litigants face in accessing the Magistrates Court, most cases in the rural areas are handled at the Community Courts. Some of the challenges identified include complicated procedures, unaffordable court fees, and limited physical access due to long distances between the Magistrates Court and the communities. Community Courts are regulated by the Customary Law and Local Courts Act.<sup>175</sup> Chiefs preside over Customary Courts.

In Zimbabwe, chieftainship is based on biological entitlements and lineage rather than merit. Chieftainship is a right by birth and, as such, cannot be contested. As a result, the majority of chiefs in Zimbabwe are male. This is so because of cultural beliefs that women cannot inherit chieftainship. Despite the constitutional guarantee that women should constitute at least 50% of all elected and appointed members of governmental bodies and commissions, women are failing to permeate the cultural spaces as chiefs.<sup>176</sup> Further, the Constitution places an obligation on the state to promote the full participation of women in all spheres of society based on equality with men. Out of the 277 chiefs in Zimbabwe, only six are women. These are Chief Sinqobile Mabhena of Umzingwane, Chief Ketso Mathe of Gwanda and Chief Nonhlanhla Sibanda of Insiza, all from the Matabeleland South Province. In the Mashonaland region, there are two female chiefs, chief Charehwa and Chief Chimukoko.<sup>177</sup> Despite the appointment of

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<sup>174</sup> O J. Ojigbo 'Does female representation at the African Commission on Human and Peoples' Rights matter?' (2017) available at <https://www.africanwomeninlaw.com/single-post-nvpea/2017/03/07/Does-Female-Representation-at-the-African-Commission-on-Human-and-Peoples-Rights-matter> accessed 25 August 2017.

<sup>175</sup> Customary Law and Local Courts Act 2, 1990.

<sup>176</sup> Sec 17 of the Constitution.

<sup>177</sup> S Mpofu 'Zimbabwe breaks new ground in traditional institutions' available at <http://www.africangn.net/fs38.htm> accessed 1 December 2016.

these chiefs, some of them still face hurdles in executing their duties, as some men refuse to accept the female chiefs' authority.<sup>178</sup>

The Constitution of Zimbabwe is now in its seventh year since its enactment in 2013, but no effort has been made to eradicate cultural practices that violate the right to equality in the appointment of traditional leaders. This is despite the fact that section 2 of the Constitution provides for constitutional supremacy. It invalidates any customary practice, culture or law that violates the rights provided in the constitution. It has been argued that one of the weaknesses of the 2013 Constitution is the lack of specific gender equality provisions in the representation of women as traditional leaders.<sup>179</sup>

Dube and Glenwright argue that this is a grey area requiring that citizens read several sections of the constitution to promote women's rights.<sup>180</sup> I, however, argue that despite the lack of a specific provision on gender equality in the appointment of chiefs, the broad provision of the right to equality can be utilised. Further, the constitution is clear that any practice that is contrary to the bill of rights is invalid. Section 2 of the constitution can be used to challenge discrimination of women from chieftainship based on culture.

#### **4.5.3 Participation of women in the legislature and the executive**

Political spaces enable women to influence policies and ensure the protection of their rights. Participation also facilitates a platform where women exercise the opportunity to promulgate legal frameworks that speak to their lived realities. Politicians make legislation, and as such, it is quite critical that women become part of the process. They need to influence the agenda and not rubber-stamp agendas set by other people. Women's participation in politics is still very low despite the use of reserved seats.

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<sup>178</sup> See T Kunene 'Zimbabwean village elders: 'no female chief'', newspaper article available at <https://wazaonline.com/en/power-people/zimbabwean-village-elders-no-female-chief> accessed 1 December 2016. This author outlines that the female chief Sinqobile Bahle Mabhena of Matabeleland South is still facing challenges of acceptance despite being instilled chief 17 years ago. The elders of the village still cite that their customary culture does not allow women to become chiefs.

<sup>179</sup> S Dube & D Glenwright (eds) 'SADC gender protocol barometer Zimbabwe' (2015) *Gender Links* 19.

<sup>180</sup> Sec 80(3); sec 17(2) and sec 56(6) should be read as one in order to eliminate discrimination of women in cultural spaces.

Challenges faced by women in participation have been well documented, and various factors have been advanced on the reasons why women do not participate in the election process as candidates.<sup>181</sup> Researchers have identified the following issues as causes of the exclusion of women from politics, violence, stereotyping, hostile environments, lack of balance in the duty of care and political life.

Further, the Research Advocacy Unit (RAU) report has also identified various reasons why women do not want to participate in politics.<sup>182</sup> Some of the reasons identified include:

- Patriarchal institutions.
- Negatives stereotypes on female politics.
- Lack of confidence by female candidates.
- The sexualisation of women.
- The lack of the rule of law.
- Lack of faith in the process.
- Lack of resources for campaigning.
- Violence.
- Domestic responsibilities.

The report further recommends that the constitutions of political parties should deal with violence, protect women from abuse, fund women at the primary election level and implement the equality provisions in the national constitution. Manchanda focused on a possible explanation for involving women in political participation. This includes the fact that women's notion of power and security is different from men's, and therefore they are more likely to be proponents for peace.<sup>183</sup> First, the author argues that women 'are more pacific than men in their

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<sup>181</sup> R Gaidzanwa 'Gender, women and electoral politics in Zimbabwe' (2004) 8 *EISA Research Report*; A P Reeler 'Zimbabwe women and their participation in elections' (2011) *Research & Advocacy Unit (RAU)*; M Zungura & E Nyemba 'The implications of the quota system in promoting gender equality in Zimbabwean politics' (2013)3(2) *International Journal of Humanities and Social Science* 204 212; Maphosa et al, 'Participation of women in Zimbabwean politics and the mirage of gender equality' (2015)4(5) *Ubuntu: Journal of Conflict and Social Transformation* 127 130; Research advocacy Unit (2017) 'Increasing women's political participation'2(17) *Policy Brief*.

<sup>182</sup> RAU 2017 (n 181 above).

<sup>183</sup> R Manchanda 'Redefining and feminising security' (2001)36 (22) *Economic and Political Weekly* 4100 4107.

approach to internal and inter-state conflict situations,<sup>184</sup> and as a result, women compromise to peace.<sup>185</sup> However, Manchanda's assertions amount to essentialising women as if they are a homogeneous group. Factors such as race, class and religion affect women's right to participate in politics differently.

Violence continues to characterise Zimbabwe's elections such that women's participation is hindered. The participation of women in politics is failing to meet the benchmarks set by the SADC Protocol on Gender and Development to which Zimbabwe is a party. The electoral process should be peaceful in order for women to be able to participate. In addition to the intimidating environment for participation, financial issues also affect women's eagerness to participate in elections since they have to fund themselves in primary elections. Funding will only be availed for parliamentary elections. It is at this juncture that the majority of women lose out. In Zimbabwe, it is still a fact that women's access to economic opportunities is not the same as men's. Patriarchal attitudes still hinder women from fully gaining access to economic and empowerment opportunities.

The enactment of the 2013 Constitution resulted in increased women in parliament due to the introduction of reserved seats. This constitution reserves 60 seats for women to be elected through a system of proportional representation, based on the votes cast for political party candidates in the National Assembly. For the 60 elected Senate seats, women and men candidates are listed alternately, with every list headed by a woman candidate.

According to UN Women, this quota system resulted in women's representation in parliament doubling from 17 per cent following the 2008 general elections to 35 per cent in the elections on 31 July 2013.<sup>186</sup> While this improvement is applauded, it has not yet reached the benchmark set by the SADC Protocol on Gender and Development. The reserved seats were misused as an opportunity to deny women the chance to compete with men in other seats. The former

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<sup>184</sup> Manchanda (n 183 above).

<sup>185</sup> Manchanda (n 183 above).

<sup>186</sup> UN Women 'Women make up more than one-third of Zimbabwe's new Parliament' (2013) available at <http://www.unwomen.org/en/news/stories/2013/9/zimbabwe-women-mps-sworn-in> accessed 2 September 2017.



coordinator of the Women’s Coalition of Zimbabwe had this to say on the abuse of reserved seats by men, ‘It was a dog-eat-dog election and women were pushed towards the 60 seats and told to vacate the competitive seats for men. It was not unusual for women to be told, ‘we gave you 60 seats, what more do you want.’<sup>187</sup>

In the 2018 elections, only 12.4% of women were elected outside the women’s quota for the National Assembly.<sup>188</sup> In 2018, only 26 women out of 210 House of assembly candidates were elected in the National Assembly. This figure was slightly lower than the outcome of the 2013 elections, where 29 women out of 210 candidates were elected outside the reserved seats.

Despite the small increase of women in parliament, their impact in influencing decision making is still minimal, particularly because women’s representation in the portfolio committees is still low. Parliamentary Portfolio Committees are platforms for members of parliament to question policy implementation through question and answer sessions and requesting reports from government departments. Of the 20 functional portfolio committees, women only chair 8 committees.<sup>189</sup>

Women are severely underrepresented in all the committees. The lowest numbers are found in the Defence, Home Affairs and Security services committees, which has 3 women out of 24 members. Media Information and Broadcasting services have 3 women out of 27 men, while the committee on industry and commerce has 3 women out of 23. From the committees available, women only constitute more than 50 per cent of the Women and Affairs Committee.<sup>190</sup> This is a clear reflection of ghettoising of the Committee. There is a misunderstanding and stereotype of perceiving the Ministry of Women Affairs Gender and Community Development and the Parliamentary Committee on Gender as women’s business. It is only these committees that have 50 per cent membership of women.

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<sup>187</sup> UN Women (n 186 above).

<sup>188</sup> Zimbabwe Gender Commission (ZGC) ‘Preliminary election monitoring report on the 2018 harmonised elections’ (2018).

<sup>189</sup> Dube & Glenwright (n 179 above) 38.

<sup>190</sup> Dube & Glenwright (n 179 above) 38.

### ***Cabinet appointments***

One of the most retrogressive aspects of underrepresentation manifests in the Cabinet despite being the most important decision-making organ in a country. The underrepresentation of women in such fora seriously detracts their ability to influence the political, social and economic context that responds to their lived realities. The underrepresentation of women in the Cabinet is not a new phenomenon in Zimbabwe. In 2013, the President appointed only four women out of a 29-member Cabinet.<sup>191</sup> This was done despite adopting a new constitution that provided for gender equality in all public appointments.

Section 17 of the constitution provides that women should constitute half of all public appointments. Although section 17 falls under the National Objectives, it can be justiciable if a progressive and purposive interpretation is done by connecting it to the right to equality provided in the bill of rights. In 2018, the country witnessed changes in Presidential leadership. Immediately after his inauguration, the new President of Zimbabwe, Emmerson Mnangagwa, appointed a Cabinet with only three women.

After the 2018 election, the President appointed 6 women out of a 20-member Cabinet. Although the Cabinet does not have a 50% female membership, it departed from the narrative of allocating ministries that are less important to women. The President appointed a woman to head the Ministry of Defence for the first time. However, the appointment of two male vice-presidents, even though at one point the ruling party had agreed that the post would belong to a woman, is retrogressive. It removes any hope women had of restoring the vice president post to a woman.

#### **4.5.4 Women and the security sector**

There is no gender mainstreaming in the security sector.<sup>192</sup> There are no affirmative action measures to promote increased women's participation in the sector. The Zimbabwe Defence Act 1972, the Police Act of 1995 and the Zimbabwe Prisons Act of 1993 are not gender

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<sup>191</sup> T Chigwata 'Three years into the implementation of the Zimbabwean Constitution of 2013: progress, challenges, prospects and lessons' in C Fombad (ed) *The implementation of modern African constitutions: challenges and prospects* (2016) 91.

<sup>192</sup>Dube & Glenwright (n 179 above) 19.

mainstreamed.<sup>193</sup> Participation in the security sector is still very low as women only constitute a mere 20% of the Zimbabwe Defence Forces staff and 25% of those in Police Services.<sup>194</sup> This is despite the clear obligation under the SADC Gender Protocol, which mandated state parties to ensure equal representation and participation in key decision-making positions in conflict resolution and peacebuilding by 2015. Zimbabwe has therefore failed to meet its targets under the SADC Gender Protocol.

#### **4.5.5 Women and religion**

Men have dominated religious leadership, although women constitute a larger part of the congregations.<sup>195</sup> Church doctrines reinforce the disqualification of women from leadership in the church. The Bible is interpreted in a manner that eliminates female church leadership. Women, therefore, occupy positions only in sisters' union forums or in the youth assemblies. The Anglican Church, for example, allows women to have other leadership posts save for deacons, priests or bishops posts.<sup>196</sup> In essence, women are not allowed to take up key decision-making positions in the church.

It has also been reported that women in the Apostolic Faith Mission (AFM) do not qualify to be church board members.<sup>197</sup> The New Constitution of AFM does not even permit women to lead the sisters' unions. It is led by the pastors of the church, who in most cases are male. The World Mission Society Church of God does not acknowledge women's leadership on the basis that God is male.<sup>198</sup>

The submissive role that women are expected to play has reinforced oppression and abuse of women. In addition to the denial of leadership roles, sexual abuse of women by church leaders

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<sup>193</sup> Dube & Glenwright (n 179 above) 131.

<sup>194</sup> Dube & Glenwright (n 179 above) 131.

<sup>195</sup> T Walter 'Why are most churchgoers women? a literature review' (1990)20 *Vox Evangelica* 20 (73). Available URL: [http://biblicalstudies.org.uk/pdf/vox/vol20/women\\_walter.pdf](http://biblicalstudies.org.uk/pdf/vox/vol20/women_walter.pdf) Accessed 20 June 2018; ZIMSTAT. 'National Census Report of 2012' (2012). available URL: [www.zimstat.co.zw/.../Census/CensusResults2012/National\\_Report.pdf](http://www.zimstat.co.zw/.../Census/CensusResults2012/National_Report.pdf) accessed 20 June 2018.

<sup>196</sup> 'The muted women of the church' *Sunday Mail* 7 August 2016 available at <http://www.sundaymail.co.zw/the-muted-women-of-the-church/> (accessed 25 May 2018).

<sup>197</sup> As above.

<sup>198</sup> Sunday Mail (n 196 above).

is also on the rise in Zimbabwe. Prominent church leaders have been accused of rape numerous times. In 2014, the RMG End Time Message leader was convicted of four counts of rape and sentenced to 40 years in prison. The evidence at the trial revealed that church congregants had endured sexual abuse from the man of the cloth for several years. The women failed to report due to spiritual threats by the Pastor, who was believed to possess much power that could cause misfortune to befall anyone who tried to report the abuse.<sup>199</sup>

Another prominent pastor of a multi-member congregation Prophet Magaya was dragged in court in 2018 on allegations of raping a congregant.<sup>200</sup> There are several newspaper reports on pastors and prophets facing rape charges.<sup>201</sup> The Church's role in providing women's right to a peaceful existence is quite crucial. The Church has been known as a sanctuary of safety. The Church is also instrumental in reinforcing peace in society. As revealed by numerous newspaper reports, the Church has now become a source of violation of women's right to peace in Zimbabwe.

#### **4.5.6 Participation of women in African traditional religion**

African traditional religion has been more accommodative of women than Christianity. The role of women as spirit mediums is highly valued and respected under the African traditional

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<sup>199</sup> 'Gumbura sentenced to 40 years' *The Herald* 3 February 2014 available at <https://www.herald.co.zw/breaking-news-gumbura-sentenced-to-40-years/> (accessed 11 July 2018).

<sup>200</sup> 'Drama at Magaya rape trial' *Newsday* 4 April 2018 available at <https://www.newsday.co.zw/2018/04/drama-at-magaya-rape-trial/> (accessed 11 July 2018).

<sup>201</sup>In 2017, an Apostolic Faith Mission pastor was charged with raping a 16-year-old congregants. Some of these stories have been reported in the following papers, 'Pastor jailed 15 years for raping a congregant' *The Chronicle* 27 March 2017 available at <http://www.chronicle.co.zw/pastor-jailed-15-years-for-raping-congregant-8/> (accessed 11 July 2018); 'Senior AFM pastor faces 5 counts of rape' *Newsday* 26 August 2016 available at <https://www.newsday.co.zw/2016/08/senior-afm-pastor-faces-5-counts-rape/> (accessed 11 July 2018); 'Sexual healing' Pastor up for rape' *The Herald* 11 August 2018 available <https://www.herald.co.zw/sexual-healing-pastor-up-for-rape/> (accessed 11 July 2018); 'Rapist Pastor jailed 22 years' *The Herald* 3 July 2017 available at <https://www.herald.co.zw/rapist-pastor-jailed-22-years/> (accessed 11 July 2018) 'HIV+ Pastor caged 18 years for raping congregant' *Newsday* 15 December 2017 available at <https://www.newsday.co.zw/2017/12/hiv-pastor-caged-18-years-raping-congregant/> (accessed 11 July 2018); 'Mwazha pastor gets 11 years for rape 20 January 2018' *Daily News* available at <https://www.dailynews.co.zw/articles/2018/01/20/mwazha-pastor-gets-11-years-for-rape> (accessed 11 July 2018).

religion. According to Cheater, women in pre-colonial Africa played the role of authority as spirit mediums in the public domain.<sup>202</sup>

In Zimbabwe, the role of Mbuya Nehanda as a spirit medium and war heroine is still symbolical up to this date. She was a leader who caused trauma to the white colonial rule. She was executed for mobilising rebellion against white rule. The African culture has always respected women's participation in important ceremonies.<sup>203</sup> Women participated in important ceremonies such as rainmaking. Cheater argues that women also took advantage of their religious role to maintain authority in society. She argued as follows:<sup>204</sup>

Religious roles in traditional belief systems therefore afforded and continue to afford exceptional women, who refuse to conform to the standard female 'social personality', an escape route into individualized positions of power as well as authority, based on traditional religion.

Only after colonisation did the exclusion of women in societal ceremonies start to occur. The colonisers came with Christianity, which emphasised the submission of women. Schmidt argues that elite African men distorted the version of African customary law in a bid to feel powerful after being emasculated by colonial rule.<sup>205</sup> This view also resonates with Cheater, who argues that 'white male attitudes and colonial legislation distorted customary flexibility.'<sup>206</sup> African leaders at the time emphasised the oppressive aspects of the customary law, which they then presented as the actual version of customary law. Customary law and practices were fluid such that punishment was not fixed. It depended on the circumstances and social position of the accused person. The perceptions of male dominance and undervaluing of women persisted beyond the colonial period into post-colonial Zimbabwe. The current version

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<sup>202</sup> A P Cheater 'The role and position of African women in pre-colonial and colonial Zimbabwe' (1986) XIII (ii) *Zambezia* 65 68.

<sup>203</sup> Cheater (n 202 above) 77.

<sup>204</sup> As above.

<sup>205</sup> E Schmidt 'Negotiated spaces and contested terrain: men, women, and the law in Colonial –Zimbabwe1980-1939' (1990) 16 *Journal of Southern Africa studies*. 622-648.

<sup>206</sup> Cheater (n 202 above).

of the position of women under customary law is a distorted one that is coming from colonial perceptions.

While it has been shown that women occupy and continue to occupy positions of authority in African traditional religion, it can be argued that the authority is not based on the notions of equality but on the role that those women will be occupying at that particular time. It is that role that is respected and not the women performing it. In addition, it can also be argued that women would sometimes get possessed by the spirit of a male spirit medium. As a result, a woman would be viewed as a man for ritual purposes and, as a result, gains respect and acceptability.

The participation of women in African traditional religion is also based on age and social class. Not every woman in the African traditional religion is permitted to participate, but rather participation is based on the privilege of age or possession of a spirit. Young women who have yet to menstruate and older women who have passed menopause participate in important religious ceremonies. Middle-aged women who do not have the privilege of being possessed by spirit mediums are automatically eliminated from participating in religious ceremonies.

#### **4.6 Women and access to resources**

Reardon argues that ‘peace means a condition of social justice, economic equality and ecological balance’.<sup>207</sup> Therefore, feminist perspectives of peace reject the notion of entirely focusing on military security at the expense of the social and economic welfare of women. Access to resources improves the economic welfare of women. It also reduces the feminisation of poverty. Access to resources empowers women to contest in elections since the lack of funds has been identified as one of the reasons why fewer women are in parliament. The following parts of the chapter will examine how women can access resources based on equality with men. The analysis is limited to access to resources such as land and mines. These have been selected because they are the main sources of revenue for the country. Zimbabwe’s economy is mainly based on agriculture and mining.

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<sup>207</sup> B Reardon ‘Feminist concepts of peace and security’ in P Smoker Pet al *A reader in peace studies* (1990) 138.

#### 4.6.1 Women and land

Women's access to land has been restrictive based on perceived notions that women do not need to own land in their own capacity since they can utilise the land owned by family members such as their fathers and husbands.<sup>208</sup> The effect is that access to land is tied to marriage, which in a way makes marriage compulsory for everyone and exclusionary to women who opt to remain single. Under customary law, the land is communally owned. This automatically disqualifies women from owning land as male heads are normally preferred.<sup>209</sup>

At independence in 1980, Zimbabwe's adopted constitution had clear provisions that discriminated against women in customary law matters. Section 20 of Zimbabwe's old Constitution allowed discrimination in matters of personal law. Therefore, this provision was a barrier for women to claim the right to equality if the claim was based on customary law. In 2000, the Government of Zimbabwe initiated a land reform programme that redistributed land from the white minority to all the people of Zimbabwe. Women did not equally benefit from the Land Reform Programme.

According to the Women in Law and Southern Africa (WILSA) study, only 18% of the women benefitted from the Land Reform Programme.<sup>210</sup> The Land Reform Programme provided an opportunity for the Government of Zimbabwe to increase women's access to land, particularly because the state provided for the land under the reform programme without any connection to patriarchal ancestors or lineage.<sup>211</sup> However, women's interests in land were peripheral as the focus was placed on race and economic efficiency.<sup>212</sup> As a result, gender equality was not considered at all. This resulted in the regurgitation of patriarchal cultural practices in land

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<sup>208</sup> M Makonese 'Women's rights and gender equality in the new Zimbabwean Constitution: the role of civil society in implementation and compliance' in C Fombad (ed) *The implementation of modern African constitutions: Challenges and prospects* (2016) 156.

<sup>209</sup> C Walker 'Land reform in Southern and Eastern Africa: key issue for strengthening women's access to land and rights in land' (2001) Report on study commissioned by United Nations Food and Agriculture Organisation Sub-regional Office of Southern and Eastern Africa.

<sup>210</sup> WILSA 'Gender, access to land post 2013 Constitution in Zimbabwe' *Baseline Report* 1.

<sup>211</sup> WILSA (n 210 above).

<sup>212</sup> M Kesby 'Locating and dislocating gender in rural Zimbabwe: the making of space and the texturing of bodies.' (1999) 6(1) *Gender, Place and Culture* 38.

allocation.<sup>213</sup> Hellum and Derman argue that the Land Reform Programme was never intended to respond to women's needs for secure land tenure and access to support services or rights but was designed and implemented solely as an instrument to serve the former President.<sup>214</sup>

The Constitution of Zimbabwe guarantees the right to access land. Section 72 of the constitution provides that 'every person has the right in any part of Zimbabwe, to acquire, hold, occupy, use transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others.'<sup>215</sup> However, despite the progressive nature of the constitution in protecting women's rights to land, the major shortfall is that the constitution was promulgated after the bulk of the land was allocated to men after the Fast Track Land Reform Programme.<sup>216</sup>

Makonese's research reflects that the implementation of constitutional provisions on women's right to agricultural land has been limited because the constitution was promulgated when most of the agricultural land was distributed.<sup>217</sup> This has seen only 18 per cent of women gaining access to A1 small-scale allocations and a mere 12 per cent in the A2 commercial and large-scale allocations.<sup>218</sup> One of the reasons advanced for the failure of land reform to allocate women land is that at the heart of land reform was the issue of race.<sup>219</sup> The white farming community mainly owned the land. One of the goals of the land reform was to distribute land to everyone, but the land was distributed firstly along with political affiliation and patriarchal lines.

Land is the source of income for the majority of Zimbabweans. Zimbabwe's economy is based on agriculture, and women lose out on opportunities to empower themselves and contribute to the economy's growth. The unequal access to economic opportunities reduces women's

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<sup>213</sup> WILSA (n 210 above) 2.

<sup>214</sup> A Hellum & B Derman 'Land reform and human rights in contemporary Zimbabwe: balancing individual and social justice through an integrated human rights framework' 32(10) *World Development* 1800.

<sup>215</sup> Further, sec 296 establishes the Zimbabwe Land Commission which has the mandate to eliminate all forms of unfair discrimination, particularly gender discrimination.

<sup>216</sup> Makonese (n 208 above) 165.

<sup>217</sup> Makonese (n 208 above) 165.

<sup>218</sup> Makonese (n 208 above).

<sup>219</sup> Makonese (n 208 above).



participation in politics, decision making, and general power. This violates the right to peace, as provided in Article 10 of the Maputo Protocol.

#### **4.6.2 Women in Mining**

Article 10 of the Maputo Protocol makes provision for the participation of women in peace management processes, but it is important to note that peace cannot be achieved without development. Peace and development are interlinked. Poverty is a major contributor to women's vulnerability to violence. It is therefore critical that women's access to economic opportunities should be increased. Financial stability enables women to make independent decisions in their lives. It enables them to remove themselves from violent relationships.

The relationship between peace and development has been acknowledged in several human rights instruments. These include the African Charter on Human and Peoples' Rights, the Maputo Protocol, the PSC Protocol, the Universal Declaration on Human Rights (UDHR), and the United Nations Declaration on the Right to Development.<sup>220</sup> Article 3 of the PSC Protocol provides that the objective of the PSC is to:<sup>221</sup>

Promote peace, security and stability in Africa, in order to guarantee the protection and preservation of life and property, the well-being of the African people and their environment, as well as the creation of conditions conducive to sustainable development.

Article 10(3) of the Maputo Protocol further emphasises the relationship between peace and development by imposing an obligation on states to reduce military spending.

The SADC Gender Protocol Barometer revealed that Zimbabwean women only constitute 23% of those in economic decision making.<sup>222</sup> The Ministry of Mines also made provision for a 30% quota for women in mining. It has been highlighted that despite the 30% quota reserved for women, very few women are interested in mining.<sup>223</sup> If interrogated further, women's lack of interest in mining reveals the societal stereotypes that mining is for men.

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<sup>220</sup> The United Nations Declaration on the right to Development was adopted by the United Nations General Assembly on 4 December 1986.

<sup>221</sup> Art 3.

<sup>222</sup> Dube & Glenwright (n 179 above) 66.

<sup>223</sup> Dube & Glenwright (n 179 above) 65.

Women mainly focus on small scale projects such as poultry, which enables them to buy basics but does not create sustainable development. As a result, women just lose interest despite the lucrative nature of the mining industry. It is, therefore, pertinent that women are trained in mining activities. They need to access loans since mining requires much capital. Article 19 of the Protocol recommends that states should ‘promote women’s access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women.’

#### **4.7. Other Social and economic issues affecting women’s right to peace**

Various social and economic factors that affect the implementation of the right to peace have been identified and discussed below.

##### **4.7.1 Unemployment**

Zimbabwe’s unemployment rate in the formal sector is unknown but estimated to be above 80%.<sup>224</sup> The unemployment rates had increased since early 2000 when the economy witnessed a spiral downfall after the Land Reform Programme. The unemployment rates also worsened in 2015 due to the Constitutional Court judgement in the case of *Don Nyamande and Anor v Zuva Petroleum (Pvt) Ltd.*<sup>225</sup> In that case, the court ruled that employers have a common law right to terminate employees’ contracts without notice. As a result of this judgement, close to 20 000 employees lost their jobs as companies took advantage of this judgement to offload salary burdens in a difficult economy.<sup>226</sup> The effects of unemployment also strain women who already suffer from the burden of care.

The loss of employment also increased domestic violence cases due to social stereotypes of masculinity that expect men to be the providers.<sup>227</sup> Social norms still expect men to be the

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<sup>224</sup> S Chiumia ‘Is Zimbabwe’s unemployment rate 4%, 60% or 95%? why the data is unreliable?’ Africa check 1 October 2014’ <https://africacheck.org/reports/is-zimbabwes-unemployment-rate-4-60-or-95-why-the-data-is-unreliable/> (accessed 10 March 2019). The actual statistics of unemployment rate in Zimbabwe are however unknown.

<sup>225</sup> SC 43/2015

<sup>226</sup> ‘Labour Bill a tragedy of good intentions’ *Zimbabwe Independent* 28 August 2015’ Zimbabwe Independent available at <https://www.theindependent.co.zw/2015/08/28/labour-bill-a-tragedy-of-good-intentions/> (accessed 10 May 2016)

<sup>227</sup> O N. Moyo, surviving structural violence in Zimbabwe: the case study of a family coping with Violence (2008) *Bulletin de l’APAD* 7.

breadwinners. This expectation puts men under much pressure, who then offload the pressure to their partners in the form of domestic violence. Many people have resorted to informal work such as vending. Women are the hardest hit by poverty due to their gender roles. As a result, women constitute the highest number of vendors.<sup>228</sup>

#### **4.7.2 Poor service delivery**

Zimbabwe is characterised by poor service delivery in almost every sector. The most affected sectors are the health, municipal services and justice delivery system. Poor service delivery negatively affects the enjoyment of women's right to peace. The country's maternal mortality rate is still considered high in the SADC region.<sup>229</sup> It is also reported that the major causes of maternal mortality in Zimbabwe are related to poverty.<sup>230</sup> Families are failing to afford maternity costs and transportation costs to the hospitals.

With the souring economy, access to health has become unaffordable for the majority of the population. Subsidised health services are no longer available. The Assistance Medical Treatment Orders (AMTOS) that used to be given to those who cannot pay so that they can access free services are no longer in use. Their disuse has resulted from the government's bad reputation of not paying service providers for the services rendered.

Municipal services such as refuse collection are a nightmare, and this burdens women's lives since they are the ones responsible for cleaning and taking care of the home. Women are resorting to coping mechanisms such as burning the rubbish or burying it, which is also a violation of the right to a healthy environment. Further, this is not a long-term solution and has negative consequences as it results in air pollution. Water supply is erratic, and again women feel the heat more than men because of the gender roles.

A baseline survey conducted by Action Aid Zimbabwe in Chitungwiza, Harare, revealed numerous abuses that women face at water points.<sup>231</sup> These include sexual abuse, where they

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<sup>228</sup> International Labour Organisation 'Situation analysis of women in the Informal economy in Zimbabwe' (2017).

<sup>229</sup> 'Maternal mortality rate still high in Zimbabwe.' *The Herald* 14 November 2018 Available at <https://www.herald.co.zw/maternal-mortality-rate-still-high-in-zimbabwe/> (accessed 20 January 2019).

<sup>230</sup> Herald (n 229 above).

<sup>231</sup> Report on file with author.

are forced to exchange sex for a bucket of water. The baseline survey revealed that this is a common practice in high-density areas. Women's participation in water governance in the area is limited. The communities have come up with committees to regulate access to borehole water.

Women are not even represented in these structures, yet the water shortage affects them more than men due to gender roles. Research by Manjengwa highlighted that working women suffer the most when accessing water.<sup>232</sup> This is because they can only fetch water in the evening after spending the whole day at work. Working women are resorting to buying water for daily use, which is not sustainable and negatively affects the family budget.<sup>233</sup>

Street lighting is another issue that was highlighted in the baseline survey. Women complained that poor lighting in the residential areas exposes them to hazards such as robbery and rape. Even in the streets with lighting, massive load shedding still causes women to remain in the dark.

#### **4.7.3 Feminisation of poverty: a violation of women's right to peace**

Zimbabwe is characterised by the feminisation of poverty. The term feminisation of poverty refers to increased differences in poverty levels among women and men, with women being poorer than men.<sup>234</sup> Women constitute the majority of vendors in the city of Harare.<sup>235</sup> The increase in the unemployment rate in Zimbabwe has seen women turning mostly to vending. The domestic duties of looking after the family force women to engage in vending to provide food for the family.

The harsh economic environment has changed some of the gender roles that men and women are expected to perform by society. For instance, men have been known traditionally as breadwinners and providers of food in the home. The reality in Zimbabwe is that women have

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<sup>232</sup> C Manjengwa 'An analysis of the impact of perennial water problems on time and economic affordability for women working outside the home in Chitungwiza, Zimbabwe' Unpublished Masters Thesis University of Zimbabwe 2014 50.

<sup>233</sup> T Njaya 'An evaluation of income disparities between male and female street vendors of Harare in Zimbabwe' (2016)2(3) *Journal of Studies in Social Sciences and Humanities* 106 107.

<sup>234</sup> M Medeiros & J Costa 'The 'feminisation of poverty': a widespread phenomenon?' in S Chant (ed.) *The international handbook of gender and poverty concepts, research, policy*.

<sup>235</sup> Njaya (n 233 as above).

taken centre stage in providing for the family. This has exacerbated their burden because, in addition to providing for the family, they still shoulder the responsibilities of all household chores.

Research by Zimbabwe Young Women Peace Network has revealed that women in Zimbabwe are susceptible to violence in the streets. The research concludes that the responsible authorities lack the political will to bring order to the vending issue peacefully. This is also caused by archaic legal frameworks that do not consider the evolving social and economic conditions. The municipal by-laws and the Urban Councils Act prohibits vending; therefore, the protection of women in cases where vending is considered illegal is non-existent.<sup>236</sup> These women face abuse and harassment by municipal police officers who will be enforcing the law.

ZYWNP states that the high number of female street vendors results from social inequalities that deny them the opportunity to go to school. The low literacy levels compel women to resort to low-income jobs that are labour intensive.<sup>237</sup> Research has also shown that female vendors earn less than male vendors.<sup>238</sup> The disparities in income result from unequal opportunities in accessing money to stock wares to sell. It was observed that female vendors mainly sell perishable stuff such as fruits and vegetables while men sell other items of value such as electricals.<sup>239</sup>

There are limited sites for vending that are legal. The allocation of these sites is marred by discrimination based on political affiliation.<sup>240</sup> Corruption by city officials is a major hindrance for women who desire to trade legally. The opportunity to access legal vending sites is limited and is based on connections. Women are vulnerable to having their goods confiscated in the streets as they will be attending to their children.<sup>241</sup> When the municipal police pound on them,

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<sup>236</sup> Zimbabwe Young Women Network for Peace Building (ZYWNP) (2017) 'Vending not disorder' 3.

<sup>237</sup> ZYWNP (n 236 above).

<sup>238</sup> Njaya (n 233 above).

<sup>239</sup> Njaya (n 233 above).

<sup>240</sup> P Mukumbiri 'Protecting the right to administrative justice for waste pickers and street vendors in Harare' Zimbabwe Researched commissioned by Women in Informal Employment Globalising and Organising (WIEGO).

<sup>241</sup> Njaya (n 233 above) 10.

women are easily caught because they cannot just run away like male vendors leaving their children unattended. Women are also vulnerable to sexual abuse as sexual favours are extorted from them to avoid arrest by municipal police.<sup>242</sup>

#### **4.8 Intersectionality of issues affecting the implementation of women's right to peace in Zimbabwe**

The implementation of the right to peace has been affected by intersecting issues such as age, class and gender. As highlighted earlier, gender inequality has reduced women's opportunities in political, social and economic processes. Women in Zimbabwe have limited access to resources such as land and mines due to gender stereotypes that eschew distribution patterns towards men. Even though women constitute more than 52 per cent of the total population of Zimbabwe, they are severely underrepresented in political spaces. This is despite a strong legal framework that promotes equal representation in all spaces of life.

This research also revealed that class is a strong determination of how women enjoy the right to peace. Poverty limits women's access to participation in economic, social and political spheres. Age is also one factor affecting women's right to participate in the peace and conflict resolution process, as provided in the Maputo Protocol. This study found that young women are interfaced with a web of oppression that seriously curtails their right to peace. Gender, class, and age are combined factors that eliminate young women's participation in the peace processes in Zimbabwe. The 2018 elections in Zimbabwe revealed the total elimination of young women in Zimbabwean politics. The 2018 harmonised elections did not see any young women being elected as members of parliament.

Young women are also side-lined in the main political parties, namely the MDC Alliance and the ZANU PF.<sup>243</sup> As highlighted earlier in this chapter, women struggle to raise resources to fund their political campaigns. Young women also failed to participate because they failed to raise funds to support their campaign at the intra-party election level. Further patriarchal attitudes that look down upon women's leadership and the violent election environment are

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<sup>242</sup> Njaya (n 233 above) 11.

<sup>243</sup>, 'AMH voices young women on primary elections' *Newsday* 23 April 2018 available at <https://www.newsday.co.zw/2018/04/amhvoices-young-women-on-primary-elections/> (accessed 23 August 2018).

some of the factors that deter women from participation. Young women also suffer the same predicament. A survey by the Research Advocacy Unit found that young women do not exercise their right to vote because they feel that political parties do not represent the interests of young women.<sup>244</sup>

#### **4.9 Conclusion**

The peace infrastructure in Zimbabwe is still at the ‘embryonic stage.’<sup>245</sup> The NPRC is the lead institution in protecting women’s right to peace. The NPRC’s work so far indicates a broader understanding of issues that affect women’s right to peace. However, its mandate is only limited to ten years which is ending in 2023..<sup>246</sup> The NPRC’s lifespan is almost ending before it has made any impact. All independent commissions are not adequately funded. The limited funding severely cripples the institutions from fully executing their mandates. The lack of power to enforce their recommendations is a major setback to the effectiveness of all the Commissions. The recommendations have largely remained on paper without benefiting the citizens of Zimbabwe. Other institutions that are part of the peace architecture, such as the Police Force and the national army, are compromised as they are more aligned to the state than the citizens. The army and the Police Force have been accused of committing numerous acts of violence against the general citizenry, including the rape of women.

The legal framework on peace has very progressive provisions that promote women’s right to peace. However, these are not being fully implemented. The right to gender equality that is guaranteed in the various Acts of Parliament is decorative. Women are not equally represented in institutions that protect women’s right to peace save for the ZGC and the NPRC.

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<sup>244</sup> Research Advocacy Unit (RAU), ‘Will young women make a difference in the 2018 elections? Findings from an online survey Report’ (2017).

<sup>245</sup> Dube & Makwere (n 122 above) 301.

<sup>246</sup> Sec 252(d) of the constitution.

## **Chapter 5: APSA's normative frameworks, policies and practices in relation to implementing women's right to peace**

### **5.1 Introduction**

This chapter analyses the normative and institutional framework of the APSA. It examines how APSA implements women's right to peace. Cognisant of the fact that the UN Resolution 1325 on women, peace and security has been made part of the AU's gender architecture, it is imperative to examine the achievements made in Africa towards achieving the goals of the resolution. Resolution 1325's aim is to protect women's rights during conflict and post-conflict societies. The resolution also implores states to promote women's participation in peace structures. However, Resolution 1325 mainly focuses on the violence that occurs in physical conflict situations. In this regard, the resolution is limited to negative peace.

Further, the African Union has a comprehensive gender architecture that is made up of five pillars, namely: the Maputo Protocol, the Solemn Declaration on Gender Equality in Africa, the African Union Gender Policy, and the African Fund for Women.<sup>1</sup> This chapter discusses the extent to which APSA implements gender equality provisions provided under the gender architecture when it implements its 'peace and security agenda programme.' The chapter addresses the second research question, which is as follows: 'How effective is the African Union Peace and Security Architecture in implementing women's right to peace?'

In responding to this question, the chapter will focus on analysing what APSA does in practice in implementing the right to peace in general and women's peace as guaranteed under Article 10 of the Maputo Protocol. The prevention and protection functions of APSA's institutions will be examined to assess the adequacy of the institution to respond to the myriad of conflicts in Africa. In addition, the chapter will be a detailed analysis of what each structure under APSA does in terms of protecting women's right to peace on the Continent. Challenges that affect the implementation of peace prevention and protection will also be discussed. This chapter also questions the efficacy of the institutional structure of APSA to protect women's right to peace.

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<sup>1</sup> H Abdullah 'Women and the African Peace and Security Architecture' (2017)12 *African Peace Building Network APN Working Papers* 1 16.



## 5.2 What is the African Union Peace and Security Architecture?

The APSA is a mechanism that has been established by the Protocol relating to the Establishment of the Peace and Security Council of the African Union (the PSC Protocol). The PSC Protocol is the normative framework upon which the African Union Peace and Security Architecture (APSA) is based. APSA is also guided by the AU's Constitutive Act, the Solemn Declaration on a Common African Defence and Security Policy, and the Post-Conflict Reconstruction and Development Policy.<sup>2</sup> It was introduced during the transformation of the Organisation of the African Union to the African Union. The African Union (AU) was formed in 2001. This was after the Constitutive Act establishing the AU entered into force in 2001.<sup>3</sup>

The AU replaced the Organisation of the African Union (OAU).<sup>4</sup> Two pillars that underpin APSA are the PSC Protocol and the Common African Defence and Security Policy (CADSP).<sup>5</sup> According to Gumedze, the PSC Protocol was adopted to implement Article 1 of the ACHPR.<sup>6</sup> Article 1 places an obligation on states to undertake 'legislative and other measures in order to realize the rights contained in the Charter, in this case, the right to peace and security.'<sup>7</sup>

The OAU's institutional framework could not deal with conflicts in Africa. Under the OAU, the Mechanism for Conflict Prevention, Management and Resolution had the mandate to coordinate all OAU's peacekeeping efforts.<sup>8</sup> One of the biggest challenges of this mechanism was its limited functions and mandate. The mechanism lacked the mandate to intervene in conflict-ridden countries. Its mandate was limited to the prevention of conflicts. As a result,

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<sup>2</sup> Abdullah 2017 (n 1 above) 10.

<sup>3</sup> The African Union Constitutive Act was adopted in Lome, Togo on 11 July 2000. The Act entered into force on 26 May 2001.

<sup>4</sup> Sithole argues that the establishment of the AU was necessitated by the deficiencies of the institutional and normative framework of the OAU. A Sithole 'The African Union Peace and Security mechanism's crawl from design to reality: was the Libyan crisis a depiction of severe limitations?' (2012) 12(2) *African Journal On Conflict Resolution* 117 13.

<sup>5</sup> A Van Nieuwkerk 'The regional roots of the African Peace and Security Architecture: exploring centre-periphery relations' (2011) 18(2) *South African Journal of International Affairs* 169 171.

<sup>6</sup> S Gumedze *The Peace and Security Council of the African Union, its relationship with the United Nations, the African Union and sub-regional mechanisms* (2011) 35.

<sup>7</sup> Gumedze (n 6 above.)

<sup>8</sup> EY Omorogbe 'Can the African Union deliver peace and security?' (2011) *Journal of Conflict & Security Law* 35 37.

sub-regional organizations played a lead role in intervention. The AU has moved from mere prevention of conflicts to intervention in order to maintain peace. Article 4(h) of the AU Constitutive Act bestows members with the right to request AU to intervene. Similarly, the AU, on its own initiative, also has a right to intervene in a member state in cases of war crimes, genocide and crimes against humanity.<sup>9</sup>

However, the right to intervene has been sparingly utilised.<sup>10</sup> The possible reason why this right has not been enforced despite unending conflicts is the respect of sovereignty more than the desire to protect human rights. Territorial sovereignty is a safeguarded principle such that the African states are willing to condone elements of dictatorship and oppression of citizens by member states that amount to crimes against humanity. The concept of brotherhood and oneness sometimes determines decision making more than the provisions of the legal framework on peace. Another reason why APSA rarely uses the right to intervene is the lack of guiding principles on intervention.<sup>11</sup>

The OAU Charter failed to prioritise human rights, resulting in a regional body that allowed ‘the rights of OAU member states to prevail over human and peoples’ rights.’<sup>12</sup> In addition to its deficiencies in human rights, the OAU Charter also lacked gender equality provisions. The AU now provides for gender equality as one of the guiding principles in its work.<sup>13</sup> The AU now has other mechanisms that ensure that gender equality is achieved. According to Abdullah, the mechanisms include ‘the AU Action Plans on Gender Mainstreaming in peace and security,

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<sup>9</sup> CA Ndubuis & AO Adeoye, ‘Rethinking African Union’s capacity for regional conflict management’ (2015) 4(1) *Journal of African Union Studies* 25 27.

<sup>10</sup> According to the report submitted by the World Peace Foundation to the African Union, The PSC has only invoked article 4(h) once in 2015.

<sup>11</sup> The Report by the World Peace Foundation referred to above states that there is a need to come up with intervention principles. This was after intervention of the AU in Burundi was not endorsed by the AU Assembly.

<sup>12</sup> Mangu, ‘What future for human and peoples’ rights under the African Union, new partnership for Africa’s development, African Peer-Review mechanism and the African Court?’ (2004) 29 *South African Yearbook of International Law* 136 139.

<sup>13</sup> Art 4 (l) of the Constitutive Act stipulates that gender equality is one of the principles that the AU should function in accordance with.

special rapporteur on women's rights, a special envoy on women, peace, and security, and the AU's Five-Year (2015–2020) Gender, Peace, and Security Programme.<sup>14</sup>

The PSC Protocol established the African Union Peace and Security Architecture (APSA).<sup>15</sup> The structure establishes the norm and institutional framework of the peace mechanisms. APSA is made up of the Peace and Security Council (PSC), the Panel of the Wise (POW), the Continental Early Warning System (CEWS), the African Standby Force (ASF) and the Peace Fund (PF).<sup>16</sup> The African Union Commission is the Secretariat of APSA. The Chair of the AU Commission is very instrumental in conflict management.<sup>17</sup> The Chairperson, with the support of the Commission, has the mandate to draw to the attention of the PSC, POW, and other structures of APSA all pertinent issues that have an effect on conflict management.<sup>18</sup>

The objectives of the PSC are to:<sup>19</sup>

- a) Promote peace.
- b) Prevent conflict.
- c) Undertaking peacebuilding activities.
- d) Prevent terrorism.
- e) Promote good governance.
- f) Promote the rule of law and human rights.

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<sup>14</sup> H Abdullah, 'The African Union's Gender, Peace, and Security Mechanisms: policy options for protecting women in Conflict' (2016) 4 APN Briefing Note.

<sup>15</sup> A Jegede, 'The African Union Peace and Security Architecture: can the Panel of the Wise make a difference?' (2009) *African Human Rights Law Journal* 409 410.

<sup>16</sup> Jegede (n 15 above) 410.

<sup>17</sup> Van Nieuwkerk (n 5 above) 173. The role of the Chairperson is to assist in implementation and follow up of action by the PSC.

<sup>18</sup> Van Nieuwkerk (n 5 above).

<sup>19</sup> Art 3 of the PSC Protocol outlines the objective of the PSC.

The APSA is the institutional framework through which ‘African solutions to African problems’ are implemented.<sup>20</sup> APSA was designed to prevent conflicts through peace building and peace support operations effectively.

### **5.2.1 The Peace and Security Council**

Peace and security are some of the important agendas of the AU, amongst others, such as economic development and regional integration.<sup>21</sup> This is because the continent's underdevelopment is due to the absence of peace. Africa is not fully benefiting from its resources because of continuous conflicts in the form of civil wars and internal disturbances. Countries like the Democratic Republic of Congo and Sudan have endured the devastating effects of civil wars. Thousands of citizens have been internally displaced. It, therefore, became imperative for AU to adopt peace as one of its objectives and principles.<sup>22</sup> In order to fulfil its objectives relating to peace, the AU adopted the PSC Protocol in 2002.<sup>23</sup>

The PSC was not initially among the organs of the AU.<sup>24</sup> The PSC is an afterthought as it is not mentioned as one of the organs of the AU listed in Article 5 of the Constitutive Act of the African Union.<sup>25</sup> It was established later under Article 5(2) of the AU Constitutive Act.<sup>26</sup> The Protocol established the PSC on the Amendments to the AU Constitutive Act.<sup>27</sup> This raises the question as to why the AU did not incorporate it in the Constitutive Act, given the importance

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<sup>20</sup> S Dersso, ‘The quest for pax africana, the case of the African Unions peace and security regime’ (2012) 12(2) *African Journal on Conflict Resolution* 11 14.

<sup>21</sup> Bah et al *The African peace and security architecture: a handbook* (2014) 28.

<sup>22</sup> Art 3(f).

<sup>23</sup> The Protocol relating to the Establishment of the Peace and Security Council of the African Union was adopted by the AU Assembly in Durban South Africa on the 10<sup>th</sup> of July 2002. It entered into force on 26 December 2003.

<sup>24</sup> At the adoption of the AU, the organs of the AU were the following; ‘AU, The Executive Council, The Pan-African Parliament, The Court of Justice, The Commission, The Permanent Representatives Committee, The Specialised Technical Committees, the Economic, Social and Cultural Council, The Financial Institutions.’ See art 25(5).

<sup>25</sup> The Constitutive Act of the African Union was adopted on 11 July 2000. It entered into force on 26 May 2011.

<sup>26</sup> Art 5(2) of the Constitutive Act of the AU authorized the AU to establish any organs that it may deem necessary.

<sup>27</sup> The Protocol on Amendments to the Constitutive Act of the African Union was adopted in Maputo Mozambique on 11 July 2003.

of this institution to the continent. There are possible explanations that have been advanced by some scholars that might have contributed to the creation of the PSC.

First, the weakness of the OAU mechanism for conflict prevention had been apparent, and therefore there was a need to develop a strong framework for the protection of peace in Africa. The failure by the OAU mechanism for conflict prevention to address security challenges compelled the need for AU to develop a new structure.<sup>28</sup> Second, since the adoption of the mechanism in 1993, many conflicts have taken place, which brought forward the need for a peace structure.<sup>29</sup> According to Majinge, the increase in conflicts after adopting the AU Constitutive Act revealed the need for a strong peace architecture.<sup>30</sup> Haacke and Williams argue that the conflicts such as the Rwanda genocide and the civil unrest in Liberia, Sierra Leone, or Sudan could be the driving force behind establishing a new peace and security mechanism.<sup>31</sup>

Third, the method of operation of the mechanism was no longer adequate and realistic to the new conflicts that were emerging. It has been argued that the preventive diplomacy that OAU was accustomed to was no longer compatible with the nature of conflicts on the continent.<sup>32</sup> As a result, a new mechanism that would respond to contemporary challenges was necessary.<sup>33</sup>

The PSC is the central and most influential organ in terms of peace prevention and protection under APSA. The PSC is the decision-making body of the APSA. It has been described as the 'nerve centre'<sup>34</sup> and 'backbone'<sup>35</sup> of the AU peace structures. This is the political organ

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<sup>28</sup> CR Majinge 'Regional arrangements and the maintenance of international peace and security: the role of the African Union Peace and Security Council' (2010) *The Canadian Yearbook of International Law* 97 115.

<sup>29</sup> Van Nieuwkerk (n 5 above).

<sup>30</sup> Majinge (n 28 above).

<sup>31</sup> J Haacke & PD Williams 'Regional arrangements, securitization, and transnational security challenges: the African Union and the Association of Southeast Asian Nations compared' (2008) 17 (4). *Security Studies* 1 35.

<sup>32</sup> Majinge (n 28 above) 115.

<sup>33</sup> Majinge (n 30 above) 115.

<sup>34</sup> Bah et al (n 21 above).

<sup>35</sup> ET Aniche & T Egbuchulam refer to the PSC as the 'AU's backbone' E Aniche & M Egbuchulam, 'Is African Peace and Security Architecture the solution? analysing the implications of escalating conflicts and security challenges for African integration and development. A Paper Delivered at the 30th Annual Conference of the

responsible for overseeing the security and stability of the African region. It has the power to promote peace through the use of ‘good offices, mediation, conciliation and enquiry.’<sup>36</sup> In order to function efficiently, the PSC has been given enormous powers that include authorising the deployment of peace missions in a member state and imposing sanctions on a country where an unconstitutional change of government takes place.<sup>37</sup> The POW backs the PSC in carrying out its duty of preventing conflicts in Africa. The role of the POW is mainly advisory in nature.<sup>38</sup>

The PSC’s enforcement mechanism is quite strong compared to the previous OAU, where the continent merely depended on the member states’ compliance to the recommendations given by the regional body. The PSC has the power to issue sanctions on a state that fails to comply with its recommendations. This power was utilised when sanctions were imposed on the Central African Republic, Togo, the Comoros, Guinea, the Islamic Republic of Mauritania, Madagascar, Mali, Guinea-Bissau and Côte d’Ivoire.<sup>39</sup> It has been argued that AU only imposes sanctions on ‘small to medium-sized States.’<sup>40</sup> In as much as the AU is criticised for its failure to impose sanctions in other countries, imposing sanctions on its own reflects a commitment towards eliminating conflicts in the region.

The PSC is guided by the principles enshrined in regional and international instruments such as the UDHR. These principles include the peaceful settlements of disputes, respect of the rule of law, human rights and the sovereignty of states and intervention on a humanitarian basis on own or at the request of a member state.

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Nigerian Political Science Association Southeast Chapter on the theme: *Elections, Security Challenges and African Development* at University of Port Harcourt, Rivers State on June 26-28 2015.

<sup>36</sup> Majinge (n 28 above) 115.

<sup>37</sup> Art 7 of the Protocol on the Peace and Security Council outlines quite a number of powers that have been given to the Council.

<sup>38</sup> Art 11 (3) of Protocol on the PSC provides that ‘the Panel of the wise shall advise the Peace and Security Council and the Chairperson of the Commission on all issues pertaining to the promotion and maintenance of peace, security and stability in Africa.’

<sup>39</sup> A Vines ‘A decade of African Peace and Security Architecture’ (2013) *International Affairs* 89 100.

<sup>40</sup> Vines argues that the only exception was when sanctions were imposed on Côte d’Ivoire. Vines (n 39 above).

### ***Membership of the PSC***

The PSC is constituted by 15 members elected on a regional representation basis by the AU Assembly. The term of office for PSC members differs. Ten members are elected for a term of two years,<sup>41</sup> while the other five members are elected for a three-year term.<sup>42</sup> The separate terms ensure that there is continuity.<sup>43</sup> Article 5(2) of the PSC Protocol provides for the eligibility criteria that should be considered by the Assembly when electing members to the AU PSC. Members are selected on the following requirements:

- a) Commitment to uphold the principles of AU.
- b) Contribution to the promotion and maintenance of peace and security in Africa.
- c) Capacity and commitment to the responsibilities entailed in membership.
- d) Participation in conflict management at regional and international levels.
- e) Contribution to the Peace Fund.
- f) Respect for constitutional governance, the rule of law and human rights.
- g) Commitment to honouring financial obligations to the Union.

The AU Assembly has been criticised for its failure to stick to the appointment criteria to thoroughly vet the PSC members. Despite the clear criteria, member states with a record of human rights violations have been elected.<sup>44</sup> Vines states that countries like Algeria, Togo, Gabon, Rwanda, Swaziland, Chad, Cameroon and Sudan were all elected to serve on the PSC despite their known bad records on human rights.<sup>45</sup>

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<sup>41</sup> Art 5(1) (a) of the PSC Protocol.

<sup>42</sup> Art 5(1) (b) of the PSC Protocol.

<sup>43</sup> Art (5)(1) (b) of the PSC Protocol.

<sup>44</sup> Williams also argues that some countries that have human rights violations record include Algeria, Chad, Equatorial Guinea, Ethiopia, and the Gambia Algeria, Nigeria, and Libya; P D Williams *The African Union's Conflict Management Capabilities, Council on Foreign Relations* (2011) available at [https://cfrd8.files.cfr.org/sites/default/files/pdf/2011/09/IIGG\\_WorkingPaper7.pdf](https://cfrd8.files.cfr.org/sites/default/files/pdf/2011/09/IIGG_WorkingPaper7.pdf) accessed 20 May 2018 151; Aniche & Egbuchulam (n 36 above) 6.

<sup>45</sup> Vines (n 39 above) 88.

According to Vines, the requirement of fair regional representation seems to be one of the main considerations for selecting members at the neglect of other requirements, particularly the eligibility criteria on human rights records.<sup>46</sup> The author further argues that the need for fair regional representation saw the election of Zimbabwe into the PSC despite a bad human rights record.<sup>47</sup> PSC members are elected based on ‘the principle of fair representation within the region.’<sup>48</sup> As a result, each sub region has seats and rotate, respectively. Central Africa, Eastern and Southern Africa have three seats, while Northern Africa is allocated two seats.<sup>49</sup>

In order to ensure credibility and inspire confidence in the citizens of the continent, the PSC should prioritise the human rights record as the eligibility criteria other than the regional representation. It is better for countries to repeat membership in the PSC rather than taking those that have a tainted image. It raises questions on the credibility and willingness of the PSC to adhere to democratic principles when its own membership is the culprit. It becomes difficult for PSC members to criticise another country when its own human rights record is an issue. Further, the decisions of the Council are based on consensus, which means that ‘autocracies are fully involved in the decision-making process.’<sup>50</sup>

### ***Female membership in PSC***

The AU Solemn Declaration on Gender mandates states to;<sup>51</sup>

Ensure the full and effective participation and representation of women in peace process including the prevention, resolution, management of conflicts and post-conflict reconstruction in Africa as stipulated in UN Resolution 1325 (2000) and to also appoint women as Special Envoys and Special Representatives of the African Union; applies a 50/50 gender parity policy.

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<sup>46</sup> Majinge (n 39 above) 118.

<sup>47</sup> Majinge (n 28 above) 118.

<sup>48</sup> African Union *African Union Handbook* (2018).

<sup>49</sup> AU Handbook (n 48 above).

<sup>50</sup> Williams (n 44 above) 8.

<sup>51</sup> Para 2 of the AU Solemn Declaration on Gender.



The Maputo Protocol also provides for the right to equality and non-discrimination in Article 3 and the right to participate in political decision making.<sup>52</sup> Female representation in the PSC is beyond the threshold of equality enunciated in the AU Solemn Declaration on Gender.

In its communiqués of 18 May 2018, the PSC acknowledged the fact that there is continuous underrepresentation of women in peace processes in Africa at all levels.<sup>53</sup> The PSC implored all states to strengthen the capacity of the Ministries of Women Affairs with enough budget allocation. This measure is intended to ensure the effective coordination of peace and security issues for women. Female representation in the PSC stood at only 10% in 2017.<sup>54</sup> The low numbers have been caused by the selection method used by states to appoint a representative in the PSC.<sup>55</sup> The PSC is composed of elected ambassadors by their respective countries. As a result, only four women are Ambassadors. The Ambassador of Kenya, Her Excellency Catherine Mwangi, who is one of the members of the PSC, indicated that member states should be implored to consider the gender parity principle in the appointment of Ambassadors since countries elect PSC members.<sup>56</sup> The fact that members should be appointed by countries is the biggest hurdle, and this is the stage where women are eliminated. It is not a rule of thumb that a regional representative on PSC should be a former head of state or ambassador. This criterion has been the general practice that has become the norm without any legal basis.

Section 5(2) of the PSC Protocol only provides for the eligibility criteria for member states and not their selected representatives. This, therefore, means that if a country qualifies to become a member of the PSC, individuals should just seek authority or inform their states of the need to represent it in the PSC. Adopting this approach will remove the barrier of holding a government position first as a ticket to appointment. What is needed is to ensure that a country

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<sup>52</sup> Art 9.

<sup>53</sup> African Union PSC Communique of a meeting held on 16 May 2018 in Addis Ababa, Ethiopia.

<sup>54</sup> UN OAU Bulletin - August-October 2017, 8 available at [https://unoau.unmissions.org/sites/default/files/unoau\\_bulletin-aug-oct\\_2017.pdf](https://unoau.unmissions.org/sites/default/files/unoau_bulletin-aug-oct_2017.pdf) accessed 30 May 2018.

<sup>55</sup> UN OAU Bulletin (n 54 above) 8.

<sup>56</sup> UN OAU Bulletin (n 54 above) 8.

representative is an expert on peace and security issues. Further, there should be a guarantee that the member will uphold the interests of the state and the region represented.

In a bid to mitigate the challenges of the underrepresentation of women, the female members of the PSC have devised a coping mechanism of bringing women's issues to the fore. The women in the PSC have resolved that each time any of the female members chairs the PSC, she brings on the agenda women and children's rights issues.<sup>57</sup> While this initiative is applauded for mitigating the handicap, it is certainly not a long-term solution. Its effectiveness may be minimal. This coping mechanism can reinforce stereotypes of associating gender as a women's issue only. It can be a backlash to the fact that women cannot think beyond women's issues. It should be borne in mind that members of the PSC represent their countries and their sub regions. As a result, they should advance both national and regional interests. Consequently, national or regional issues which are not related to gender may be prioritised. This strategy, while notable, is subject to limitations and does not solve the problem of the underrepresentation of women.

### ***The mandate of the Peace and Security Council (PSC)***

The PSC is the central organ of the APSA. Its mandate is provided for in Article 6 of the PSC Protocol. Its functions are outlined as follows:

- a) 'Promotion of peace, security and stability in Africa.'<sup>58</sup>
- b) 'Early warning and preventive diplomacy.'<sup>59</sup>
- c) 'Peace-making, including the use of good offices, mediation, conciliation and enquiry.'<sup>60</sup>
- d) 'Peace support operations and interventions, pursuant to Article 4(h) and (j) of the Constitutive Act.'<sup>61</sup>

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<sup>57</sup> UN OAU Bulletin (n 54 above) 8.

<sup>58</sup> Art 6(a).

<sup>59</sup> Art 6(b).

<sup>60</sup> Art 6(c).

<sup>61</sup> Art 6(d).

- e) 'Peace-building and post-conflict reconstruction.'<sup>62</sup>
- f) 'Humanitarian action and disaster management.'<sup>63</sup>
- g) 'Any other function that the Assembly decides upon.'<sup>64</sup>

The functions of the PSC listed above illustrate the fact that PSC is the backbone of APSA. The PSC is also responsible for implementing the Common African Defence and Security Policy (CADSP).<sup>65</sup> The PSC's mandate can be categorised into three folds: the prevention of conflicts, the promotion of peace, and coordination. These will be analysed in detail below.

### ***Prevention of conflicts***

The PSC has the duty to anticipate and prevent conflicts in terms of Article 3(b) of the PSC Protocol. This objective is achieved through early warning and using diplomacy.<sup>66</sup> The structures of APSA, such as the POW and the CEWS, are the drivers of the prevention role of the PSC. The Regional Economic Communities (RECs) and other sub regional institutions such as SADC and ECOWAS also assist in conflict prevention. This is because of geographical proximity, which enables the RECs to better understand the context and causes of problems than the broader AU institutions. The PSC coordinates the work on peace and security of all regional mechanisms, which helps to strengthen the architecture and further improves the region's strides towards eradicating conflicts and achieving peace. The efficiency of the CEWS is quite critical in achieving the prevention role of the PSC because the PSC relies on the goodwill of states to implement recommendations made by the PSC to avoid conflicts.

### ***Challenges faced by the PSC in conflict prevention***

The prevention role of the APSA is not very effective. As observed by Anthoni van Nieuwkerk, the greater part of the AU and PSC's activities have been leaning more on conflict resolution efforts and less on conflict prevention.<sup>67</sup> Conflict prevention is mainly hampered by the need

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<sup>62</sup>Art 6(e).

<sup>63</sup> Art 6(f).

<sup>64</sup> Art 6(g).

<sup>65</sup> Aniche & Egbuchulam (n 35 above) 6.

<sup>66</sup> Art 6(b) of the AU Constitutive Act.

<sup>67</sup> Van Nieuwkerk (n 5 above) 177.

to avoid internal interference and upholding of sovereignty. Challenges of bad governance, dictatorship and economic inequalities are the root causes of conflict. Therefore, there is a need for APSA to deal with causes of conflicts such as economic decline, corruption, and embezzlement of funds by dictatorship regimes. APSA is failing to deal with these issues, which are determinants of peace. These issues should be addressed as part of the prevention of conflicts.

The PSC Protocol mandates the PSC to ‘promote and encourage democratic practices, good governance, the rule of law, the protection of human rights and the observance of international law norms as part of conflict prevention.’<sup>68</sup> The African Peer Review Mechanism (APRM) is one such mechanism that assists in preventing conflicts. The biggest challenge is that APRM is an optional process for member countries; as such, only those that are willing to subject themselves to scrutiny will be reviewed. The recommendations out of the review process are not binding on states. It is up to the goodwill of states to implement the recommendations and be open about the challenges they face.

The lack of coordination between institutions also detracts from the ability of APSA to prevent conflicts. Van Nieuwkerk argues that;<sup>69</sup>

Unless and until the Pan African Parliament (PAP), the Economic, Social and Cultural Council (ECOSOCC), the African Peer Review Mechanism (APRM) of NEPAD, the African Court on Human and Peoples Rights (ACHPR) and African civil societies can coordinate activities and action; conflict prevention will remain mostly a dream.

While the sentiments expressed by this author are valid, resource constraints are also a challenge that reduces the impact of the collaboration. Secondly, the underutilisation of enforcement mechanisms by the PSC contributes to the failure of the prevention role. The PSC Protocol allows for sanctions to be imposed on a country that does not comply with the provisions of the AU and any other human rights instruments. This provision has not been fully utilised, and as a result, there is no inducing mechanism for states to comply with decisions of PSC and other AU institutions such as the courts and the commission. Sanctions are the only functional whip for non-complying member states. Member states are obliged to extend full

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<sup>68</sup> Art 3(f) of the PSC Protocol.

<sup>69</sup> Van Nieuwkerk (n 5 above) 177.

co-operation with the PSC. This is because member states, upon ratification of the Protocol, agree that the PSC will act on their behalf.<sup>70</sup> As a result, co-operation is necessary to ensure that the PSC carries out its mandate effectively.

### ***Promotion and protection of peace***

The PSC's other core mandate is to promote and protect peace so as to eradicate conflicts and maintain stability on the continent. In the event that APSA fails to prevent conflicts, the PSC has an obligation to conduct peace building.<sup>71</sup> Article 3(b) provides that the 'PSC must ensure that it protects and promote peace, security and stability so as to guarantee protection, preservation of life and property and well-being of the African citizens.' In this regard, an environment conducive to peace and sustainable development must be created.<sup>72</sup> It is important to note that the linkage between peace and development is emphasised by Article 3(b).

Other promotional and protection functions of the PSC include intervention and peacekeeping missions. Intervention may be requested by member states<sup>73</sup> or maybe an initiative by the PSC after a decision of the AU Assembly to that effect.<sup>74</sup> The PSC has the power to lay down and review the guidelines of intervention missions. The powers of the PSC concerning interventions are so broad to such an extent that it has the power to determine the nature and method of interventions after the approval of the intervention by the AU Assembly.<sup>75</sup> One of the powers that the PSC is underutilising is the imposition of sanctions whenever there is an unconstitutional change of government.<sup>76</sup> The PSC is also mandated to conduct humanitarian

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<sup>70</sup> Art 7(2) of the PSC Protocol.

<sup>71</sup> Art 3(b) of the PSC provides that the objective of the PSC is to 'anticipate and prevent peace but in the event that it fails it activates its protection mandate through peace-making and peace building.'

<sup>72</sup> Art 3(a) of the PSC Protocol.

<sup>73</sup> Art 4(k).

<sup>74</sup> Art 4(j).

<sup>75</sup> Art7(1)(f) of the PSC Protocol.

<sup>76</sup> Art 7(1) (g) of the PSC Protocol.

work, including disaster management in states that are experiencing or have just experienced conflict.<sup>77</sup>

### ***Coordination role***

As the backbone of the peace and security architecture, the PSC's coordination role is a string that holds the architecture together. The PSC is responsible for coordinating and harmonising all the continent's work in matters of peace and security. This is because the PSC Protocol imposes a duty on the regional mechanisms for conflict management,<sup>78</sup> such as the African Commission,<sup>79</sup> the PAP<sup>80</sup> and civil society,<sup>81</sup> to collaborate with the PSC in its efforts to achieve peace on the continent. Majinge argues that the PSC has been better on coordinating responses to peace and security issues than the former OAU peace mechanism.<sup>82</sup> The RECs now work according to the instructions and mandate from the PSC, which is different from what the OAU mechanism for conflict and prevention did.<sup>83</sup> The PSC's requirement to cooperate with the African Commission is crucial as it reinforces the PSC's human rights role, which is to promote the observance of human rights by member states.<sup>84</sup>

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<sup>77</sup> Art 6(e) of the PSC Protocol.

<sup>78</sup> Art 16 of the PSC protocol provides that regional mechanisms are part of the APSA and as such the chairperson of PSC has a duty to harmonise and coordinate the efforts of regional mechanisms in promoting peace. The RECS include 'the Economic Community of West African States (ECOWAS); the Southern African Development Community (SADC); the Intergovernmental Authority on Development (IGAD); the Economic Community of Central African States (ECCAS); the East African Community (EAC); the Common Market for Eastern and Southern Africa (COMESA); the Arab Maghreb Union (AMU) and the Community of Sahel-Saharan States (CEN-SAD).

<sup>79</sup> Art 19 provides that the African Commission on Human and Peoples' Rights has a 'mandate to seek close cooperate with the PSC in achieving promoting and protecting peace on the continent.' As such the Commission has to draw to the attention of the PSC any information that comes in communication that has the effect of disturbing peace.

<sup>80</sup> In terms of art 18, the PSC has a duty to submit to the Pan-African Parliament upon request in relation to its functions.

<sup>81</sup> Art 20 of the PSC Protocol gives room for civil society to engage with the PSC on matters relating to Peace. However, the major drawback is that civil society only addresses the PSC upon invite. This provision is limiting and does not truly enable the civil society to fully engage with the PSC on issue of women's rights to peace.

<sup>82</sup> Majinge (n 28 above).

<sup>83</sup> Majinge (n 28 above).

<sup>84</sup> Art 3(f) of the PSC Protocol.

As highlighted earlier, the practicality of implementing the provisions of the PSC Protocol is a major setback because of political considerations that dilute the PSC's mandate to implement human rights. Manjinge argues that the requirement to publish the African Commission's report only after its presentation to the AU Assembly is an impediment to human rights protection.<sup>85</sup> This is because the AU Assembly has at one point ordered an amendment before the report was published.<sup>86</sup> Such disregard for human rights by the highest body to which the PSC answers reduces the potential efficacy of the APSA.

Besides this practical challenge, the normative framework on human rights of APSA is weak. The PSC Protocol omits the ACHPR, the mother of all human rights instruments in Africa.<sup>87</sup> There is no express mention of the ACHPR in the Protocol.<sup>88</sup> This is even though the Charter is the only human rights instrument that guarantees the right to peace. The Protocol rather mentions the UDHR, which does not expressly provide for the right to peace, although the right can be implicitly drawn from other provisions.

The effectiveness, prevention, protection, promotion and coordination role of the PSC is based on the willingness of member states to cooperate in fulfilling the aims and objectives of the APSA. Despite financial challenges, there is a lack of clarity on the functions of the PSC in terms of Article 6. This lack of clarity is from an 'operational or policy standpoint.' According to Levitt, the Protocol provides 'only for the structures without giving an indication of how these are to operate in practice.'<sup>89</sup>

### ***PSC Engagement with women's groups***

Article 20 of the PSC Protocol creates a framework for PSC to engage with women's organisations to protect women's rights to peace and security. Article 20 provides as follows-

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<sup>85</sup> Majinge (n 28 above).

<sup>86</sup> Majinge (n 28 above) 122. This practice by the AU Assembly also depicts the fact that the highest body of the AU does not consider peace and security as human rights issues which cannot be derogated from and need constant observance.

<sup>87</sup> Gumedze (n 6 above) 7.

<sup>88</sup> Gumedze (n 6 above).

<sup>89</sup> J Levitt, 'The Peace and Security Council of the African Union: the known unknowns' (2003) *13 Transnational Law. & Contemporary Problems*. 109 110.

The Peace and Security Council shall encourage non-governmental organizations, community-based and other civil society organizations, particularly women's organizations, to participate actively in the efforts aimed at promoting peace, security and stability in Africa. When required, such organizations may be invited to address the Peace and Security Council.

This provision is a platform for women's organisations to bring their peace and security concerns to the PSC directly. In order to give effect to Article 20 of the PSC Protocol, an initiative for the CSOs and the PSC to interact on the issues of peace was adopted in 2008.<sup>90</sup> This initiative is called the Livingstone Formula.<sup>91</sup> The formula clearly outlines the eligibility criteria for organisations to interact with the PSC.<sup>92</sup> These criteria are similar to the one enunciated by Article 6 of the ECOSOCC Statute. These include:

- a) Registration in an African country which a member of the AU.
- b) Upholding of the AU objectives and principles.
- c) Memberships of a non-governmental organisation that operate at national, regional or global levels.
- d) Accreditation with AU.
- e) The organisation should make a declaration 'to uphold the objectives and principles of the AU.
- f) Affiliation with 'recognized regional or continental umbrella/network of CSOs.

The eligibility criteria are limiting. They seem to target big institutions with regional coverage at the expense of local ones. The CSO requirement to be a member of an umbrella body will shut some organisations out. An open approach for small organisations that are not attached to any regional institutions ensures unlimited access by grassroots organisations. This provision also creates much bureaucracy and negatively impacts the need to act swiftly in conflict prevention and response. It creates multiple reporting structures. On another note, the requirement is also necessary to avoid duplication of issues and efforts in conflict prevention and management. The umbrella organisation will assist with coordinating information

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<sup>90</sup> Abdullah (n 1 above) 8.

<sup>91</sup> Abdullah (n 1 above).

<sup>92</sup> Sec 4.



dissemination, arranging meetings with PSC, and ensuring that important items are placed on the agenda.

The efficacy of this strategy is yet to be seen since from Between 2010 and 2019 the PSC held about 18 sessions dedicated to the various thematic areas on women's issues.<sup>93</sup> Currently, four umbrella organisations have been selected to represent the CSO in the sub regions. In terms of section 5 of the Livingstone Formulae, the PSC and ECOSOCC are supposed to meet once a year and discuss any thematic areas on peace. This meeting is timely conducted to capture submissions by the CSO before submitting its report to the AU Assembly at a Summit.<sup>94</sup> The PSC may also invite the CSO to make an address at a PSC meeting provided that the CSO's work has a bearing on the agenda of the meeting at hand.<sup>95</sup>

The Livingstone Formulae recognises the important role that the CSO plays in conflict prevention and management in Africa. This includes making reports that give early warning of conflicts. The CSOs can also assist in research that will inform decision making. The CSOs can provide relevant information to guide the mediation role of the PSC. The CSOs also assist in peacekeeping missions by undertaking the civilian component. The conflict rehabilitation process by the PSC is inclusive of CSOs. In relation to rehabilitation, CSOs may provide access to basic services after the end of conflicts. CSOs can also support the reconciliation process in post-war communities.

One of the crucial roles of PSC that is aimed at improving the PSC's effectiveness is monitoring its activities by the CSOs. Section 16 of the Formulae gives room for CSOs to monitor the implementation of the decisions of the PSC. This provision creates much-needed accountability in terms of implementing normative and legal frameworks on peace. This provision fills in the void created by the weak enforcement mechanisms by the AU Assembly. This provision also

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<sup>93</sup> Amani Africa Report No 8 '10 Years Review of the Women, Peace and Security Agenda of the AU Peace and Security Council' (2020)7. Available at <https://amaniafrica-et.org/10-years-review-of-the-women-peace-and-security-agenda-of-the-au-peace-and-security-council/> Accessed 10 February 2021.

<sup>94</sup> Sec 5 of the Livingstone Formulae.

<sup>95</sup> Sec 6.

creates an opportunity for CSOs that advocate women's rights to specifically measure the implementation of gender equality in decision making by the PSC.

Lastly, the CSOs also assist in information dissemination on the existence and role of the PSC on the African continent. It is indeed crucial that the PSC is known so that women can benefit from its work. Informal dialogues with women's organisation representatives in Zimbabwe revealed that they are unaware of the PSC. They do not understand how their work can fit into the PSC agenda.<sup>96</sup> This is mainly because of the limited understanding of peace, which focuses on eliminating conflicts only. Since Zimbabwe does not have a civil war, they do not see the need to engage this mechanism to improve women's rights.

### **5.3 The Panel of the Wise (POW)**

The POW was established under Article 11 of the PSC Protocol. The POW was inaugurated in 2007 to support the PSC's work in the area of conflict prevention through mediation and advising the PSC and the AU Commission on issues relating to peace. It is meant to operate through personal mediation, quiet diplomacy, and good offices to facilitate the signing of peace agreements.<sup>97</sup> The main function of the POW is to complement the PSC in preventing conflicts. Ewi argues that the POW was designed as an informal mechanism that responded to the challenges of resistance by states due to the principles of 'sovereignty and non-interference.'<sup>98</sup> Through the POW, the AU is able to delve into issues of a particular country without any formal interference.<sup>99</sup> Jegede categorises the POW's functions into two thematic areas: conflict prevention and the promotion of peace and security.<sup>100</sup> The promotion mandate involves

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<sup>96</sup> C Hodzi 'Role of Civil Society in peace making' (2018). Unpublished. File with author.

<sup>97</sup> Aniche & Egbuchulam (n 35 above) 10.

<sup>98</sup> MA Ewi 'The African Union Panel of the Wise: an assessment of its role and significance as a mechanism for conflict resolution and mediation in Africa (2015) *Institute for Security Studies* 1 23

<sup>99</sup> Ewi (n 98 above).

<sup>100</sup> Jegede states that conflict prevention mandate is based on articles 6(b), (c), 10(1), 11(1) and (4) of the PSC Protocol Jegede (n 15 above).

making recommendations to the PSC and the Commission to contribute to the promotion of peace.<sup>101</sup>

The POW reports to the PSC and the AU Assembly but through the PSC.<sup>102</sup> The POW's mandate enables the PSC to fulfil its mandate of anticipating and preventing conflicts. It acts as early warning and preventive diplomacy. It also acts as a protection mechanism in that it engages in dialogue and mediation to stop conflicts. The role of the POW is also to advise the PSC and the Chairperson of the AU Commission on all issues pertaining to the promotion and maintenance of peace, security and stability in Africa.<sup>103</sup> The mandate of the POW is very broad. It is given much leeway to undertake its mandate. The POW can undertake any action on 'its own initiative or at the request of the PSC or the Chairperson of the Commission.'<sup>104</sup> The AU Commission determines how the POW functions.<sup>105</sup>

### **5.3.1 The philosophical basis for the establishment of POW**

According to Murithi and Mwaura, the creation of the POW was inspired by African culture and practices.<sup>106</sup> The POW is a 'contemporary rendition of the traditional institution of the council of elders.'<sup>107</sup> This is based on the African cultural beliefs that old age is a sign of wisdom. Porto and Ngandu argue that the concept 'wise' is associated with old age and wisdom under the African tradition.<sup>108</sup> The concept of the panel of the wise reflects the confidence placed upon the elders under the African culture. The elders are greatly valued, and it is believed that experience enables them to mediate the conflicts in Africa. The creation of the POW by the AU reflects the importance that is placed on the traditional conflict resolution

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<sup>101</sup> According to Jegede the promotional mandate is based on art 6(a)(d), (e) and (f), 10(2)(b) and (c), 11 (3), (4) of the PSC Protocol and part III (I)(a) of the Panel Modalities. Jegede (n 17 above).

<sup>102</sup> Art 11(4) of PSC Protocol.

<sup>103</sup> Art 11(3) of the PSC Protocol.

<sup>104</sup> Art 11(4) of the PSC Protocol.

<sup>105</sup> Art 11(7) of the PSC Protocol.

<sup>106</sup> T Murithi & C Mwaura 'The Panel of the Wise' in J Porto et al (eds) *Africa's new Peace and Security Architecture: promoting norms, institutionalizing solutions* (2013) 79.

<sup>107</sup> Murithi & Mwaura (n 106 above) 79.

<sup>108</sup> J G Porto & K Y Ngandu *The African Union's Panel of the Wise: A concise history* (2015) 25.

mechanisms.<sup>109</sup> However, the POW has proved to be more progressive than the traditional conflict resolution mechanism consisting of male elders. The POW's membership criteria can be distinguished from the traditional council of elders because of its emphasis on expertise.<sup>110</sup> Members of POW are not primarily selected based on age but for their experience in handling conflict situations in the region. Further, unlike the traditional mechanisms that exclude women, POW has been inclusive.

While the philosophical basis emphasises the African way of handling conflicts and determination to solve African problems using African solutions, what needs to be interrogated is the extent to which the advice or views of the POW are respected. Under the African culture, the elders' views are greatly valued, and departure from them carries sanction. Under APSA, it seems the political considerations of the heads of government carry the day. This principle of respecting elders only acknowledges the concept but disregards the advice. This is one of the challenges that the Panel is facing. Porto and Ngandu argue that the POW failed to implement planned activities due to countries' resistance to internal interference.<sup>111</sup>

### **5.3.2 Composition of the Panel**

The Panel is made up of five individuals who should not only be competent in terms of their experience and contribution to peace but also should be persons of high reputation.<sup>112</sup> In practice, the number has risen to ten to include friends of the panel. The challenge with this requirement is that it has often resulted in the appointment of former heads of states or those that had senior government positions in their countries. This practice results in the disqualification of women because the majority of heads of state and officials from government departments are male.

In terms of Article 11 of the PSC Protocol, members of the Panel are selected by the Chairperson of the AU Commission based on regional representation and consultation with

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<sup>109</sup> Porto & Ngandu (n 108 above) 28.

<sup>110</sup> NMP Ntieche 'The African Union's duty to prevent the political and security crisis in the DRC: a gendered perspective' Unpublished Master's thesis Norwegian University of Life Sciences 2017 20.

<sup>111</sup> Porto & Ngandu (n 108 above).

<sup>112</sup> Article 11(2) of the PSC Protocol.

member states.<sup>113</sup> Gender equality is not provided for as one of the considerations in selecting members of the panel. However, the failure to include gender equality as a criterion for the appointment has not resulted in discrimination against women, as the composition reflects gender sensitivity.<sup>114</sup> Since the first panel's appointment, the composition has been consistent in maintaining a 40 per cent women composition.<sup>115</sup> The panel for 2014 - 2017 even increased the female percentage to 60 per cent, and a woman has been appointed as the Chair.<sup>116</sup>

While the inclusion of women is critical, it is always important to examine the influence and power of these women. To what extent do they influence the agenda? Numbers alone are not enough. A common element amongst all the panel members is their history of working for their governments. Not even a single member is from civil society. The extent to which they exercise their mandate independently without the influence of their governments is a critical question that needs to be examined.

As highlighted earlier, most of the members are former heads of states or have worked for their governments. It is a fact that they would have been seconded by the governments. As such, their impartiality can be compromised when their government's interests and that of the regional bloc clash. Women's chances of membership in this panel are limited. This is mainly because of the precedent of appointing former heads of states or those who would have held senior positions in government. They would not be appointed because they would not have held any senior government positions. Very few women have been heads of state. The eligibility criteria simply focus on a person's contribution to peace, but the trend has been simply to appoint holders of posts in the government as if working for the government automatically amounts to a contribution towards peace. Some of the governments even have records of violations of human rights.

Further, the composition is based on elitist notions of capacities for participation. It is assumed that only former heads of state and top civil servants can articulate peace issues in the best

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<sup>113</sup> Art 11(2).

<sup>114</sup> Abdullah (n 1 above) 10.

<sup>115</sup> Abdullah (n 1 above).

<sup>116</sup> Abdullah (n 1 above) 10.

interests of the communities represented. This is devoid of realism. Those that are affected by peace should also be in the APSA structures. The panel is allowed to co-opt members. It can utilise this provision to take people from the grassroots to participate in the panel. They should be part of the decision making on measures to be taken to protect the peace. The government officials and former heads of state risk adopting an armchair approach. In this instance, the solution will be divorced from reality.

### **5.3.3 Modalities for the function of POW**

The framework that determines how the POW operates was adopted by the PSC in 2007.<sup>117</sup> The framework outlines the operation procedures of the POW. The POW should meet a minimum of 3 times a year.<sup>118</sup> However, the Chairperson of the AU Commission or the PSC can request the POW to meet any time.<sup>119</sup> Its meetings are in closed sessions, but the POW can invite other relevant persons to the meeting. These can be ‘resource persons, experts, institutions or individuals.’<sup>120</sup> Members of the Panel set the agenda of the meetings. However, the Panel can also receive issues for discussion from the ‘PSC Chairperson of the Commission, the Pan-African Parliament, the African Commission on Human and Peoples’ Rights and CSOs’.<sup>121</sup> Recommendations on matters of peace and security by the Panel shall be submitted to the Council and the Chairperson of the Commission. The framework also extended the mandate of the POW to include ‘conflict management and post-conflict rehabilitation.’<sup>122</sup> The POW can carry out fact-finding missions and encourage political dialogue to resolve disputes. It can also offer advice in post-conflict societies on the implementation of peace agreements.<sup>123</sup>

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<sup>117</sup> Modalities for the functioning of the panel of the wise. Available at <http://www.peaceau.org/uploads/final-modalities-eng-26-nov-2-.pdf> accessed 20 May 2018.

<sup>118</sup> Para 3 of the Modalities for the functioning of the panel of the wise.

<sup>119</sup> Para 3.

<sup>120</sup> Para 5.

<sup>121</sup> Para 5.

<sup>122</sup> As above.

<sup>123</sup> Para 1(g) and (1e) of the Modalities.

### **5.3.4 Relationship with the organs of the Union**

The AU Commission takes a central role in the work of the POW. It provides administrative, logistical and technical support to the POW. The commission supports the work of POW through research and conducting advocacy. The commission gathers information concerning the POW's thematic period for that period and shares it with the POW.<sup>124</sup>

The Panel should constantly update the PSC and the Chairpersons of the AU Commission and AU on its activities to ensure coordination and harmonisation. The panel should inform the Council before undertaking any visit to any state. The panel has the right to address the AU Assembly or any other AU institution if requested.<sup>125</sup> However, the Chairperson can also request to address the AU Assembly on important issues. This provision enables the POW to bring urgent issues before a relevant organ of the AU since waiting for an invite might delay conflict prevention efforts.

### **5.3.5 Reporting**

The panel reports to the PSC and the Chairperson of the Commission. It has an obligation to submit regular reports to the PSC. It is also required 'to submit bi-annual reports to the Assembly through the PSC.'<sup>126</sup> These reports shall be part of the reports that the PSC submits to the AU Assembly on the state of peace on the continent.<sup>127</sup>

### **5.3.6 Friends of the Panel of the Wise**

The recognition of the limitation of the size of the POW concerning its huge mandate was the rationale behind the formation of Friends of the Panel of the Wise. The role of the Friends of the POW is to complement the work of the POW. The friends of the POW are now incorporated into a network called Pan-African Network of the Wise.

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<sup>124</sup> As above (n119) para VIII (2) of the modalities.

<sup>125</sup> Para VII (2) of the modalities.

<sup>126</sup> Para V (2) of the modalities.

<sup>127</sup> As above.

### 5.3.7 Pan-African Network of the Wise (PANWISE)

According to the AU Handbook, the PANWISE is made up of the following members;<sup>128</sup>

AU Panel of the Wise/Friends and their sub-regional counterparts. Economic Community of West African States' (ECOWAS's) Council of the Wise, Southern African Development Community's (SADC's) Mediation Reference Group, Panel of Elders, Common Market for Eastern and Southern Africa's (COMESA's) Committee of Elders., Intergovernmental Authority on Development's (IGAD's) Mediation Contact Group, Economic Community of Central African States (ECCAS), East African Community (EAC), Arab Maghreb Union (UMA) and Community of Sahel–Saharan States (CEN–SAD)

The rationale of the PANWISE is to consolidate the efforts of all regional prevention mechanisms and strengthen the prevention of conflicts in Africa.<sup>129</sup> PANWISE is also a platform for sharing experiences, best practices and lessons learnt in the different fora. The role of PANWISE is to mediate, conciliate and undertake fact-finding missions.<sup>130</sup> The PSC Protocol provides that all regional conflict prevention mechanisms are part of the APSA.<sup>131</sup> Therefore, there is a need for the harmonisation and coordination of all the prevention works of regional and sub regional bodies. The AU Chairperson is responsible for coordinating the activities of the network of POW.<sup>132</sup> In addition to the POW and the Friends of the Panel, there is also a forum called PanWise associate members. This is made up of the 'Forum of Former African Heads of States (Africa Leadership Forum) African Ombudsman and Mediators Association, National Infrastructures for Peace, National Mediation Councils, Relevant African Mediation Associations, and all Africa Council of Churches.'<sup>133</sup> These associate members are former African heads of state.<sup>134</sup> They also complement the efforts of the POW and the PSC.

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<sup>128</sup> AU handbook (n 48 above) 72.

<sup>129</sup> AU Handbook (n 48 above) 72.

<sup>130</sup> AU Handbook (n 48 above) 72.

<sup>131</sup> Art 16 of the PSC Protocol.

<sup>132</sup> Art 10(3) of the PSC Protocol.

<sup>133</sup> AU handbook (n 48 above) 72.

<sup>134</sup> AU Handbook (n 48 above) 72.



### **5.3.8 African Network of Women in Conflict Prevention and Peace Mediation (FEMWISE)**

The 2010 thematic focus of the POW on addressing the vulnerability of women in conflict situations resulted in the setting up of the network of women.<sup>135</sup> The Network is part of the POW and the PANWISE. Its location within the APSA gives it a comparative advantage to advocate for the implementation of gender equality on the continent.<sup>136</sup> The FEMWISE's role is to assist in implementing Article 10(2) of the Maputo Protocol. It strengthens the participation of women in conflict prevention and mediation.<sup>137</sup> The FEMWISE's role ensures that women's voices are heard in Africa through advocacy and lobbying. The network is designed to report to the PSC every quarter of the year.<sup>138</sup>

The network is composed of the steering committee, Secretariat and Assembly and is open to individual and organisation membership. The Assembly of the FEM-WISE is constituted by members. These members are selected based on their experience in peace prevention and mediation. The function of the Assembly is to monitor the work of the Secretariat.<sup>139</sup> The Assembly meets once a year. The Secretariat of the network is the 'foot soldier' of the network. The Secretariat is the public relations office with a mandate to carry out all communications of the network with members and other structures of the APSA. It is responsible for the coordination of activities of the network. It also receives instructions from the 'AU Chairperson, the PSC, FEMWISE members and other relevant stakeholders.'<sup>140</sup>

#### ***Anticipated outcomes from the network***

The network is still in its infancy and has projected the following outcomes-

#### **Outcome 1: Mobilisation of women's movement in Africa**

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<sup>135</sup> A U Handbook (n 48 above) 73.

<sup>136</sup> As above.

<sup>137</sup> AU Handbook (n 48 above) 73.

<sup>138</sup> As above.

<sup>139</sup> AU Handbook (n 48 above) 73.

<sup>140</sup> AU Handbook (n 48 above) 73.

This outcome is designed to ensure that results are achieved through collective action. In this regard, collaborations and synergies are important in consolidating the smaller gains that women achieve.

### **Outcome 2: Creating an enabling environment for women's participation in leadership**

Various factors have hindered women's participation. Some of these include violence, lack of access to resources, social exclusions. The outcome anticipates influencing the realisation of a conducive environment that enables women to participate in the peace structures.

### **Outcome 3: Improving women's capacity**

Capacity building is an integral element of ensuring the meaningful participation of women in peace processes. Women have been side-lined for a long time. As a result, some lack confidence to enter into the spaces that were formally considered as exclusively male territories. At the end of the day, it is not about numbers but the quality of contributions that women bring in the spaces.

### **Outcome 4: Improving the synergy 'between women leading and active in conflict prevention and mediation efforts at sub-national and community levels and political processes.'**

The APSA does not suffer from a lack of institutions but of coordination and the overlapping of roles such that, in the end, the efforts are not collective. There is a need to measure the achievements of institutions and explore how the gains can be maintained and improved. There is a need to identify experts in the area and then utilise such. There is also a need to map capacities and tap into the diversity to ensure that women's interests are well catered for. The biggest challenge to the synergies is the competition for visibility and resources. Most of the structures depend on donor funding. As a result, each structure would want to prove that they are the right candidates for funding, and collaborative efforts may fail. This anticipated outcome has the potential of enhancing effective coordination in conflict prevention.

### **Outcome 5: 'Enriched political solutions at tracks 1 through the involvement of women's social options approach.'**

This outcome seems to address the challenges of excluding women in decision making. It acknowledges the fact that long-lasting political situations should involve women. This outcome draws towards a women-centred solution where women are part of problem mapping and solving. The outcome goes against blueprint solutions where women participate in

predefined spaces without setting the agenda.<sup>141</sup> As a result, such participation would not adequately respond to their needs.

### **Outcome 6: Mobilisation of women’s leadership in order to expedite peace-making office**

This outcome focuses on identifying capable women leaders and encouraging them to participate in the decision-making process. This is interrelated with outcome 2, which focuses on the creation of conducive environments where women can participate. Capable women normally shun leadership positions because of the hostile environments. They then focus on their careers and lose from the wealth of experience and abilities they possess. The brave ones may not necessarily be capable leaders. Some may even assume leadership positions because of their alliance with powerful men. The outcome also addresses the need for funding peace and conflict programmes.

The FEMWISE has highly ambitious goals, and if fulfilled, it will change women’s lives and result in the implementation of the right to peace as provided by the Maputo Protocol. The effectiveness of the FEMWISE is yet to be seen since it is still in its infancy. However, there is a need to guard against being ghettoised such that it becomes one of the platforms where women meet and share their challenges without any implementation. It should not be seen as one of those platforms where women caucus and discuss issues affecting them. It should not be reduced to a women’s club. The network should be able to bring the PSC and all AU structures to account for the implementation of women’s right to peace.

The success of the FEMWISE depends on the extent to which women have access to power. The Platform of the FEMWISE will not work if women do not occupy key decision positions in Africa. The FEMWISE should transform the spaces in which they operate.

### **5.3.9 Achievements of POW**

The POW has registered considerable success in conflict prevention on the continent. Van Wyk argues that the POW has registered the following notable achievements:<sup>142</sup>

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<sup>141</sup> T Paffenholz et al ‘Making women count - not just counting women: assessing women’s inclusion and influence on peace negotiations,’ *Geneva: Inclusive peace and transition initiative* (2016) 22.

<sup>142</sup> JA Van Wyk ‘High-level panels as diplomatic instruments: The African Union Panel of the Wise and the emergence of an African peace diplomacy Architecture’ (2016) 41 (1) *Journal for Contemporary History* 57 58.

- a) The PSC monitored the elections in Guinea, Egypt, Tunisia, the Democratic Republic of the Congo, Senegal, Sierra Leone, Ghana and Kenya. The engagement positively contributed to the peaceful elections. The Panel also gave recommendations on the electoral violence in the aftermath of the electoral violence in Kenya and Zimbabwe in 2008. The AU Assembly of Heads adopted the recommendations.
- b) As a result of its thematic focus on women and children in conflicts, the Panel had open sessions on women and children in armed conflicts. The report produced by the Panel on its thematic focus on women and children on conflict led to the establishment of an AU Peace and Security Gender Mainstream Department and the appointment of the first AU Special Envoy on Women, Peace and Security in 2013. The POW contributed to the Declaration of 2010-2020 as the Decade of African Women and the appointment of the Committee of 30 for the African Women's Decade.<sup>143</sup>
- c) The creation of the FEMWISE is one of the success stories of the POW as a result of its thematic focus on women and children in conflict.

### 5.3.10 Challenges of POW

#### *Funding*

Funding has been cited as the biggest impediment to the realisation of the mandate of the POW.<sup>144</sup> Funding for the whole peace architecture needs to be increased. Nathan argues that the mediation arm of APSA should have adequate resources because of the following reasons:

- a) Mediation has no formula due to the dynamics of conflicts. Conflicts produce unforeseen consequences. As such, the POW should be adequately funded.
- b) Peacemaking through mediation should be pursued in a dedicated continuous fashion. This, therefore, entails continuous communication with all parties involved in the conflict. As a result, adequate financial resources and human expertise is a necessity.

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<sup>143</sup> Van Wyk (n 142 above) 66.

<sup>144</sup> Porto & Ngundu (n 108 above) 32; Jegede (n 15 above).

The problem of funding dilutes the ‘African solutions to African problems’ mantra because of the reliance on donor funds. The AU had to hand over some of the peace missions to the UN because of the limited funding. Abebe argues that most of the problems specially related with peace and security are being addressed by the former colonial powers that are sometimes part of the problem themselves.<sup>145</sup> It has been argued that the POW has always faced funding challenges from its inception, which has caused a delay in its operations.<sup>146</sup> As such, downsizing the operations of the POW has been suggested. In reality, this would entail that the POW can remain with the prevention mandate and leave the promotional mandate to the PSC and the AU Commission.

### ***Size of the POW***

It has been argued that the size of the POW is inadequate to meet the demands of the crisis in Africa.<sup>147</sup> At present, there are many conflicts in Africa, such that the services of the POW are always in demand. The inadequacy of the panel to deal with the volumes of conflicts seems to be mitigated by the fact that the panel has increased in size from the initial 5 people to 10. The Friends of POW, the FEMWISE and associates of the Panel also boost the capacity of this mechanism. However, the argument is still valid despite the increase of the panel members to 10.

The continent of Africa has conflicts that are ongoing and require constant intervention. In addition to the challenge of limited numbers, young mediators have been missing in POW. It has been argued that youth and female mediators have the potential of bringing in fresh perspectives to conflict prevention techniques.<sup>148</sup> Further, the traditional norms of conflict prevention may not be relevant in solving the 21<sup>st</sup> Century crises.<sup>149</sup> It is also important to note that globalisation and colonisation have made huge inroads into the values placed on traditional institutions. As such, the POW concept may be outdated. Ewi argues that despite the inroads

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<sup>145</sup> W Abebe ‘Responsibilities and challenges of the African Union in maintaining continental peace and security: a case study of the Malian Crisis.’ (2016) 7 *Arts and Social Sciences Journal* 1 23.

<sup>146</sup> Abebe (n 145 above).

<sup>147</sup> Jegede (n 15 above).

<sup>148</sup> L Siewers ‘Young and female: the future mediators in conflicts? building Peace’, (2017)10.

<sup>149</sup> Ewi (n 98 above).

of colonisation and globalisation into traditional dispute resolution mechanisms, the POW remains relevant in the 21<sup>st</sup> Century because of the members' expertise.<sup>150</sup>

### ***Accessibility of the POW***

The limited visibility of the Panel to individual members is one of the challenges that the structure is currently facing.<sup>151</sup> Jegede argues that “the Panel is not visible to the citizens of the African continent.”<sup>152</sup> The basis for this conclusion is the fact that agenda issues come from the AU organs and not individuals. Other organs such as the Pan-African Parliament, members of the Panel, the Chairperson of the AU Commission, the African Commission and members of the civil society have access to the Panel. They bring issues on the agenda of the POW. In as much as members of the civil society can represent individual interests, access to the Panel by individuals in their own capacities boosts the visibility of the Panel.<sup>153</sup>

### ***States co-operation***

Limited co-operation by states reduces the efficacy of the work of the POW. The POW works on the goodwill of the states. If they want to carry out investigations, the particular country has to offer the support of allowing the POW to come into the country and conduct its mandate. The Panel's fact-finding mission is only possible if consent is given by the states. States abuses the principle of state sovereignty and non-interference to block investigations by the POW. Porto and Ngandu argue that the POW failed to implement planned activities due to countries' resistance to internal interference.<sup>154</sup> If permission is denied, the POW has no other option save to report to the PSC, which also reports to the AU Assembly of which the country in question is a member.<sup>155</sup>

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<sup>150</sup> As above.

<sup>151</sup> See Jegede (n 15 above) 70.

<sup>152</sup> Jegede (n 15 above) 70.

<sup>153</sup> Jegede (n 15 above) 70.

<sup>154</sup> Porto & Ngandu (n 108 above) 46.

<sup>155</sup> Jegede (n 15 above).

### ***Independence of POW***

As highlighted earlier, the Panel of the Wise suffers from an inadequate budget, which constrains its effort to carry out its mandate successfully. The fact that it relies on the PSC for its budgets has been highlighted as the factor that reduces its independence. This is despite the fact that the Protocol provides that the POW will carry out its mandate independently. The fact that the POW has been given the power to carry out any other activity that furthers its mandate is indicative of its independence. The independence has become theoretical as it is constrained in practice because of funding. It becomes difficult for the POW to react swiftly in urgent cases because of financial limitations.

### ***Late intervention***

The POW is accused of being reactionary instead of proactive. Van Wyk argues that the POW only intervened in the 2011 DRC elections a bit late when the ‘electoral arena was already very tense with election-related violence occurring.’

### **5.4 African Peace Fund (APF)**

The African Peace Fund was established to provide finance to the work of APSA.<sup>156</sup> It is also an ‘organ through which donors contribute to the APSA.’<sup>157</sup> The Peace Fund aims to create African ownership of continental peace activities and reduce dependency on partner funding. It also aims to provide reliable and predictable funding and relieve pressure on national treasuries.

In terms of Article 21(2) of the PSC Protocol, the Peace Fund is made up of the following pool of funds:

- AU regular budget.
- Voluntary contributions from members.
- Contributions from CSOs and individuals.
- Contributions outside Africa.

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<sup>156</sup> Art 21(1) of the PSC Protocol.

<sup>157</sup> Aniche & Egbuchulam (n 35 above).

The AU Commission Chairperson is empowered to engage in fundraising activities and accepts donor funds from outside Africa ‘in conformity with the objectives and principles of the AU.’<sup>158</sup> The condition of accepting funds on the basis that they conform with the AU objectives is meant to avoid situations of conditional funding. It is also meant to safeguard external interference by the Western countries, which sometimes give condition-tied donations.

A reading of Article 21(2) of the PSC Protocol reveals that the APF was designed to ensure the sustainability of peace and security activities in Africa through a dedicated fund. The realisation that donor funds cannot be relied upon appears to be the major motivation behind setting up the peace fund. Further, the ‘African solution to African problems’ mantra is put into effect by this initiative. In order to ensure total ownership of the APSA, it is essential that financial dependency on external actors is reduced. The Peace Fund enables the African Union to initiate its own peace missions without waiting for the United Nations. The Rwanda Genocide taught Africa not to over-rely on external funding. Therefore, the Peace Fund becomes a crucial element of guaranteeing ownership of APSA.

The APF should be comprised of ‘AU budget and voluntary contributions from member states and other private entities such as the civil society and individuals.’<sup>159</sup> The major challenge with this facility is that African governments are struggling with their own budgets such that contributions to the APF are not a priority. Also, the PSC Protocol does not have a provision that imposes a penalty on member states that default contributions. The penalty would be an inducement for members to contribute towards the Peace Fund. The PSC can only impose sanctions in cases where there is an unconstitutional change of government.<sup>160</sup>

According to Williams, the fact that the APSA depends on an external source of funds reflects not only a lack of commitments by members states but also reinforces ‘the hypothesis that some African governments view the APSA as just another way of extracting resources to help ensure regime survival rather than as a set of their own mechanisms to resolve peace and security

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<sup>158</sup> Art 21 of the PSC Protocol.

<sup>159</sup> Art 21(2) of the PSC Protocol.

<sup>160</sup> See section article 7(g).



crises on the continent.’<sup>161</sup> As argued by Williams, African states do not have a good track record of contributing to the continent's activities. The Peace Fund has received little contributions from the members of the African Union, and as such, it has failed to secure sustainable funding.<sup>162</sup> Since its establishment, the Fund has received less than \$70 million between 1993 and 2005.<sup>163</sup> Of this amount, \$45 million was provided by non-AU members. In 2009, the AU’s Peace Fund had a negative balance.<sup>164</sup> Very few members have been willing or able to contribute to the Peace Fund. Williams states that ‘Only five member states, that is, Algeria, Egypt, Libya, Nigeria, and South Africa have provided 75 percent of the AU’s budget, with each of these five contributing 15 percent since 2006.’<sup>165</sup> Libya was suspected of having made the biggest contribution towards the fund to the extent of paying other members’ dues. It follows that the crisis in Libya has reduced the contribution from AU members.

The Peace Fund has been sustained by external funding since its inception. Over-reliance on donor funds means that the AU’s response to a crisis is ad hoc. An AU report highlighted that ‘more than 95 percent of such activities are funded by external partners, including conflict prevention, mediation, special envoys and special political missions undertakings.’<sup>166</sup> It has been argued that the decision by the European Union in 2016 to reduce funding for the allowances of the troops in AMISOM by imposing a cap on the coverage of allowances to 80% of the total costs was a wake-up call to the AU.<sup>167</sup> The remaining 20% was to be covered by troop-contributing countries through their own resources or from alternative partner contributions.<sup>168</sup> At its 27<sup>th</sup> Ordinary Session held at Kigali in Rwanda, the AU Assembly agreed to adopt the proposal by the High Representative for the Peace Fund, Dr Donald

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<sup>161</sup> Williams (n 44 above).

<sup>162</sup> Williams (n 44 above).

<sup>163</sup> Williams (n 44 above).

<sup>164</sup> Williams (n 44 above).

<sup>165</sup> Williams (n 44 above.)

<sup>166</sup> African Union ‘African Union Commission, implementation of the women, peace, and security agenda in Africa’ (2016)10.

<sup>167</sup> J Mackie et al *Evaluation of the implementation of the African Peace Facility as an instrument supporting African efforts to manage conflict on the continent Final Report 1*(2017) 20.

<sup>168</sup> Mackie (n 167 above).

Kuberuka.<sup>169</sup> He was assigned to identify a sustainable funding model for AU-led peace operations. He proposed to raise funds by imposing a level of 0.2% on all goods imported to Africa. This funding mechanism was designed to establish a crisis reserve facility of not less than US\$50 million, which would cater for urgent responses to the crisis in the continent.<sup>170</sup>

APSA's current new funding structure shifts the funding responsibility from individual states to regions. This implies that the AU will reduce its dependency on individual states who are perennial contributors.<sup>171</sup> Each region of the AU has an obligation to contribute US\$65 million through collecting the import levy. Although this is a great initiative, there is a potential problem of coordination that the gap in governance issues has created. The proposed governance structure is not inclusive of regional blocks despite being contributors and part of APSA's conflict prevention and protection mechanisms. Only the AU Commission officials are part of the governance structure. According to ISS, the governance structure 'creates a gap between the origins of the funding and the governing structure of the Peace Fund.'<sup>172</sup> It is further argued that such a structure has the potential to impact the coordination between AU and the RECs negatively.<sup>173</sup>

### **5.5 Continental Early Warning System (CEWS)**

The CEWS is one of the 'pillars of APSA' established under Article 12 of the PSC Protocol as a conflict prevention mechanism. The role of CEWS is to assist in preventing conflicts. CEWS consists of an 'observation and monitoring centre' called the Situation Room.<sup>174</sup> The Situation

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<sup>169</sup> The African Union Assembly, Decision on the Outcome of the Retreat of the Assembly of the African Union Assembly/AU/Dec.605 (XXVII), Twenty-seventh Ordinary Session, 17-18 July 2016, Kigali, Rwanda.

<sup>170</sup> As above.

<sup>171</sup> ISS Peace and Security Council Report October 2016 available at <https://issafrica.org/pscreport/addis-insights/the-aus-new-funding-model-to-focus-on-preventing-conflicts> accessed 20 May 2018. According to this report, countries like Algeria, Egypt, Nigeria, South Africa and Angola have been seasoned contributors to the peace fund.

<sup>172</sup> ISS report (n 171 above)

<sup>173</sup> ISS report (n 171 above).

<sup>174</sup> Art 12(2) (a) of the PSC Protocol.

Room is responsible ‘for data collection and analysis based on an appropriate early warning indicators module.’<sup>175</sup>

The key objective of the CEWS is to provide ‘early warning signals’ on possible conflicts and thus act as a prevention mechanism. The system is designed to directly link with regional mechanisms in enhancing observation and monitoring of potential conflicts in the region.<sup>176</sup> In addition to getting information from the RECs, CEWS also receives information from AU missions stationed in countries and ambassadors to compile and verify its reports.<sup>177</sup> This information obtained through the CEWS enables the PSC to determine intervention strategies.<sup>178</sup>

According to Calhalvo, conflict prevention has two approaches, namely: operation prevention and structural prevention.<sup>179</sup> The operational approach to conflict prevention includes dialogues to facilitate peace, election observation and military intervention.<sup>180</sup> Structural prevention aims to avoid conflicts through the provision of ‘political, economic, social and cultural opportunities.’<sup>181</sup> The structural prevention approach aims to address long term solutions to conflicts. It includes the establishment of strong and independent institutions.<sup>182</sup> It also involves ensuring public participation in policy-making.

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<sup>175</sup> Art 12 (2) (a) of the PSC Protocol.

<sup>176</sup> Art 11 (2b).

<sup>177</sup> Aniche & Egbuchulam (n 35 above) 10.

<sup>178</sup> As above.

<sup>179</sup> Gustavo de Carvalho ‘Conflict Prevention what’s in it for the AU?’(2017) 103 Policy Brief 103 available at [https://reliefweb.int/sites/reliefweb.int/files/resources/policybrief103-2\\_0.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/policybrief103-2_0.pdf) accessed 17 May 2018.

<sup>180</sup> Gustavo de Carvalho (n 179 above).

<sup>181</sup> Gustavo de Carvalho (n 179 above).

<sup>182</sup> Gustavo de Carvalho (n 179 above).

The APSA 2015-2020 Roadmap adopts a multi-dimensional approach to peace which recognises the two elements of conflict prevention stated earlier. The roadmap stipulates that;<sup>183</sup>

Conflict prevention involves, simultaneously, a direct and operational focus of intervening before violence occurs as well as a systematic, strategic focus of addressing the root, proximate, and structural causes of conflict.” As such the roadmap’s priority is “to contribute to effective, coordinated and timely direct and structural prevention of conflicts by AU and all.

The APSA Roadmap intends ‘to contribute towards achieving the objectives of silencing guns by 2020 and the first 10-Year Implementation Plan of the Union’s Agenda 2063.’<sup>184</sup>

### 5.5.1 Challenges of CEWS

The challenges of the CEWS have been identified as limited staff, weak regional and national early warning systems that should feed into CEWS and political interference in data gathering and transmission.<sup>185</sup> The mechanism is also faced with the challenge of failing to analyse gathered data to feed into the prevention mechanisms.<sup>186</sup> The reports of the CEWS have been labelled as gender blind.<sup>187</sup> Other weaknesses of CEWS identified include:

#### a) Focus on short-term triggers

The CEWS has been criticised for focusing on ‘triggers of conflicts rather than structural causes.’<sup>188</sup> The data from the CEWS has been paying attention to direct prevention instead of examining how structural factors are a threat to peace and security in Africa. Because of this focus, the responses advocated by the CEWS are only short term and do not permanently eradicate the threats to peace.<sup>189</sup> According to ISS Report, CEWS’s tendency to focus on short-term triggers results from member states’ resistance to accept help in addressing structural

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<sup>183</sup> African Union ‘African Peace and Security Architecture. APSA Roadmap 2016 – 2020’ *African Union Commission, Peace and Security Department* (2015) 23.

<sup>184</sup> African Union (n 183 above) 10.

<sup>185</sup> African Union (n 183 above) 11.

<sup>186</sup> As above.

<sup>187</sup> Abdullah (n 1 above).

<sup>188</sup> ISS Report (n 171 above).

<sup>189</sup> ISS report (n 171 above)

challenges in the country.<sup>190</sup> The principle of sovereignty is conveniently utilised by members to avoid criticism of structural challenges that a country faces.

In 2015, the AU adopted the Structural Conflict Prevention Framework. The Framework creates two instruments: The Country Structural Vulnerability Assessment (CSVA) and the Conflict Structural Vulnerability Mitigation Strategy (CSVM). This Framework allows the CEWS to get a comprehensive view of the emerging instability.<sup>191</sup> The challenge in using these tools is the unwillingness of members to cooperate since the tools under the Framework can only be utilised with the consent of member states.<sup>192</sup>

The ISS report states that the main challenge is ‘the negative reaction by some member states when situations in their countries are the subject of early warning.’<sup>193</sup> Members deny the existence of structural issues, which are the root causes of conflicts in their countries. Zimbabwe is an example of a country that has been in denial of its structural challenges. Issues of bad governance, economic instability and weak state institutions are structural challenges Zimbabwe is facing. This lack of co-operation hinders the effectiveness of the CEWS.

#### **b) Implementations of CEWS report**

The Chairperson of the Commission is obliged to report to the PSC on potential conflicts after gathering information through the warning system.<sup>194</sup> In reality, the reports from the CEWS have not resulted in the anticipated action by the PSC. As noted by the ISS Peace and Security Report, ‘the drafting of an early warning report does not necessarily result in a PSC meeting.’<sup>195</sup> The PSC is also criticised for not addressing country-specific issues. As a result, Zimbabwe has never been on the agenda of the PSC despite the ongoing political instability in the

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<sup>190</sup> As above.

<sup>191</sup> ISS report (n 171 above).

<sup>192</sup> ISS report (n 171 above).

<sup>193</sup> As above.

<sup>194</sup> Art 12(5) of the PSC Protocol.

<sup>195</sup> ISS Report (n 171 above).

country.<sup>196</sup> Further, the APSA 2015-2020 Roadmap Framework noted that there is ‘a weak linkage between early warning and early response by decision-makers.’<sup>197</sup> One of the reasons why implementation is a challenge is the gathering of inadequate data because of the constant changing conflict dynamics in the continent.<sup>198</sup>

### **c) Uneven coordination with RECs**

The continental warning system’s effectiveness is reduced by the inability to coordinate the regional warning systems effectively. This is mainly because of the fact that the AU Commission relies on reports. The AU Commission rarely sends its staff on the ground to collect information.<sup>199</sup> The commission needs to closely coordinate the desk research and field research to increase its efficacy. All the RECs should also timely give feedback to the commission to ensure effectiveness.

### **d) Reactionary approach**

The biggest challenge that the mechanism faces is the inability to detect conflicts and prevent them. According to the IIPCA Report, the ‘2011 uprisings in North Africa, and the crises in Mali and Guinea-Bissau’ exposed the ineffectiveness of the CEWS.<sup>200</sup> The CEWS is failing to prevent conflicts as early warning signs of conflict are retrospectively identified after the conflict has broken out.<sup>201</sup> The reactionary approach is mainly caused by limited coordination among national, sub regional and regional warning systems. The PSC Protocol provides that the collection and analysis of data by the CEWS are based ‘on clearly defined and accepted

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<sup>196</sup> ISS Report Denialism plagues Africa's early warning system 19 April 2017 available at <https://issafrica.org/pscreport/on-the-agenda/denialism-plagues-africas-early-warning-system> accessed 10 May 2018 2.

<sup>197</sup> African Union (n 183 above).

<sup>198</sup> As above.

<sup>199</sup> The ISS report notes that CEWS should emulate the approach by warning systems of the Economic Community of West African States (ECOWAS) and the Intergovernmental Authority on Development (IGAD), which have analysts in every country of their respective regions. ISS Report (n 171 above).

<sup>200</sup> International Peace Institute ‘Preventing conflicts in Africa: Early warning and response’ (2012) 7. This paper states that the coup in Mali that ousted a sitting president occurred two days after a ministerial meeting of the PSC was held in Mali. If the CEWS was effective the coup could have been avoided.

<sup>201</sup> International Peace Institute (n 200 above) 7.

political, economic, social, military and humanitarian indicators, which shall be used to analyse developments within the continent and to recommend the best course of action.<sup>202</sup> This approach entails that the APSA collect data examining the structural problems since these are also the root causes of conflict. The CEWS also suffers from inadequate funding. The APSA Roadmap noted that donations from the UN and other agencies mainly focus on conflict management in the form of peacekeeping. The prevention mechanisms of APSA are therefore underfunded.

### **5.6 African Standby Force (ASF)**

AU established the African Standby Force (ASF) to become an implanting organ of the AU in cases of intervention to protect the peace. Its establishment was designed to fulfil the provision of Article 4(h) and Article 4(j) of the PSC Protocol, which allow intervention on humanitarian grounds.

The ASF is not only composed of members of the defence forces but also the police force and civilians.<sup>203</sup> The ASF suffers the same fate as the other mechanisms: inadequate funding. The Fund is supposed to come from a budget approved by the AU Assembly and members' contributions. The members' contributions have been erratic. Given the economic situations of the majority of African countries, it is not feasible for them to timeously and consistently contribute towards the Peace Fund. As a result, the ASF's interventions are mainly backed by partners such as the United Nations. The desire to have an 'African solution to an African problem' is not feasible if ASF cannot initiate most of the intervention independently.

### **5.7 APSA and gender**

Having outlined the normative framework and institutional structure under APSA, this part of the chapter now examines how APSA has integrated gender equality principles to ensure women's participation in the promotion and protection of the right to peace on the continent. The African Union has a gender architecture made up of five pillars: the Maputo Protocol, the

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<sup>202</sup> Art 12(4) of the PSC Protocol.

<sup>203</sup> Art 13 (1) of the PSC Protocol.

Solemn Declaration on Gender Equality in Africa, the African Union Gender Policy, the African Women's Decade, and the African Fund for Women.<sup>204</sup>

### 5.7.1 Conceptual clarifications on the concept of gender in Africa

The conceptual clarification of gender is important in this research because it provides a basis for a critique of the implementation of gender equality by the APSA. Gender is often conflated with the term sex. Gender is also synonymous with women, yet gender is a dynamic concept that is fluid and inclusive of both sexes. Gender roles are 'historically and culturally determined'<sup>205</sup> Gender refers to the society's construction of how men and women are supposed to behave.<sup>206</sup> Gender depends on how society views the relationship of male to man and female to woman.<sup>207</sup> Gender defines the acceptable behaviour, attitude and entitlements of men and women in society. According to Coates, gender 'concerns men's and women's participation in the determination of their lives including access to rights, power and control over resources.'<sup>208</sup>

Societal construction of gender has resulted in binary ways of behaviour in the form of femininity to women and masculinity to men. Masculinity becomes a valued trait, while femininity is frowned upon. Femininity is supposed to be gentle, soft, submissive and relational, while masculinity is tough and strong and is ascribed to men. Consequently, individuals that identify with both traits or that neither fit into femininity nor masculinity traits can be labelled as misfits in society. As mentioned earlier, gender is a fluid concept that evolves with time and space, although some aspects remain constant. For example, the two categories of masculinity and femininity remain but have been developed and modified to embrace concepts that were strictly confined to one another. In a bid to ensure gender equality, societies have moved to embrace the positive aspects of both masculinity and femininity, disregarding

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<sup>204</sup> Abdullah (n 1 above) 16.

<sup>205</sup>I Stevens & I Van Lamoen *Manual on gender mainstreaming at universities* (2001) 22.

<sup>206</sup> General Recommendation No. 25 of 2004 on Equality and on Discrimination and temporary special measures para 8

<sup>207</sup> BB Hess & MM Ferree *Analyzing gender: a handbook of social science research* (1987).

<sup>208</sup>S Coates 'Gender and development approach to water, sanitation, and hygiene' (1999) Available at [www.wateraid.org.uk/document/gender.pdf](http://www.wateraid.org.uk/document/gender.pdf). accessed 10 November 2021.



those that are frowned upon. An example would be to fully exploit the power and strength associated with masculinity in a positive way.

Some scholars have coined the term redemptive masculinity.<sup>209</sup> This is masculinity that empowers and embodies the positive values of men to promote gender equality. Redemptive masculinity utilises the strength in masculinity to guarantee gender equality through greater responsibility.<sup>210</sup>

It is important to interrogate how the concept of gender manifests in implementing the right to peace by APSA structures. Therefore, this part questions how the concept of gender is provided for under the AU instruments.

### **5.7.2 Gender: An African concept?**

Culture is often vilified as the root cause of gender inequality in Africa. Patriarchy is labelled as the most oppressive force that opposes gender equality. However, some scholars have argued that many African societies observed gender equality before colonisation.<sup>211</sup> The influence of colonialist perspectives on female subordination eroded the gains of gender equality that existed in many African societies, as colonisers imposed their Christian views that subjugated women.<sup>212</sup> While it is acknowledged that patterns of gender inequality manifested in pre-colonial Africa, they became more pronounced after colonisation. Montgomery argues that ‘gender inequality and female disempowerment, in terms of the limited social and physical mobility, already existed to varying degrees in African cultures before the arrival of missionaries and colonizers.’<sup>213</sup>

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<sup>209</sup> E Chitando & S Chirongoma (eds.) ‘Redemptive masculinities: men, HIV and religion’ (2010).

<sup>210</sup> Chitando & Chirongoma (n 209 above).

<sup>211</sup> See FW Anunobi ‘Women and development in Africa: from marginalization to gender inequality’ (2002) 2(2) *African Social Sciences Review* 3; M Montgomery ‘Colonial legacy of gender inequality: christian missionaries in German’ (2017) 45(2) *East Africa Politics & Society* 225 268; SF Miescher ‘Becoming an cpanyin: elders, gender and masculinities in Ghana since the nineteenth century’ in C Cole et al (eds) *Africa after gender* (2007) 253-270.

<sup>212</sup> As above.

<sup>213</sup> Montgomery (n 213 above) 268.

There is research that gender relations and roles in pre-colonial Africa were fluid and complimentary.<sup>214</sup> Miescher argues that in pre-colonial societies in Ghana, gender had a close relationship to seniority such that ‘attainment of the position of an elder would mean that a man or a woman embodies a different gender.’<sup>215</sup> This author further gives examples of societies such as the matrilineal Akan societies and Asante communities where men and women’s genders changed in the course of their lives due to age.<sup>216</sup> According to Miescher, gender roles and identity were determined by seniority.<sup>217</sup> Older women were allowed to occupy high positions. Bakare Yosuf argues that among the Yoruba communities, sex difference has no normative implications beyond anatomical distinction.<sup>218</sup> As such, seniority and not gender is the determinative factor of social status.

In pre-colonial Africa, there were no fixed gender identities as situations determined the power and role of a person at the time. Rituals, for example, provided interchangeable roles for men and women. Women were deities who possessed a lot of power and respect. Women assumed the roles of leaders as priestesses and divine healers.<sup>219</sup> Christianity relegated women to the domestic spheres because of the sexual divisions of roles that are based on biblical interpretations.<sup>220</sup> As such, post-colonial Africa is vilified for being gender-biased and reinforcing notions of male superiority, which are foreign to the African religion. It has been

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<sup>214</sup> T Gale ‘Gender and religion: Gender and African religious traditions. encyclopedia of religion.’ (2005) available at <https://www.encyclopedia.com/environment/encyclopedias-almanacs-transcripts-and-maps/gender-and-religion-gender-and-african-religious-traditions>.

<sup>215</sup> S F Miescher ‘Becoming an cpanyin: elders, gender and masculinities in Ghana since the nineteenth century in C Cole et al (eds) *Africa after gender* (2007) Indiana University Press 253.

<sup>216</sup> Miescher (n 215 above) 254.

<sup>217</sup> As above.

<sup>218</sup> B Bakare-Yusuf ‘Yoruba’s don’t do gender: a critical review of Oyeronke Oyewumi’s the invention of women: making an African sense of western gender discourses’ in A Signe (ed) *African gender scholarship: concepts, methodologies and paradigm* (2004) 61.

<sup>219</sup> Gale (n 214 above).

<sup>220</sup> Gale (n 214 above).

argued that gender equality existed in pre-colonial Africa, and women have held high positions of authority at that time.<sup>221</sup> It has been argued that;<sup>222</sup>

Gender equality flourished in ancient lands where African women occupied positions of responsibility. While there were so many, our history books recognized only a few of them: Queen Ann Nzinga of Angola, Makeda the Queen of Sheba in Ethiopia, Queen Ahmose-Nefertiti of Egypt, Mbuya Nehanda of Zimbabwe, Yaa Asantewa of the Ashanti Empire, Buktou of Mali and Didon, Queen of Carthage (Carthage now known as Tunisia was the first State in the world founded by a woman.

Therefore, the implementation of gender equality in Africa should be rooted in Africa's own experiences. The history of gender relations in pre-colonial Africa is important in implementing the gender equality provisions under the APSA. Further, the history aligns with the pan Africanism mantra of 'African solutions to African problems.'

### 5.7.3 Gender equality and equity

According to UNESCO, gender equality means;<sup>223</sup>

That women and men have equal conditions for realizing their full human rights and for contributing to, and benefiting from, economic, social, cultural and political development. Gender equality is therefore the equal valuing by society of the similarities and the differences of men and women, and the roles they play. It is based on women and men being full partners in their home, their community and their society.

UNESCO defines gender equity as the 'process of being fair to men and women.'<sup>224</sup> This process includes taking measures that 'compensate for the historical and social disadvantages that prevent women and men from operating on a level playing field.'<sup>225</sup> Equity is, therefore, a 'means while equality is the result.'<sup>226</sup> Gender equity and equality are foundational principles in implementing women's right to peace. The principles allow women to define peace on their own terms. The principles of equality and equity are embodied in Article 10(2) of the Maputo Protocol, which obligates states to ensure the participation of women in peace processes.

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<sup>221</sup> Habiba El Mejri Scheikh 'Gender equality: what do African citizens think? year of women's empowerment and development towards Africa's agenda 2063.' (2015) 1 AU Commission Newsletter.

<sup>222</sup> Habiba El Mejri Scheikh (n 221 above).

<sup>223</sup> UNESCO 2003 Gender mainstreaming implementation framework baseline definitions of key concepts and term. available at <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/BSP/GENDER/PDF/1.%20Baseline%20Definitions%20of%20key%20gender-related%20concepts.pdf> accessed 5 June 2018.

<sup>224</sup> UNESCO (n 223 above).

<sup>225</sup> UNESCO (n 223 above).

<sup>226</sup> UNESCO (n 223 above).

#### **5.7.4 The AU normative frameworks on gender equality**

As noted by Hendricks and Abdullah, there is little scholarly analysis on gender mainstreaming in the APSA. The work by Hendricks will be heavily relied on as authority for analysing gender mainstreaming in APSA. In this regard, this study significantly contributes towards the discourse by bringing in gender analysis of the implementation of the right to peace by APSA. The AU has made significant contributions in terms of setting the frameworks for gender equality in peace processes.<sup>227</sup> However, the biggest challenge is that the norms have largely remained in theory.

The African Union Peace Framework has a strong legal base that recognises gender equality. These instruments are the PSC Protocol, the Maputo Protocol, the Solemn Declaration on Gender Equality in Africa (SDGEA) and the AU Action Plans on Gender Mainstreaming in Peace and Security. The above instruments have largely remained in theory as practical implementation is a challenge; this is discussed below. Hendricks's study found that 'there has not been sufficient translation of the changes at the institutional level (intergovernmental and governmental) into meaningful transformation of the everyday experiences of women in conflict and non-conflict situations, nor has there been a marked increase in women's participation in the peace processes.'<sup>228</sup>

#### ***The African Union strategy for Gender Equality and Women's Empowerment (GEWE) 2018-2028***

The AU has an ambitious strategy whose objective is to ensure the implementation of gender equality in Africa. The strategy was adopted in 2019. The Strategy acknowledges that women are still under-represented in conflict prevention and resolution processes. The Strategy acknowledges the centrality of the APSA framework in ensuring women's equal and effective participation.<sup>229</sup> The strategy's objective is to ensure that women participate equally in all areas

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<sup>227</sup> See Abdullah (n 14 above); C Hendricks 'Progress and challenges in implementing the women, peace and security agenda in the African Union's Peace and Security Architecture' (2017) XLII (3) *Africa Development* 73 84.

<sup>228</sup> C Hendricks 'Progress and challenges in implementing the women, peace and security agenda in the African Union's Peace and Security Architecture' (2017) XLII (3) *Africa Development* 73 84.

<sup>229</sup> Gender strategy 2018-2023 24.

of conflict management.<sup>230</sup> It also aims ‘to strengthen the Women, Peace and Security programme to ensure that all African countries adopt and implement UN Resolution 1325 including the provision of transitional justice and reparations.’<sup>231</sup> The strategy sets a plan to realise Aspiration 6 of the African Union’s Agenda 2063. Aspiration 6 of Agenda 2063 acknowledges the participation of women and the youth in Africa’s development. Outcome 2.2 of the strategy targets the reduction of violence against women in all spheres of life and increases the participation of women in peace processes. The strategy’s intervention area concerning the participation of women in peace processes includes the building of ‘a continental coalition to strengthen outcomes of existing AU and global commitments to ending and penalizing VAWG; promoting women’s participation in peace processes; developing guidelines on reparations, and lobbying for their integration into transitional justice and peace processes.’<sup>232</sup> The strategy is a mouthful of ambitions to conceptualise gender equality in AU structures. The strategy has the potential to deal extensively with implementation gaps on gender equality.

### ***Agenda 2063***

The Agenda 2063 is a framework by the African Union that aims at the social and economic transformation of Africa by 2030. The Framework seeks to accelerate development in Africa.<sup>233</sup> The Agenda 2063 framework has seven aspirations which are all geared towards having a united and peaceful Africa.<sup>234</sup>

Aspiration 6 of the Agenda 2063 recognises the fact that the continent's development cannot be complete without the involvement of women and youth. In this regard, Agenda 2063 acknowledges the need for

‘strengthening the role of Africa’s women through ensuring gender equality and parity in all spheres of life (political, economic and social); eliminating all forms of discrimination and violence against women and girls;

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<sup>230</sup> As above.

<sup>231</sup> Gender strategy (n 229 above).

<sup>232</sup> As above

<sup>233</sup> Gender strategy (n 229 above) 24.

<sup>234</sup> Gender strategy (n 229 above).

creating opportunities for Africa's youth for self-realization, access to health, education and jobs; and ensuring safety and security for Africa's children, and providing for early childhood development.<sup>235</sup>

However, the Agenda can be problematised for lumping women and the youth into one category. This depicts the stereotypes of placing women and children under the supervision and tutelage of men. Further, it views women as inferior hence lumping them together with the youth at the exclusion of men. This goal does not consider the variables such as age, class, religion, race ethnicity that exist in women's lives. These variables affect the way women enjoy the right to peace.

Aspiration number 6 seems to have remained on paper. Evidence on the ground actually does not depict sincerity in implementing this aspiration. An analysis of the profile of African leaders reveals that older men mainly carry out leadership roles. Women and the youth are actually left out. The African belief that old age is associated with wisdom is a disadvantage to women and the youth. This belief seems to allude to the fact that only older men have the wisdom. Only two women have been presidents of African countries. These are Sirleaf Johnson, the former president of Liberia and Joyce Banda from Malawi. Currently, all African Presidents are above the age of 50 years. Africa is generally considered a young continent with 60% of the population under the age of 25.<sup>236</sup> However, the continent is led by the old despite having a young population. The former President of DRC, Laurent Kabila, was Africa's only youngest President. He got into the office at the age of 27. His rise to power as a young person was easy because he took over from his father. The election of Kabila as a young President clearly shows that the youth are excluded from power and are only eligible if they succeed their fathers. This makes leadership positions a privilege only available to a few individuals and not open to all young people in Africa. This is a clear indication of shutting the doors against the youth. Supporters of the ruling party in Zimbabwe have been calling for an increase in the presidential age limit from the current 40 years to 55 years. The calls have been made on the assumption that a person is considered mature at 55 years. The move aimed to block the young opposition leader, Nelson Chamisa, from contesting in the 2023 elections. This kind of thinking

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<sup>235</sup> FAnunobi 'Women and development in Africa: from marginalization to gender inequality' (2002)2(2) *African Social Science Review* 43 63.

<sup>236</sup> Y Adegoke 'The world's youngest continent will keep being run by its oldest leaders' (2017) *Quartz Africa* available at <https://qz.com/africa/1162490/the-youngest-continent-keeps-on-being-run-by-the-oldest-leaders/> accessed 25 February 2019.

conflates maturity and capacity. Being older does not guarantee capability, and old age does not automatically translate to capacity. The current governance crisis in Africa is a clear testimony to the fact that old age and capacity are not related.

### ***AU constitutive Act***

Article 4 of the AU Constitutive Act outlines the principles upon which AU functions. Gender equality is one of the principles that guide AU operations. Article 4 is imperative that all AU institutions and structures adhere to gender equality since the foundational instrument embodies the principles.

### ***PSC Protocol***

The PSC Protocol is silent on the need to promote gender equality. It does not have any provision that speaks to the inclusion of women in AU peace structures such as the ASF, the POW and the CEWS. Gender equality is not even mentioned as one of the principles upon which the PSC functions. The assumption could be that since one of the objectives of the PSC is to uphold human rights, gender equality is incorporated in the human rights framework. Given the fact that the PSC Protocol came after the AU Constitutive Act, its silence on gender equality is a cause for concern. However, in its operations, the PSC has exhibited adherence to gender equality by including women as members of the Council. However, the inclusion has not extended to key decision-making positions such as Chairpersonship.

The Protocol does not focus on empowering women but emphasizes the victimology of women in conflict-ridden societies. Article 14(3) (e) provides that the PSC shall help a member country to ‘assist vulnerable persons, including children, the elderly, women and other traumatized groups.’ Women are also mentioned in the Protocol under Article 13 on the training of military and civilian personnel who are part of the African Union Standby Force. Article 13 provides that ‘the training of civilian and military personnel shall place special emphasis on the rights of women and children. This provision is silent on the inclusion of women as trainees.’

The PSC Protocol promotes the interaction between the PSC and women’s organisations.<sup>237</sup> The PSC's role is to encourage women’s organisations to actively participate in peace-making

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<sup>237</sup> Art 20.

structures.<sup>238</sup> The PSC Protocol also provides that women's organisations may be called to make presentations before the PSC.

### ***AU Solemn Declaration on Gender Equality***<sup>239</sup>

The Declaration was adopted by the AU Heads of Assembly in Addis Ababa, Ethiopia, in 2004. The Declaration reinforces the commitments made by the African Union in the 2002 Declaration on Gender. The declaration noted that although women bear the brunt of conflicts, they continue to be side-lined in peace negotiations and peacebuilding activities.<sup>240</sup> The declaration also noted that feminisation of poverty results from the under-representation of women in 'social, economic and political decision-making structures.'<sup>241</sup>

Article 2 of the declaration aims to 'ensure the full and effective participation and representation of women in peace processes including the prevention, resolution, management of conflicts and post-conflict reconstruction in Africa as stipulated in UN Resolution 1325 (2000) and to also appoint women as Special Envoys and Special Representatives of the African Union.' The declaration also expands and promotes the gender parity principle in all AU institutions, RECs and parliaments of member states.<sup>242</sup>

The declaration addresses the challenges that women face in a holistic approach. Article 7 seeks to promote the implementation of legislation that addresses women's property rights, including inheritance and access to education.<sup>243</sup> This provision enables women to enjoy peace in its fullest sense without limiting it to negative peace, which is the mere absence of physical violence.

Article 11 laid the foundation of the Women's Trust Fund. The Fund's objective is to conduct capacity building for African women.

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<sup>238</sup> Art 20.

<sup>239</sup> AU solemn Declaration on gender equality was adopted by the General Assembly in 2004.

<sup>240</sup> Preamble to the Solemn Declaration on Gender Equality in Africa.

<sup>241</sup> As above.

<sup>242</sup> Art 2 of the Declaration.

<sup>243</sup> Art 8 of the declaration.



### ***Maputo Protocol***

The Maputo Protocol obligates states to apply gender equality in legislation, development plans, and programmes. The Protocol emphasises the need to adopt gender equality in marriage and adequate representation in decision making. Article 9 protects women's right to participation in decision-making processes. It provides that women should be represented on an 'equal basis and at all levels with men in all electoral processes, development plans and in all decision-making processes.'<sup>244</sup>

### ***African Women's Decade***

The African Union declared 2010 to 2020 as the African Women's Decade. This Decade was dedicated to accelerating the adoption of gender equality in all spaces. Its aim is to 'advance gender equality by accelerating implementation of the Dakar, Beijing and AU Assembly Decisions on Gender Equality and Women's Empowerment (GEWE), through a dual top-down and bottom-up approach, which is inclusive of grassroots participation.'<sup>245</sup>

The theme of the Decade places emphasised on the bottom-up approach to development. The African Women's Decade has 10 thematic areas which touch on different aspects of women's lives, such as health, climate, food security, capacity building and peace and security. The thematic areas are related and, if successfully implemented, will result in the implementation of the right to peace. The theme of fighting poverty will ensure that women are empowered and gain access to closed spaces. Poverty limits women's chances of access to opportunities.

While the framework of the African Decade is comprehensive, the usual challenge, as with all other policy frameworks, is implementation. The end of term review of the decade indicates an increase in women's participation in politics in countries like Mauritius, Cameroon, Madagascar, Malawi, Libya, Algeria, and Zimbabwe.<sup>246</sup> However, some of the recorded achievements have been overturned. In Zimbabwe, the number of women in parliament significantly reduced after the 2018 elections. The review also noted that women were involved

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<sup>244</sup> Art 9(1) (b).

<sup>245</sup> AU Solemn Declaration (n 239 above).

<sup>246</sup> African Union *The end of the African women's decade; Tracking progress on commitments*. (2020) Available at <https://www.un.org/africarenewal/news/end-african-women%E2%80%99s-decade-tracking-progress-commitments> accessed 20 December 2021.

in peacekeeping missions, but the percentage is far below the required 50% threshold. The decade has passed without any significant changes on gender equality in the AU. The AU enters the new decade for 2020-2030, focusing on the inclusion of women in economic activities.

### *Challenges in implementing gender equality provisions*

The application of gender equality in APSA has been from a minimalistic perspective. It is argued so because, firstly, the aim seems to increase women's numbers without allowing them to define the agenda. The unequal balance in power in decision making remains unchallenged. APSA adopts an integrationist approach where women are supposed to come into already defined structures that do not allow them to define issues from their standpoint. Secondly, even the integrationist approach fails to reach the adequate 50 per cent threshold in terms of numerical representation.

An examination of some of the statistics on the critical appointments of women depicts that gender equality is still far from being realised in APSA. Hendricks has noted the following appointments:

- In 2012 the first woman, Nkosazana Dlamini-Zuma, was appointed as the AUC Chairperson in a very competitive process.
- Of the eight commissioners during her tenure (2012–16), four were women.
- More women were appointed into key positions such as Chief of Staff, Deputy Chief of Staff, Directors, Heads of Divisions, and Special Representatives.<sup>247</sup>
- The current composition of the POW has 3 women out of 5 members.
- Of the thirty-one former and current chairs of the AU PSC, eight have been women.
- Of the 15 members of the PSC, three of them are women.
- 7 out of 9 Representatives are men.

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<sup>247</sup> According to Hendricks although more women were appointed at this period, the gender parity principle staff-complement in the Office of the Chairperson and Deputy Chairperson and the AUC, as a whole, did not reach gender parity under Nkosazana Dlamini Zuma's term.

- Seven out of eleven Heads of Missions are men.
- One woman is part of the eleven Special Envoys.
- The AU High-Level Panel on Darfur that the AU PSC established had two women out of eight members of the Panel.
- The appointment of Special Envoy on Women Peace and Security.

This special envoy for peace has been influential in the continent in terms of advocating for the inclusion of women in peace processes. Some of the notable achievements made by the special envoy involved undertaking solidarity missions to conflict and post-conflict countries on the continent, initiating networks, projects and training on the continent.<sup>248</sup> Some of the networks initiated are as follows-

- a) Network of Reporters on Women, Peace and Security.
- b) The African Women's Mediator's Network and Training of Women Mediators.
- c) IGAD Women's Peace Forum.
- d) South-Sudan National Women's Peace Platform, Regional Platform for Women of the Sahel.
- e) Training on electoral observation and dispute mediation for forty women leaders.

While creating women's networks is important, it is also critical to guard against ghettoising women. Women should not get carried away by forming coalitions that do not transform gender relations. There should be forums for engagement on important issues affecting the continent and achieve tangible results. If not fully utilised, these coalitions might end up as women's clubs where they meet and empathise with one another.

The Chairperson of the AU Commission, Moussa Faki Mahammat, was first elected in 2017 and re-elected in 2021. He is deputised by a woman. As per the standard procedure of the AU Commission, the Chairperson and the deputy cannot be of the same gender. Although the heads

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<sup>248</sup> Hendricks (n 228 above) 84.

of the PSC are men only, women are also represented in the Commission. There are four men in the Peace and Security, Trade and Industry, Human Resources, Economic Affairs Portfolios and four women who are in the Social Affairs, Political Affairs, Rural Economy and Infrastructure and Energy Portfolios.<sup>249</sup>

However, the participation of women has been limited to increasing their numbers without allowing women to be appointed to influential positions. Hendricks notes that the AU has yet to appoint women in strategic decision-making positions that influence policy development and implementation, such as the Commissioner for Peace and Security, the Special Advisor for Defence and Security, or the Head of the Department of Peace and Security.<sup>250</sup> This depicts the conceptualisation of peace in masculine terms. Defence and security have always been a preserve for men. Hence, women are appointed in other capacities and not those that are linked to military security.

Participation of women is still limited. Women constitute the lowest number of troops deployed in peace missions.<sup>251</sup> The AU adopted a gender policy in 2010, but the challenge is mainstreaming gender into the peace and security framework. The Peace and Security Department is accused of inconsistencies in implementing gender mainstreaming in the continent.<sup>252</sup> This is seen through the adoption of new action plans without implementing the existing ones and the abolishing of the position of gender advisor. The Gender Policy has been criticised for providing little guidance on mainstreaming gender.<sup>253</sup> The PSC integrated gender aspects through its action plan. It has also been argued that despite the AU's strong normative framework on peace and security, the institution lacks an all-encompassing organisational

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<sup>249</sup> Hendricks (n 228 above) 82.

<sup>250</sup> Hendricks (n 228 above) 80.

<sup>251</sup> Y Kasumba & W Lotze 'Mainstreaming gender into African union peace support operations: why we are getting it wrong' (2013) 2 *Conflict trends* 23 29.

<sup>252</sup> Abdullah (n 14 above). The author further argues that the intention of the PSD to mainstream gender across the continent weakens the process. Rather gender mainstreaming should be centralized to have an impact.

<sup>253</sup> Abdullah (n 14 above) 24.

gender strategy to guide its work in conflict and post-conflict situations.<sup>254</sup> This is despite introducing two action plans on gender mainstreaming in the peace and security agenda.<sup>255</sup>

Adopting the gender parity principle in the APSA and the broad AU framework reflects the symbolism of tokenism unaccompanied by action, particularly to shift power dynamics and decision making. Increasing the number of women is important but should not be the end in itself. Women need to occupy influential positions that enable them to determine the agenda

The biggest challenge that affects the implementation of the continent's ambitious framework on gender is the failure to act by the AU leaders. The lack of action is caused by limited resources and a lack of political will. The AU has a proliferation of institutions that basically duplicate duties. These institutions compete for the few resources available. Resultantly, reliance will then be placed on donor resources that do not guarantee the sustainability of programmes. The proliferation of institutions also affects proper coordination. The APSA has the POW, special envoys, special rapporteurs, the African Commission, and all the RECs. All the mentioned structures conduct fact-finding missions as part of their mandate of implementing the right to peace. AU further appoints high-level panels to handle specific crises.<sup>256</sup> This has the potential of duplication and can create an element of hostility by countries where fact-finding missions are supposed to be conducted.

The lack of political will by the AU heads of states is reflected in the fact that the gender equality parity principle is yet to be realised fully in various countries. The above statistics show that women are still underrepresented in all spheres. Women seem to be an appendage of male-dominated spaces simply as a tokenism to implementing the gender equality principle. Gender equality is politicised such that states want to be seen as politically correct by subscribing to the notion of gender equality principle outlined in the AU legislative framework without accompanying such subscription with action. Abdullah argues that 'while the AU scores high on de jure instruments designed to improve the legal framework for women's rights

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<sup>254</sup> As above.

<sup>255</sup> Abdullah (n 14 above). These actions plans were introduced in 2010 and 2013.

<sup>256</sup> For example, the PSC appointed a High level Panel to handle the peace talks in South Sudan. The Panel was headed by the former President of South Africa, Mr. Thabo Mbeki.

and gender equality, the evidence suggests less progress in terms of the de facto practices directed toward their implementation.<sup>257</sup> There is a huge gap between reality and theory.

Article 10(2) of the Maputo Protocol makes it mandatory for women to be included in peace structures at the national, regional and international levels. In this regard, states have to ensure that they appoint women as ambassadors and ministers since the practice in the APSA is to appoint former heads of state or senior government officials to represent the country in the PSC or the POW. This practice is discriminatory and eliminates many women with potential. The legal framework on the APSA does not require that a person should have been a head of state or senior government official to qualify for an appointment in the PSC. This practice violates the right to equality and non-discrimination based on status. On another note, this criterion can be justified because states would want to protect their interests at such regional platforms. Electing a former head of state or anyone in government guarantees the protection of states' interests.

Hendricks argues that 'one of the challenges of implementing gender equality is that Africa relies on template training frameworks on gender issues.'<sup>258</sup> These templates may not even suit the context. As alluded to earlier, gender construction in Africa is fluid and interchangeable depending on the event and purpose of roles that an individual is supposed to play. If analysed carefully, these gender templates do not give room for flexibility, which explains why there is sometimes resistance in implementation.

It has been noted that training on gender focuses on protection more than empowerment. Hendricks argues that this portrays women as victims in need of protection. Hendricks argues that so far, gender mainstreaming within the APSA has overly concentrated on sexual and gender-based violence training and conferences. While it is acknowledged that this kind of training is important, it should be complementary to other strategies that seek to ensure gender equality. Further, gender mainstreaming activities have primarily focused on integrating and including women in the previously male-dominated spaces without changing the unequal

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<sup>257</sup> Abdullah (n 14 above) This author argues that the fact that The Maputo Protocol has not been ratified by fourteen member states, and also some of the member states entered reservations is a clear sign of lack of commitment to gender equality and observance of women's rights.

<sup>258</sup> Hendricks (n 228 above) 368.

balance of power. Women enter into spaces that are still embedded with gender stereotypes, and they will not achieve much. At the end of the day, it becomes a game of increasing women's numbers without the power to determine the agenda and bring new narratives of women's empowerment.

However, some authors believe that some gains have been achieved in the implementation of Article 10 of the Protocol because legislation outlawing violence against women has been passed in various countries.<sup>259</sup> However, to conclude that there are gains without analysing the implementation of the enacted laws would be celebrating too early. While the achievements are a cause to celebrate, the focus should not be lost on the need to track implementation. There are other notable achievements made by the Women, Gender and Development Directorate (WGDD). These include the development of a training manual that enables gender mainstreaming in peace operations and organising the use of the manual in countries that supply troops to the ASF.<sup>260</sup>

The WGDD also played a fundamental role in ensuring the recruitment exercise of gender experts for the AU Liaison Offices and the PSOs in 2010. The WGDD also supported women candidates in Somalia's 2012 elections and worked with the elected AMISOM in developing a national gender policy.<sup>261</sup> However, these achievements relate to participation in peace keeping and armed conflict settings to the exclusion of participation in other forums that have the potential of promoting women's right to peace in its broader perspective.<sup>262</sup> The Declaration of the Decade on Women's Rights is also an achievement, given the fact that it helps in putting women's rights on the agenda.<sup>263</sup>

In carrying out its mandate of peace building after conflicts, the PSC is obliged to ensure the protection of women from violence. The Protocol recognises the need to protect women from

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<sup>259</sup> Hendricks (n 228 above).

<sup>260</sup> Abdullah (n 14 above).

<sup>261</sup> As above.

<sup>262</sup> This includes gender mainstreaming in development and access to resources issues.

<sup>263</sup> The decade started from 2010 to 2020 and its just 3 years away before the end of the decade yet there is still a lot that needs to be done in relation to increasing women's participation in peace and conflict management.

violence. However, the Protocol depicts women as ‘mostly passive victims of war’ and powerless.<sup>264</sup> Women are grouped in vulnerable groups that need assistance, such as the elderly, children and other traumatised groups in society.<sup>265</sup> There is a need to adopt an approach that recognises the multiples roles that women can play in conflicts, including being the perpetrators and as leaders in peace building initiatives.<sup>266</sup> Hendricks argues that ‘there has not been any meaningful reflection on the differences between women in conflict and post-conflict environments.’<sup>267</sup> She further argues that women have been presented as a homogenised group of victims in need of protection.<sup>268</sup>

The inclusion of women in peace and security seems to be motivated mainly by the need to protect them from sexual gender-based violence. This, therefore, resulted in the prioritisation of women’s physical security to the neglect of other security issues such ‘as social and economic security, dignity, access to health.’<sup>269</sup> The participation of women under such limited frameworks amounts to ‘token participation in stereotypical gendered roles.’<sup>270</sup>

The PSC Protocol provides an opportunity for women’s organisations to participate in the peace structures on the continent. This provision is in line with the dictates of Article 10(2) of the Maputo Protocol, which mandates states to ensure an increase of female participation in peace promotion and protection structures. However, the clawback clause on the participation of women in PSC’s work is the fact that they have to be invited by the PSC. This totally removes the element of participation as this can be an avenue to eliminate women’s voices in the PSC’s work. This limitation is restrictive in the sense that the invited may not come. The issue of invitation does not consider the need to engage the PSC on an urgent basis such that by the time the invite is given, women would have suffered irreparable harm. This provision

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<sup>264</sup> Abdullah (n 16 above).

<sup>265</sup> Art 14(3) of the PSC Protocol.

<sup>266</sup> Abdullah (n 16 above).

<sup>267</sup> Hendricks (n 228 above).

<sup>268</sup> Hendricks (n 228 above).

<sup>269</sup> Hendricks (n 228 above).

<sup>270</sup> Hendricks (n 228 above) 369.



seems to contradict the objective to prevent conflicts. If this objective is to be achieved, the doors of the PSC should be open at any time without the need for an invite. In order to implement article 20 of the PSC Protocol, the PSC adopted the Livingstone Formula in 2008. The Livingstone Formula is a framework that regulates the interaction between the PSC and civil society in matters of peace and security.<sup>271</sup>

The Formula provides that civil society organisations should comply with the eligibility criteria as a prerequisite to interacting with the PSC. They should be registered in an African country. The organisation's purpose should be in line with the 'objectives and principles' of the African Union. The organisation should also be accredited by the AU or any REC. That organisation should also be a member of a recognised umbrella network of civil society. The Livingstone Formula provides that the civil society can be part of fact-finding missions as observers. They can also submit reports to the AU Commission that will be considered at PSC meetings. The platform for interaction with civil society is an opportunity to lobby for implementing gender equality provisions by the PSC.

## **5.8 Challenges of APSA as a whole**

The effectiveness of the PSC is measured by the level of the challenges that it faces. These challenges affect the implementation of women's right to peace by APSA. Some of the challenges that affect APSA's effectiveness include weak coordination, lack of political will and underfunding.

### **5.8.1 Coordination**

The coordination of activities by APSA has proved to be a challenge. Countries pay more loyalty and commitment to subregional mechanisms than the APSA. Aniche and Egbulaim have argued that subregional mechanisms are also conflicted and threatened 'by the sub-nationalism or disintegrative nationalism.' This conflict distracts the subregional mechanisms from cooperating with the PSC to achieve peace on the continent.<sup>272</sup> It has also been argued that APSA is also failing to coordinate civil society activities due to the fragmentation of the

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<sup>271</sup> Abdullah (n 16 above).

<sup>272</sup> Aniche & Egbuchulam (n 35 above).

civil society.<sup>273</sup> As a result, civil society organisations are not fully benefiting from the interaction with APSA.

### 5.8.2 Adopting a wrong model

Criticism has been raised on the model adopted by the AU in establishing APSA. It has been argued that the AU adopted a model from the EU neo-functional approach as a template for conflict management in Africa. This template was adopted without an analysis of its appropriateness for Africa.<sup>274</sup> Africa does not have the required resources to adopt such a structure, and as a result, the dismantling of the APSA and its replacement with a subregional mechanism such as NASBRIG, EASBRIG, FOMAC, SADCBRIG and ECOBRIG is proposed.<sup>275</sup> However, while it is admitted that Africa does not have the resources to sustain all the structures, it is not necessary to dismantle the whole structure. Structures that share the same mandate can be combined and composition reduced. For example, the Panel of the Wise, the special envoys and the CEWS can be combined.

### 5.8.3 Proliferation of institutions

Baimu argues that ‘while the problem of proliferation of institutions is not unique to the African Union, the difference rests on the ability to fund the institutions.’<sup>276</sup> APSA institutions are not adequately funded. The author further argues that since the AU is failing to adequately finance the African Commission, it can be concluded that it will not cope with all the institutions under APSA.<sup>277</sup> Further, multiple memberships of RECs to the AU frameworks affect the commitment of states.<sup>278</sup> RECs will be forced to align more with the structures where they benefit the most instead of where they get more obligations.

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<sup>273</sup> Majinge (n 28 above) 123 argues that ‘the interaction between the two has been minimal given the opaque nature of decision making within the AU PSC and the fragmentary nature of civil society organizations in Africa.’

<sup>274</sup> Aniche & Egbuchulam further argue that this model is not appropriate for Africa because Africa is ‘still faced with injustice, battling with poverty, under development and divisions. (n 35 above) 23.

<sup>275</sup> Aniche & Egbuchulam (n 35 above).

<sup>276</sup> E Baimu ‘The African Union: hope for better protection of human rights in Africa’ (2001)2 *African Human Rights Law Journal*.

<sup>277</sup> Baimu (n 276 above).

<sup>278</sup> Aniche & Egbuchulam (n 35 above).

#### 5.8.4 Lack of co-operation

Countries in Africa do not cooperate with the PSC sometimes, which negatively affects the PSC's capacity to manage conflicts in Africa. The Sudanese government, at one point, rejected the proposal of the PSC.<sup>279</sup> The PSC had proposed the setting up a tribunal composed of judges from Sudan and other African countries.<sup>280</sup> The rejection shows the little faith that countries have in their own system. It also shows that PSC cannot influence the decisions of the states. This is against the background that states declare under the PSC Protocol to cooperate with the PSC.<sup>281</sup> This lack of co-operation by States has resulted from the APSA's lack of inducement mechanisms to gain compliance. Williams argues that the PSC 'lacks the coercive mechanisms or inducements that would give it leverage over the conflict parties.'<sup>282</sup>

The PSC is also facing the challenge of coordinating the deployment of troops to protect civilians in conflict-torn areas; as a result, the uneven distribution of troops on the continent.<sup>283</sup> Williams argues that less than twelve member states have their troops deployed to AU Missions.<sup>284</sup> The major cause of such uneven distribution is the poor economies of most African countries, although in some cases, it is just the lack of political will.<sup>285</sup> Williams argues that Algeria and Angola are some of the countries that have the capacity to deploy troops but lack the political will, and their contributions to ASF have been just symbolic.<sup>286</sup>

#### 5.8.5 Governance issues

Most conflicts in Africa result from bad governance culminating in election disputes, unequal representation, and unequal distribution of resources. The AU has frameworks that seek to

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<sup>279</sup> Majinge (n 28 above.)

<sup>280</sup> Majinge (n 28 above)

<sup>281</sup> Majinge further argues that the rejection by the Sudanese government reflects the lack of sincerity of African countries to maintain peace. They only cooperate when the decision proposed tallies with their own interests.

<sup>282</sup> P Williams 'Reflections on the evolving African Peace and Security Architecture' (2014)7(3) *African Security*.151.

<sup>283</sup> Williams (n 282 above).

<sup>284</sup> Williams (n 282 above).

<sup>285</sup> William (n 282 above) 151.

<sup>286</sup> William (n 282 above).

ensure good governance among member states. These include the APRM, the PSC Protocol, the AU Constitutive Act, and the African Charter. Despite this, APSA institutions have not been able to deal with bad governance in the member states.<sup>287</sup>

### **5.8. 6 Financial capacity**

The full implementation of the ‘African solutions to African problems’ is a challenge in light of the financial constraints of APSA. The African states have shown double standards to some extent by demanding non-interference and total control of their affairs in situations that suit them. When African governments want funding, they are ready to accept partnership, but when it comes to accepting criticism by external countries, institutions and agencies, they quickly point to the concept of sovereignty.

A pertinent question has been asked by Williams. He asked, ‘does the African Union genuinely own APSA institutions?’<sup>288</sup> This question is very difficult to answer and can lead to an unending debate on the question of ownership. For instance, does ownership mean that Africans will not allow any partnerships in the areas of peace? If participation is allowed, what would be the roles of external partners? Does entering into partnerships mean the solution is no longer African? These questions need further interrogation. The reality is that AU is struggling to fund the APSA and relies on donor funding to fulfil its objectives of managing conflict and maintaining peace in the region.

### **5.9 How do the challenge faced by APSA affect implementation of women’s right to peace**

The challenges highlighted above negatively impacts the implementation of women’s right to peace in many ways. The inadequate funding of APSA means that it will not be able to focus on non-military issues. It reduces its prevention role leaving it to fire fight on issues of armed conflicts. It also implies that women’s issues will be relegated to the periphery. Late intervention by APSA increase women’s vulnerability to sexual abuse during conflict. The lack of cooperation by states certainly impact women more than men. It is argued so because women are underrepresented in key decision making. As such there is a risk that that women’s concerns

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<sup>287</sup> Williams (n 282 above) 153.

<sup>288</sup> As above.

may not be taken into account. Priority will be given to state security which is generally militaristic.

### **5.10 APSA's contribution to Zimbabwe's political and economic crisis**

The PSC has a duty to take prevention and protective measures in matters of peace in terms of Article 6 of the PSC Protocol. The PSC is mandated to develop early warning strategies to prevent conflicts. In the event that prevention fails, the PSC has an obligation to protect civilians and mitigate the damage to infrastructure and loss of lives. The role of the PSC in Zimbabwe's crisis is measured against the PSC's two broad mandates, as highlighted.

The Continental Early Warning System (CEWS) is the conflict prevention mechanism of the APSA. The CEWS is supposed to advise PSC on potential threats to peace in Africa timeously. The CEWS has not advanced any warning advice on Zimbabwe. One of the reasons for such failure is that the CEWS is mainly concerned with volatile situations where the possibility of armed conflict is high. If the CEWS is taking an expanded approach to peace, it does not have to wait for election disputes for the PSC or Panel of the Wise to engage Zimbabwe.

It is beyond doubt that economic crisis, unemployment, unequal opportunities, unequal distribution of resources trigger physical violence. Without even looking at the social and economic issues, Zimbabwe's political situation needs urgent intervention. Political violence has become a permanent feature in the election cycles. Freedom of expression and petition is severely curtailed. Human rights defenders and individuals who voice their dissatisfaction with the status quo continue to face arbitrary arrests.

The systematic abuse of state machinery to suppress citizens' right to protest has always been present in Zimbabwe during and after Mugabe's era. Human rights activist are constantly persecuted.<sup>289</sup> In 2019, the new President of Zimbabwe announced a fuel price increase of over 200 per cent. The announcement resulted in mass protests and stay-away. The military was deployed in the residential areas where it unleashed violence on unarmed citizens. During the protests, a lockdown of the country was imposed. People's movement was restricted. The internet was shut down. Soldiers assaulted women with children strapped at the back. The few

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<sup>289</sup> 'Unacceptable persecution of human rights defenders' *The Zimbabwean* 18 November 2016(available at <http://www.thezimbabwean.co/2016/11/unacceptable-persecution-human-rights-defenders/> (accessed 22 August 2017).

complaints of rape that have been reported were not investigated. The police spokesperson held a press conference and invited all the rape victims to come and report the sexual assault. The army's spokesperson denied responsibility and claimed the soldiers stole army uniforms and committed the atrocities.<sup>290</sup> There have been several incidents of abductions of citizens by members of the central intelligence services.<sup>291</sup> It has been reported that more than 50 human rights activists were abducted in 2019. A female comedian was also abducted and tortured for making political jokes that criticise the government's failure to solve Zimbabwe's economic situation.<sup>292</sup> The Zimbabwe Human Rights NGO Forum reported that 1803 violations were committed during that period.<sup>293</sup> These violations include at least 17 extrajudicial killings, 17 cases of rape or other violations of a sexual nature, 26 abductions, 61 displacements, 81 assaults consistent with gunshot attacks, 586 assaults and torture, inhuman and degrading treatment including dog bites, 954 arrests and detention.<sup>294</sup> The situation described clearly indicates that Zimbabwe is not a peaceful nation. As such, the situation warrants intervention by the APSA.

### **5.10.1 PSC's role in Zimbabwe through the Southern African Development Community (SADC)**

The study observed that APSA has not directly engaged with Zimbabwe but has utilised the principle of subsidiarity and complementarity by allowing SADC to solve the political crisis in Zimbabwe. The principle of subsidiarity allows the PSC to delegate subregional organisations resolve conflicts. The principle of subsidiarity has a competitive advantage because the

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<sup>290</sup> Breaking: 'Civilians stole our uniforms – Zimbabwe Police & Army say In joint press conference' *Pindula news* 19 January 2019 available at <https://news.pindula.co.zw/2019/01/19/civilians-stole-our-uniforms-zimbabwe-police-army-say-in-joint-press-conference/> (accessed 12 February 2019).

<sup>291</sup> TRT World Who is behind the spate of activist abductions in Zimbabwe available at <https://www.trtworld.com/magazine/who-is-behind-the-spate-of-activist-abductions-in-zimbabwe-30433> (accessed 20 January 2020); Zimbabwe Peace Project Monthly Monitoring Report September 2019 available at <https://reliefweb.int/report/zimbabwe/zpp-monthly-monitoring-report-september-2019> (accessed 2 December 2019).

<sup>292</sup> Zimbabwe Peace Project. 'Three years on, the promised new dawn has turned out to be a nightmare available at [https://zimpeaceproject.com/three-years-on-the-promised-new-dawn-has-turned-out-to-be-a-nightmare/accessed\\_10\\_March\\_2020](https://zimpeaceproject.com/three-years-on-the-promised-new-dawn-has-turned-out-to-be-a-nightmare/accessed_10_March_2020).

<sup>293</sup> Zimbabwe Human Rights NGO Forum 'On the Days of Darkness in Zimbabwe An Updated Report on the Human Rights Violations Committed between 14 January 2019 to 5 February 2019.'(2019) available at <http://www.hrforumzim.org/wp-content/uploads/2019/02/Shutdown-Atrocities-Report-6-February-2019.pdf> (accessed 20 February 2019).

<sup>294</sup> Zimbabwe Human Rights NGO Forum report (n 290 above).

regional mechanism intervening is close to the problem and, therefore, can appreciate the conflict better. The principle of subsidiarity is supposed to enable speedy resolution of conflicts. Article 16(1)(b) of the PSC Protocol mandates the PSC to partner with the regional mechanisms to promote and maintain peace, security, and stability.

APSA's intervention in Zimbabwe has been mainly through SADC. SADC has a duty to complement the efforts of the PSC in maintaining peace in the continent. As a regional mechanism under the APSA, SADC has the primary responsibility of promoting peace, security and stability in Southern Africa.<sup>295</sup> The SADC approach to conflict management is modelled under the POW framework. SADC mediation structure is called Mediation, Conflict Prevention, and Preventative Diplomacy Structure.<sup>296</sup> The structure is composed of a mediation support unit (MSU), a Panel of Elders (PoE), and a mediation reference group (MRG). SADC has a dual structure which is the Mediation Reference Group and the SADC Panel of Elders. Using this model, the REC deployed mediators and special envoys to engage the governments and stakeholders in Zimbabwe.<sup>297</sup>

SADC has an early warning mechanism that was launched in 2010. The early warning mechanism is supposed to provide 'collection and analysis of information on any real or potential crisis to inform response strategies.'<sup>298</sup> The warning system has not been effective due to the fact that established centers for the collection of data have been mainly a form of government extensions of intelligence systems at the exclusion of civil society groups, research institutions, think tanks, academics, and Non-governmental Organisations.<sup>299</sup> SADC members place more emphasis on sovereignty and adopt a hands-off approach in internal crisis of its members. Such approach seriously undermines the ability of the regional block to hold each other accountable. It has been argued that SADC member states only open up to SADC at their

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<sup>295</sup> Art 16 of the PSC Protocol.

<sup>296</sup> D Deleglise 'Trends in SADC mediation and long-term conflict transformation' in T McNamee & M Muyangwa (eds) *The state of peacebuilding in Africa* (2021).

<sup>297</sup> J Porto & K Ngandu (n 229 above).

<sup>298</sup> Southern Africa Crisis Group 'Implementing Peace and Security Architecture (II)Africa Report' 191 (2012) 12.

<sup>299</sup> Southern Africa Crisis Group (n 297 above).

convenience.<sup>300</sup> SADC failed to find a balance between ending conflicts and fulfilling longer-term agendas for sustainable peace in Zimbabwe. Consequently, SADC chose a simple root of securing agreements at the neglect of addressing fundamental root causes of the problem.<sup>301</sup>

The first intervention by SADC in Zimbabwe was in 2007. The former President of South Africa, Thabo Mbeki, was appointed to deal with the issue of heavy-handedness and crackdown on members of the opposition.<sup>302</sup> At that particular time, SADC did not see the Zimbabwean crisis as an issue. Rather SADC chose to be swayed by the ruling party ZANU PF's arguments that Zimbabwe was facing an economic crisis caused by the controversial land reform programme that the party had embarked on.<sup>303</sup> The SADC mediators downplayed the complaints by opposing parties of an unfair regulatory framework. As a result, the 2008 elections were held without addressing the institutional challenges in the Zimbabwe Election Commission. The elections results did not result in the ultimate winner, which necessitates President Thabo Mbeki to mediate over Zimbabwe's election dispute in 2008. Mbeki facilitated a power-sharing agreement of the three main political parties, namely ZANU PF, MDC M and the MDCT. In the meeting held in Algiers, Algeria, in October 2008, the POW expressed satisfaction at Mbeki's achievements of facilitating a power-sharing agreement of the political parties, namely ZANU PF, MDC M, and the MDC T.<sup>304</sup> The POW endorsed the peace agreement even though the process excluded women. Only one woman participated in the negotiations for a government of national unity.

The main concern of SADC was the signing of the peace agreement, and gender considerations were submerged into the overall agenda. In this regard, the APSA violated Article 10 of the Maputo Protocol by ratifying an agreement that was reached at the exclusion of women at the peace table.

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<sup>300</sup> Southern Africa Crisis Group (n 297 above) 16.

<sup>301</sup> Deleglise (n 295 above) 13.

<sup>302</sup> Deleglise (n 295 above) 13.

<sup>303</sup> Deleglise (n 295 above) 13.

<sup>304</sup> Porto & Ngandu (n 229 above).



SADC blindly ignored the human rights atrocities committed against the people of Zimbabwe during the land invasions. SADC also condoned Zimbabwe's failure to comply with SADC Tribunal rulings against it. The situation of Zimbabwe led to the SADC Tribunal being disbanded. The SADC tribunal ruled in the case of *Mike Campbell Pvt Ltd and Others v The Republic of Zimbabwe*<sup>305</sup> that Zimbabwe had violated sections 4(c) and 6(2) of the Treaty of SADC. The matter was reported to the Summit so that it could take action in terms of Article 32(5) of the SADC Protocol. After the Tribunal reported to the SADC Summit on non-compliance of Zimbabwe, the Summit then decided to review the role and functions of the Tribunal.<sup>306</sup> The Tribunal's powers to receive and hear new cases were withdrawn because it had found Zimbabwe to violate its obligations.<sup>307</sup> The Summit suspended the Tribunal and failed to renew the terms of the judges.<sup>308</sup>

Zimbabwe even refused to register a SADC judgement on land reform because it was against the public policy of Zimbabwe. In the case of *Gramara (Private) Limited and Another v the Government of the Republic of Zimbabwe*, the High Court of Zimbabwe ruled that enforcing the SADC ruling would contradict Zimbabwe's policy on land reform.<sup>309</sup> This contradicted Article 27 of the Vienna Convention on the Law of Treaties, which stipulates that a 'party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'<sup>310</sup>

The SADC Heads of States failed to agree on how to handle the case of Zimbabwe as some strongly felt that Zimbabwe's actions of taking land from the white community and giving it to blacks expressed African beliefs of self-determination and control of resources. The issue of human rights violations was also another important issue that the SADC heads of states needed

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<sup>305</sup> Case 002 of 2007.

<sup>306</sup> M Ssenyonjo 'Strengthening the African regional human rights system' in M Ssenyonjo *The African human rights system 30 years after the African Charter on Human and Peoples' Rights* (2011) 466.

<sup>307</sup> Ssenyonjo (n 306 above).

<sup>308</sup> Ssenyonjo (n 306 above) 467.

<sup>309</sup> HH 169/ 2009.

<sup>310</sup> Ssenyonjo (n 306 above).

to deal with since massive human rights abuses were committed in the process of the land invasions. SADC failed to address the issue.

SADC adopts a minimalist implementation of SADC principles and guidelines.<sup>311</sup> SADC lacks the power to act on member states' delinquency.<sup>312</sup> SADC sacrificed its own rules in the name of solidarity and stability in handling Zimbabwe's crisis.<sup>313</sup> It has been argued that SADC member states only open up to SADC at their convenience. SADC adopted a state-centric approach in mediation. The Global Political Agreement was facilitated without transforming relationships on good governance and involvement of all actors such as the civil society, the church and academic institutions.<sup>314</sup> The PSC made bold steps to solve Zimbabwe's crisis by classifying Zimbabwe's 'political crisis as category four, among the states that have failed to take any steps towards peace', but these were not adequate to solve the crisis.<sup>315</sup> Ndlovu argues that the AU, in coordination with the UN, sent Ambassador Haile Menkerios of Eritrea to try to mediate the crisis, but SADC unequivocally told AU to stay out of the situation.<sup>316</sup> That is where PSC involvement in Zimbabwe ended. The AU could have taken over the crisis after realising that the regional block had failed to resolve the conflicts in Zimbabwe.

When there was a constitutional threat of a military coup in 2017, SADC's mediator Jacob Zuma sent emissaries to deal with the potential unconstitutional; change of government. However, they were assured that the situation was under control. Consequently, Mugabe was forced to resign. When Robert Mugabe made claims that he was forced to resign from the presidency through a military coup, SADC's position was that there was no crisis in Zimbabwe. The view of SADC was that this was an internal problem within a political party and not a national crisis. This appears to be a technical excuse to avoid interfering because the political

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<sup>311</sup> R Chikohomero 'Elections and stability in SADC: the Zimbabwe case policy brief' (2018) 128 *Institute for Security Studies* 14.

<sup>312</sup> Chikohomero (n 311 above) 4.

<sup>313</sup> Chikohomero (n 311 above) 6.

<sup>314</sup> Chikohomero (n 311 above) 4.

<sup>315</sup> J Ndlovu 'The AU-SADC interface on peace and security: challenges and opportunities' in A Van Nieuwkerk & K Hoffman (eds) *Southern Africa Security Review* (2013) 94.

<sup>316</sup> Ndlovu (n 316 above) 94.

party in question is the ruling party and is the larger portion of the government. Their internal disturbances automatically became a national issue. SADC mediation in Zimbabwe from 2007 to 2013 did not transform the structures that caused the conflicts.<sup>317</sup> SADC mediation in Zimbabwe ended in 2013 after the elections.

The case of Zimbabwe reflects SADC's failure to act against a strong member state.<sup>318</sup> SADC was overwhelmed by the culture of solidarity among member states.<sup>319</sup> The solidarity is built upon a common history of the liberation struggle.<sup>320</sup> Resultantly, effective diplomacy fails to prevent potential threats to peace and security. SADC's stance on Zimbabwe reflected a culture of impunity.<sup>321</sup> It has been argued that;<sup>322</sup>

‘The case of Zimbabwe is one of habitual non-compliance and impunity, revealing the inherent institutional weaknesses in SADC. Both the 2013 and 2018 preliminary SEOM reports for Zimbabwe reveal a pattern of minimalist implementation of the SADC Principles and Guidelines and a lack of willpower to act on member states’ delinquency’.

## 5.11 Conclusion

The chapter has discussed the effectiveness of the APSA in implementing women's right to peace. It examined the normative and institutional framework of APSA. The framework is theoretically solid but very weak in implementation. Funding is the major constraint in the work of APSA. A bigger part of the APSA funds come from external donors. This is so despite the AU adopting a new funding mechanism. APSA is mainly reliant on donors; as a result, its work is ad hoc. It is also reactionary most of the time, and it responds when conflicts have already escalated. The CEWS also fails to gather data on structural causes of conflict in Africa. It is paying more attention to the direct prevention of conflicts instead of structural prevention.

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<sup>317</sup> D Motsmai ‘Evaluating the peacemaking effectiveness of SADC’ Unpublished PHD Thesis University of Witwatersrand 2018 144.

<sup>318</sup> Chikohomero (n 311 above) 6.

<sup>319</sup> Southern Africa Crisis Group (n 297 above) 8.

<sup>320</sup> Southern Africa Crisis Group (n 297 above) 18.

<sup>321</sup> K Matlosa ‘The role of the Southern African Development Community in the management of Zimbabwe’s post-election crisis’ (2009) (8)(2) *Journal of African Elections* 46 48.

<sup>322</sup> Matlosa (n 321 above).

Further, its effectiveness is also reduced by states' failure to comply with its recommendations. The APSA also suffers from a lack of coordination. The work of the subregional mechanism is not properly feeding into the work of the PSC. There is a duplication of mandates by the APSA structures such as the POW, special envoys, the African Commission and the Special Rapporteur on Peace and Security.

The chapter also highlighted that Article 10(2) of the Protocol is not being realised as women's participation in APSA is limited. Women are underrepresented in CEWS, PSC and ASF. Further, women have been participating mainly in ASF as part of support staff such as counsellors and care workers and not peace-keepers.

The chapter concludes that gender equality provisions contained in numerous AU policy and legal frameworks largely remain in theory. Despite the AU's 'strong normative framework' on peace and security, the institution lacks an all-encompassing organisational gender strategy to guide its work.<sup>323</sup> PSC's framework on monitoring state implementation of gender in women, peace and security programmes is still very weak. The failure to integrate gender throughout all of the APSA structures reduces the impact of its work in implementing women's right to peace. The implementation mechanisms across the whole continent are generally weak. The APSA lacks the adequate human and technical expertise to implement gender within the 'women peace and security agenda' of the AU. The adoption of action plans that are never implemented and the creation of new ones detract from the commitment of the AU to gender equality. The effectiveness of the APSA to promote and protect peace is still in the shadows, although there is great potential.

APSA's implementation of peace is militaristic. APSA does not pay adequate attention to non-military issues that violate women's right to peace. As highlighted in this chapter, APSA's work has been more reactionary than preventative. Even in its reactionary approach, APSA targets the effects of the conflict and not the root causes. Social and economic aspects of the right to peace are not given attention at all. The CEWS fails to gather data that highlights the structural causes of conflict. The POW is also suffering from the same weakness of failing to deal with structural causes of conflicts.

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<sup>323</sup> Abdullah (n 16 above).

Lastly, the case study of Zimbabwe has revealed the weakness of the prevention mandate of the APSA. The Zimbabwean situation is no longer a priority on the agenda of the AU Summits, the SADC regional and the PSC meetings. The only time that the APSA has paid due attention to Zimbabwe was when physical violence erupted after the election dispute in 2008. The then SADC Chair, Thabo Bheki, intervened, resulting in a Government of National Unity. The physical violence that took place after the elections triggered a response from the APSA but afterwards, the interest was lost. The claims of a *coup d'etat* by the former President was viewed as a non-issue warranting serious attention of SADC.

This indicates that APSA is more aligned to negative peace and associates peace with the absence of armed conflict. Zimbabwe's situation is a violation of both negative and positive peace. The right to freedom of expression is being curtailed as human rights defenders are arrested for expressing their opinions. Police brutality is the order of the day to suppress legal demonstrations. Poverty, unequal distribution of resources, and structural violence manifests in the Zimbabwean context and need the APSA's intervention. The participation of women in conflict management is not being realised as provided in the Maputo Protocol. Zimbabwe is not fulfilling its obligation to increase women's participation in the processes of the promotion and maintenance of peace.

## Chapter 6:

# Locating women's right to peace at the interface of regional frameworks and practices at the African Commission and the African Court

### 6.1 Introduction

The PSC Protocol mandates human rights treaty bodies to collaborate with the PSC on matters of 'peace and security on the continent.' Article 19 of the PSC Protocol stipulates that 'the Peace and Security Council shall seek close co-operation with the African Commission on Human and Peoples' Rights in all matters relevant to its objectives and mandate.' Further, the African Commission is mandated to 'bring to the attention of the Peace and Security Council any relevant information that has a bearing on the objectives and mandate of the PSC.'<sup>1</sup> This chapter analyses the extent to which this provision has been implemented by the African Commission and the African Court on Human and Peoples' Rights in complementing APSA's implementation of the right to peace.

Article 19 refers to the African Commission only, but it is logical to argue that the same provision can be applied to the African Court on Human and Peoples' Rights since the court is also a judicial body. The Commission has been specifically mentioned under Article 19 because it was the only judicial organ that had the mandate to consider communications on human rights violations at the time when the PSC Protocol was enacted. However, although the court is not directly mentioned, the Court can still complement the PSC through its advisory jurisdiction and protection mandate. Article 53 of the Protocol Establishing the African Court of Justice and Human Rights provides that the PSC is one of AU institutions that can request an advisory opinion. Suppose PSC requests an opinion on the right to peace; such an opinion aids the implementation of the right to peace by the PSC. If a case on the right to peace is brought before the court, such judgement has the effect of clarifying state obligations on the right to peace. This complements one of the objectives of PSC, which is to protect human rights in terms of Article 3(f) of the PSC Protocol.

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<sup>1</sup> Art 19.

In addition to examining the implementation of Article 19 of the PSC Protocol, this chapter discusses how the two judicial organs have used their mandate to realise the right to peace. The African Commission has both the promotion and protection mandates which place it in the best position to implement the right to peace.

## **6.2 The role of the African Commission and the Court in the implementation of the right to peace**

The Commission was established by Article 30 of the ACHPR. Article 30 provides that the Commission's duty is to promote and protect human rights in Africa. The African Commission started functioning in 1987 when it was 'inaugurated on 2 November 1987 in Addis Ababa, Ethiopia.'<sup>2</sup>

The composition of the Commission is in terms of Article 31 of the ACHPR. There are eleven commissioners chosen based on their integrity, reputation and competence in human rights matters. In order to ensure the independence of the Commission, the ACHPR provides that members will serve in their personal capacity.<sup>3</sup> These commissioners are selected because of their experience in human rights issues. The Commission has a fair representation of women. The Commission currently has six female commissioners, which is an improvement on the first eleven commissioners, who were all male.<sup>4</sup> However, some scholars have criticised the appointment of other Commission members who had held government positions in the past.<sup>5</sup> These include the positions of attorney-general, minister of justice or internal affairs, and ambassador.<sup>6</sup> The argument is based on the fact that their impartiality may be a challenge because of the need to serve national interests. The ability to distinguish the fact that working

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<sup>2</sup> African Commission website available at <http://www.achpr.org> accessed 2 January 2018.

<sup>3</sup> Art 31 of the ACHPR.

<sup>4</sup> M Killander 'The African Commission on Human and Peoples' Rights' in M Ssenyonjo *The African human rights system 30 years after the African Charter on Human and Peoples' Rights* (2012) 236.

<sup>5</sup> AP Van Der Mei 'The new African Court on Human and Peoples' Rights: towards an effective human rights protection mechanism for Africa?' (2005) 18 *Leiden Journal of International Law* 113 117.

<sup>6</sup> Van Der Mei (n 5 above). This author further argues that 'a number of commissioners have occupied government posts in notorious dictatorial regimes, which may imply that they themselves are accountable for human rights violations.'

for the Commission does not mean representing the states may be a critical challenge for some members.<sup>7</sup>

### **6.2.1. The promotional mandate of the African Commission**

The role of the Commission is found in Article 45 of the African Charter. It includes promotional and protective mandates. In carrying out its ‘promotional mandate,’ the African Commission is obliged to ‘collect documents, undertake studies and research on African problems in the field of human and peoples’ rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples’ rights.’<sup>8</sup> It also formulates rules and principles to solve legal problems relating to the implementation of human rights in the continent. The African Commission should co-operate with AU and non-AU institutions in the area of human rights.<sup>9</sup>

The duty of the Commission has been broadened by Article 46 of the ACHPR, which gives room for the Commission to resort to any method of investigation. In fulfilling Article 46 of the ACHPR, the Commission has appointed the ‘special rapporteurs’ and formulated ‘working groups’ to reinforce its promotional mandate.<sup>10</sup> The Commission has established working groups on various aspects. Some of these include ‘working group on older persons and people with disabilities, on indigenous communities in Africa on economic social and cultural rights, on death penalty and extra-judicial summary or arbitrary killings in Africa on, group on extractive industries, environment and human rights violations.’<sup>11</sup>

There is no working group on women’s rights. The absence of this can be justified because women’s issues cut across all the thematic areas covered by the working groups. In this regard, there will not be a need to have a standalone group dedicated to dealing with women’s issues. However, it can be argued that the need for a standalone working group on women remains

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<sup>7</sup> Van Der Mei (n 5 above).

<sup>8</sup> Art 45.

<sup>9</sup> Art 45(1c).

<sup>10</sup> Killander (n 4 above) argues that the commission has been innovative and filled in the vague provisions of the charter by ‘developing monitoring methods not explicitly mentioned in the Charter such as special rapporteurs and working groups, missions, resolutions, press releases, urgent appeals and interaction with civil society.’

<sup>11</sup> <http://www.achpr.org> accessed 2 January 2018.



critical because women often suffer from ‘discrimination on the basis of the sex and gender.’ Alternatively, it can also be argued that the role of the special rapporteur on women’s rights serves that purpose. The African Commission has appointed special rapporteurs. These include special rapporteurs on ‘human rights defenders’, on the rights of women, on ‘freedom of expression and access to information, on refugees, asylum seekers, migrants and internal displaced persons,’ and on ‘prisons, conditions of detentions and policing in Africa.’<sup>12</sup> The work of the special rapporteur on women’s rights will be analysed in detail in the ensuing paragraphs.

### ***The Special Rapporteur on Women’s Rights***

The position of the ‘Special Rapporteur on Women’s Rights’ was established by Resolution 38 in 1999.<sup>13</sup> The mandate has been renewed after every two years since then.

### ***The functions of the rapporteur***

The duties of the ‘Special Rapporteur on the Rights of Women in Africa is as follows:<sup>14</sup>

- a) To be the central point for all the eleven commissioners concerning the implementation of women’s rights.
- b) To assist African countries in implementing the Maputo Protocol and its domestication in their national legislation.
- c) To carry out promotional mandates disseminating information on the ACHPR and the Maputo Protocol.<sup>15</sup>
- d) To carry out fact-finding missions in member states.<sup>16</sup>

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<sup>12</sup> <http://www.achpr.org> accessed 2 January 2018.

<sup>13</sup> ACHPR Resolution 38 ‘was adopted by the African Commission at its 25<sup>th</sup> ordinary session in Burundi in 1999.’

<sup>14</sup> Resolution 327 on the Appointment of the Special Rapporteur on the Rights of Women in Africa The resolution was ‘adopted at the 57<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples’ Rights held in Banjul, The Gambia, from 4 to 18 November 2015.

<sup>15</sup> Resolution 327 (n 14 above).

<sup>16</sup> Resolution 327 (n 14 above).

- e) To monitor how states implement the ACHPR and assist them in coming up with reports on women's rights.<sup>17</sup>
- f) To formulate draft resolutions on the situation of women, which are to be tabled for consideration by other members of the Commissions.<sup>18</sup>
- g) Researching on the situation of women's rights in Africa.<sup>19</sup>
- h) Collaborating with government departments, non-governmental organisations and other relevant special rapporteurs from other jurisdictions to implement women's rights.<sup>20</sup>

One of the notable achievements is that the Special Rapporteur Mechanism was instrumental in the 'drafting and adoption of the Maputo Protocol.'<sup>21</sup> The Special Rapporteur engaged in advocacy initiatives that resulted in the ratification of the Maputo Protocol. The advocacy was targeted at key government institutions through the use of platforms such as making presentations during country reporting sessions before the Commission.<sup>22</sup> The 'Special Rapporteur' was assisted by the Centre for Human Rights at the University of Pretoria to draft reporting guidelines under the Maputo Protocol.<sup>23</sup> The African Commission adopted the guidelines during its 46<sup>th</sup> Ordinary Session in 2009 in Banjul.

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<sup>17</sup> Resolution 327 (n 14 above).

<sup>18</sup> Resolution 327 (n 14 above).

<sup>19</sup> Resolution 327 (n 14 above).

<sup>20</sup>As above.

<sup>21</sup>S Maiga, 'Intersession Report of the Mechanism of the Special Rapporteur on the Rights of women in Africa since its Establishment.' (2012) The report was made at the '52<sup>nd</sup> Ordinary Session of the African Commission on Human and Peoples' Rights Yamoussoukro - Côte d'Ivoire, 9 - 22 October 2012.' para 12.

<sup>22</sup> Maiga (n 21 above) para 12.

<sup>23</sup> As above.

The Special Rapporteur's report also indicated that raising awareness about the Maputo Protocol was one of the achievements of the Mechanism. This was done through conducting seminars. The Mechanism organised the first seminar in Africa on women's rights.<sup>24</sup>

As a result of its advocacy work, country visits, workshops, and seminars, the Mechanism was instrumental in adopting legislation that protects women's rights in general and specific issues such as sexual reproductive and health rights and participation rights.<sup>25</sup> The advocacy initiative also resulted in some governments creating 'fully-fledged ministries to empower women, children and the family'.<sup>26</sup>

### *Special Envoy on Women Peace and Security*

The special envoy on women, peace and security was appointed in 2014. Her mandate is to ensure that women's interests are taken into account in peace structures.<sup>27</sup> The AU 2020 report noted that the special envoy was instrumental in mobilizing countries to adopt action plans for the women peace and security agenda.<sup>28</sup> By 2019, 25 African countries had adopted NAPs.<sup>29</sup> However, it has been observed that the African countries that have adopted NAPS are those experiencing conflicts.<sup>30</sup> This indicates the limited understanding by African states of the fact that peace is broader than absence of conflict.

### **6.2.2 Protective mandate of the African Commission**

The African Commission's protective role is exercised by considering state reports and the adjudication communications submitted by aggrieved parties. Article 62 of the ACHPR obligates states to report on how they are implementing rights provided in the Charter. The reports should be submitted every two years.<sup>31</sup> The report should focus on legislative and other

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<sup>24</sup> Maiga (n 21 above) para 17.

<sup>25</sup> Maiga (n 21 above) para 22.

<sup>26</sup> Maiga (n 21 above) para 23.

<sup>27</sup> African Union 'Report on the Implementation of the Women, Peace & Security Agenda in Africa' 2020 11.

<sup>28</sup> A U Report (n27 above).

<sup>29</sup> As above.

<sup>30</sup> A U Report (n27 above).

<sup>31</sup> Art 62 of the ACHPR.

practical measures that states have undertaken to give effect to the rights in terms of Article 1 of the African Charter. One of the major challenges of the reporting system is the non-submission and delay in the submission of reports by countries. A visit to the website of the African Commission reveals that more than half of the African Countries that ratified the African Charter are behind with their reports. The Commission's recommendations after the state reporting process are not taken seriously by states because there are no sanctions for non-compliance with the reporting obligations. The Commission merely provides for recommendations and therefore depends on the goodwill of the states for implementation.

### ***State reporting***

In terms of Article 62 of the ACHPR, states should submit a report after every two years. The report highlights the measures taken to implement the ACHPR. The Commission's reporting guidelines assist states in making the reports. The original guidelines have been criticised for being voluminous and not elaborating on state obligations.<sup>32</sup> The Commission has since revised the guidelines. However, they are not elaborate when it comes to the obligations of states on the right to peace. Procedurally, after submitting the reports, states are invited to send country representatives for the public examination of the report.<sup>33</sup>

The major shortfall of the reporting system under the ACHPR is the failure by states to submit reports at all or delay in submitting and also failure to send representatives to discuss the reports.<sup>34</sup> As a result, the Commission has resorted to consideration of states reports in the absence of the state representatives, reducing the effectiveness of the reporting system.<sup>35</sup> The reporting objective is to interact with the state representatives concerned, highlighting concerns

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<sup>32</sup> M Hansungule 'African Courts and the African Commission on Human and Peoples' Rights' in A Bosl & J Diescho J (e.ds) *Human rights in Africa legal perspectives on their protection and promotion* (2009) 233.

<sup>33</sup> M Evans & R Murray 'The state reporting mechanism of the African Charter' in M Evans & R Murray *The African Charter on Human and Peoples' Rights: the system in practice* (2008) 55.

<sup>34</sup> Evans & Murray (n 33above) 55.

<sup>35</sup> As above.

on implementation and the challenges that the states are facing.<sup>36</sup> If states do not send representatives, the objective of the whole reporting process is defeated.

Evans and Murray state that the Commission's response to the late submission of reports and the non-attendance of state representation has been very weak.<sup>37</sup> Evans and Murray argue that the dialogue process could be the reason behind the states' non-compliance with the reporting obligations.<sup>38</sup> This is so because the reporting system is centred on friendly dialogues, and unfortunately, the state parties are not taking it seriously. As of 2016, only five countries had reported under the Maputo Protocol Guidelines.<sup>39</sup> The AU Assembly should adopt a robust approach, including sanctioning member states that fail to adhere to reporting obligations. The fact that no punitive action is taken against member states that fail to comply is a major setback to implementing the Charter as a whole. It does not incentivise compliance by other countries that have ratified the Charter.

Consideration of state reports by the Commission creates an opportunity to interpret the provisions of the Charter by highlighting areas of improvement in the concluding observations. The Commission can determine the adequacy of the actions taken to implement the right to peace. Analysing reports creates an opportunity to interpret elusive provisions on the right to peace.

The Maputo Protocol Reporting Guidelines do not shed light on what states should actually do to implement the right to peace. The Guidelines simply state the structures of the reports. The initial report should not be more than fifty (50) pages. Subsequent reports should not be more than thirty (30) pages long. The African Commission should utilise general comments to enable extensive interpretation of states' expectations in relation to the right to peace. Up to date, the Commission has adopted two guidelines on country reports, but there is no clarity on the duties of states on the right to peace. Article 10(3) of the Protocol, which requires states to reduce

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<sup>36</sup> Reporting guidelines indicate that the purpose of the report is to 'create channel for constructive dialogue between states and the Commission.'

<sup>37</sup> Evans & Murray (n 33 above) 54.

<sup>38</sup> Evans & Murray (n 33 above).

<sup>39</sup> Maiga (n 21 above).

military expenditure, seems to be clear on states' obligations regarding the implementation of women's right to peace.

### ***Communications***

The ACHPR provides for interstate and individual communications. Procedurally, a complaint by the state or an individual has to be lodged with the Commission after exhausting local remedies.<sup>40</sup> The requirements that states have to comply with before lodging the complaint are less cumbersome than individual communications, which are supposed to comply with the admissibility criteria laid out in Article 56.<sup>41</sup>

One of the setbacks on the Commission's protective role is the binding nature of the recommendations passed. The African Commission only passes recommendations that are not binding until the AU Assembly has adopted them. The findings become 'final' only when they are part of the Commission's Annual Activity Report.<sup>42</sup> This provision reduces the strength of the Commission's decisions. As argued by Viljoen, it is not clear whether the decisions become binding even after being adopted by the AU Assembly.<sup>43</sup> If the findings are not adopted in the activity report, that would be the end of it, and victims will be left with recommendations that have no backing from the executive arm of the AU. Udombana's observation in this regard emphasises the ineffectiveness of the operating procedures of the Commission. Udombana argues that 'the decision on whether to publicize a human rights violation on the part of an

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<sup>40</sup> Art 47 to 51 sets out the procedure that is to be followed in interstate communications.

<sup>41</sup> 'The communication should indicate name of the author even though the authors want anonymity. The communication should be compatible with the Charter. No disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity, Are not based exclusively on news discriminated through the mass media, The communication should be sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged, Communications are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and should not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.'

<sup>42</sup> F Viljoen 'A human rights court for Africa and Africans' (2004)30 (1) *Brooklyn. Journal of International Law* 1 13.

<sup>43</sup> Viljoen (n 42 above) 13.

African state is reserved to the discretion of her sister states in the OAU Assembly, who may be responsible for similar abuses.’<sup>44</sup>

The Commission’s findings on Zimbabwe’s human rights violations were not adopted because the Government of Zimbabwe objected to the inclusion of the recommendations of the Commission in the activity report and, subsequently, consideration by the AU Assembly. The basis for the objection was that they had not been given an opportunity to respond to the findings.

Implementation of the findings and recommendations of the Commission is a major setback to its effectiveness as a quasi-judicial institution. Udombana argues that the African Commission was created as a ‘paper tiger’.<sup>45</sup> However, Viljoen’s argument seems to blame the Commission for the lack of implementation of its recommendations by the states. He argues that the Commission has remained passive regarding the non-implementation of its recommendations because it has not instituted any compliance system to gather information about states’ responses to the African Commission’s findings.<sup>46</sup>

### ***Cases brought before the Commission on the right to peace***

There are very few cases that have been litigated on the right to peace under the ACHPR. The few cases brought have been on the violation of Article 23 of the ACHPR. There is no single case that has been lodged before the Commission relating to violation of Article 10 of the Maputo Protocol. What is not clear is whether the lack of cases on peace is caused by the failure to appreciate the circumstances necessitating the fulfilment of this right or women are utilising other provisions of the ACHRP, for example, the right to equality and human dignity. As will be discussed later, some of the cases on the right to peace were not ruled on merit. They were dismissed on technicalities. However, in those cases that were decided on merit, still, the Commission failed to elaborate the entitlements of the right to peace. It simply ruled that there has been a violation without clearly highlighting the determinants of peace. At the time of

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<sup>44</sup> N J Udombana ‘Toward the African Court on Human and Peoples’ Rights: better late than never’ (2000) 3 *Yale Human Rights and Development Law Journal* 45 46.

<sup>45</sup> Udombana (n 44 above).

<sup>46</sup> Udombana (n 44 above).

writing, a small number of communications had been brought before the Commission about the right to peace, and these will be analysed below.

### **Association Pour la Sauverhgade de la paix au Burundi v. Tanzania et al<sup>47</sup>**

#### **Facts of the case**

This is a complaint by the Association pour la Sauvegarde de la Paix au Burundi that was made against the States of the Great Lakes Region. The respondents included the Democratic Republic of Congo, Kenya, Rwanda, Tanzania, Uganda, Zambia and Ethiopia. These countries had imposed an embargo against Burundi. The reason for the imposition of the embargo was that the army of Burundi had removed a constitutionally elected government through a *coup d'etat*.

The respondent states argued that the imposition of the embargo was not made for the purposes of gaining an advantage but was a strategy to ensure that the military government restored 'constitutional legality, democracy, peace and stability.' The joint initiative taken by their governments were part of their contributions to the international efforts aimed at promoting the rule of law, despite the sacrifices that this initiative entailed for the people of the countries that initiated the embargo against Burundi.

#### **The decision of the Commission**

The Commission did not find any violation of the right to peace or any other rights as provided under the African Charter. The Commission's reasons for the decision were that first, the respondent states took collective action to address a matter that was a threat to peace, stability and security.<sup>48</sup> Secondly, the respondents' action was based on the principles enshrined in the Charters of the OAU and the UN, and therefore there were no procedural irregularities.<sup>49</sup>

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<sup>47</sup> Communication No. 157/96.

<sup>48</sup> Para 71.

<sup>49</sup> Para 72.



Lastly, the Commission ruled that the embargo was not ‘a mere unilateral action or a naked act of hostility but a carefully considered act of intervention sanctioned by international law.’<sup>50</sup>

### **Mauritania: Malawi African Association and Others v Mauritania<sup>51</sup>**

#### **Facts of the case**

This case was brought up after serious human rights violations in Mauritania between 1986 and 1992. The violations included forced arbitrary arrests, curfew and curtailment of freedom of movement, the expulsion of the minority population from their lands, extra judicial killings, deprivation of land and resources, and killing villagers. The Communication was brought on behalf of the affected persons by the Malawi African Association. They alleged a violation of numerous rights enunciated in Articles 2, 4, 5, 6, 7, 9, 10, 11, 12, 14, 18, 19, and 26 of the ACHPR.

#### **The decision of the Commission**

The Commission stated in obiter that ‘the unprovoked attacks on villagers constitute a denial of the right to live in peace.’<sup>52</sup> The complainants had never raised a violation of the right to peace, nor did the Commission find a violation of Article 23. In the judgement, the Commission declared that massive human rights violations during the period 1989 – 1992 constituted inhuman and degrading treatment.<sup>53</sup> After finding violations of numerous rights, a number of recommendations, which include setting up an independent inquiry that has the mandate to identify perpetrators of violence and punish them, were made.<sup>54</sup> The Commission also recommended the compensation of victims. The Commission did not profoundly address the right to peace in its decision, although it mentioned it in the judgement.

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<sup>50</sup> Para 72.

<sup>51</sup> AHRLR 149 (ACHPR 2000).

<sup>52</sup> Para 140 of the judgement.

<sup>53</sup> Para 142.

<sup>54</sup> Para 144 and 146 of the judgment.

## **Democratic Republic of Congo vs Rwanda, Burundi and Uganda**<sup>55</sup>

### **Facts of the case**

The complainant, in this case, was the Democratic Republic of the Congo (DRC). It alleged that Rwanda, Burundi and Uganda had violated Articles '2, 4, 6, 12, 16, 17, 19, 20, 21, 22 and 23 of the Charter.'<sup>56</sup> DRC alleged that Rwanda and its allies had entered into its territory in the Eastern part of DRC, where it killed members of the DRC army. It also alleged that Rwanda and Ugandan forces disrupted the electricity supply after besieging a hydroelectric dam. As a result of the two armies' actions, hospital patients died due to loss of power in the 'operating theatres and respiratory equipment.'<sup>57</sup>

The DRC further alleged that Rwandese and Ugandan soldiers purposively infected the civilian population with HIV through rape by infected soldiers from the two countries' armies. The respondent states justified their invasion of DRC because they wanted to protect their national interests.

### **Decision**

The Commission found that the occupation of DRC's territory by the three countries was a violation of the right to peace as provided in Article 23 of the ACHPR. It also violated Article 33 of the United Nations Charter, which mandates states to settle disputes peacefully. The Commission further held that the respondent states could force their interests by invading the territory of another country. The Commission held that 'Rwanda, Burundi and Uganda's national interests would better be protected within the confines of their territories and not in the DRC.'<sup>58</sup>

The African Commission breathed life into Article 23(1), which emphasises preserving peace through 'principles of solidarity and friendly relations' as provided in the AU instruments and

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<sup>55</sup> Communication No. 227/99.

<sup>56</sup> Para 8.

<sup>57</sup> Para 3.

<sup>58</sup> Para 76.

international law. It held that the act of Rwanda and Burundi amounted to using DRC as a base for subversive activities because their acts were actually subversive elements. The Commission rejected the arguments by Rwanda and Burundi that they were enforcing their interests. The Commission indicated that the interests would still be protected in the countries' territories without necessarily being physically present in DRC.

**Southern Cameroons Case Dr Kevin Ngwang Gumne and Others; Acting on their Behalf and on Behalf of SCNC/SCAPO and the Southern Cameroons versus La République du Cameroun.**<sup>59</sup>

**Summary of the case**

The complainants alleged they were denied the opportunity to benefit from development projects. They claimed that their education was underfunded due to a monopoly over state resources. Overall, their complaint was based on discrimination from many opportunities, including business transactions from the use of civil law system in French instead of common law system in which they were well versed.

**The decision of the Commission**

The Commission did not find a violation of the right to peace. The basis of this decision was that 'the claim was not substantiated to the Commission's satisfaction, and as such, a violation was not found.'<sup>60</sup> The Commission could have taken the opportunity to outline the essential elements of the right to peace to justify its decision that the claim was not substantiated. Such an outline would guide states on what needs to be proved when alleging a violation of the right to peace.

***Reports submitted under the Maputo Protocol***

The major setback for the state party reporting under the ACHPR is the non-submission of reports by states and the delay in submitting reports. In its 40<sup>th</sup> Activity Report that covered the

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<sup>59</sup> Communication No. 266/2003.

<sup>60</sup> B Ugochukwu et al 'Group rights under the African Charter on Human and Peoples' Rights: concept, praxis and prospects' in M Ssenyonjo *The African Human Rights System 30 years after the African Charter on Human and Peoples' Rights* (2012) 116.

period from December 2015 to April 2016,<sup>61</sup> the African Commission indicated that 19 countries were up to date with their reports, 2 countries have 1 report overdue, 7 have 2 reports outstanding, 5 countries have 3 outstanding, 14 countries have more than 3 reports overdue. These statistics paint a bad picture of the extent of implementation of the ACHPR and the Maputo Protocol. Without reports, it is impossible to assess the states' compliance with the Charter. The following part of this chapter will look at how states implement the right to peace as reflected in their reports. Not all reports have been analysed. Purposive sampling was done by picking countries with up to date or with not more than two reports due.

### **South Africa**

South Africa combined its second report under the ACHPR with the initial report under the Maputo Protocol. The report discussed how the country undertook peace missions and how women have been involved in those peace missions. In relation to the Maputo Protocol, the report emphasises Article 10(2) on the participation of women in peace conflict resolutions processes. South Africa reported an increase in the deployment of women in peace missions.

### **Rwanda**

Rwanda submitted its 11th, 12th and 13th combined periodic reports on the implementation status of the ACHPR and the initial report on the implementation status of the Maputo Protocol.

Rwanda reported that, in compliance with Article 23, it ensures that individuals accorded asylum in the country do not engage in subversive activities against their home countries or use Rwanda as a base for terrorist activities. Rwanda reported that it had entered into agreements with its neighbouring countries to ensure the maintenance of friendly relations. In those agreements, Rwanda had declared its 'determination to transform the region into a place of sustainable peace and security for all states and people.'<sup>62</sup> Rwanda has also deployed several

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<sup>61</sup> Activity report available at [http://www.achpr.org/files/activity-reports/40/actrep40\\_2016\\_eng.pdf](http://www.achpr.org/files/activity-reports/40/actrep40_2016_eng.pdf).

<sup>62</sup>Rwanda's 11th, 12th and 13th combined periodic report to the African Commission on Human and Peoples' Rights 59.

high-ranking military officers to participate in peacekeeping operations under the United Nations Peace Keeping Mission.<sup>63</sup>

Rwanda's report on the Maputo Protocol highlights the key achievements relating to the participation of women in the post-conflict peace process. The report shares success stories of women's role in promoting peace, unity, and reconciliation. It also indicates that women have spear-headed key institutions intended to handle post-genocide justice and reconciliation processes.

The Rwanda report shows that women have not only participated in peace processes but have taken influential positions such as judges in some of the Genocide cases handled. The report further reveals that the legislative framework mandates that at least 30% of the elected mediators should be women. The Rwandan report does not, however, indicate whether this benchmark has been achieved in practice. What is also impressive about Rwanda's report is that it reflects that women have participated in different peace forums, including grassroots dispute resolution mechanisms. Rwanda did not report on reducing military expenditure to cover maternal health.

## **Mozambique**

Mozambique's report was submitted in 2012. The report was the second and combined covering the period from 1999 to 2010.

The report simply addressed the country's obligations under the ACHPR and excluded the Maputo Protocol. This is so even though Mozambique ratified the Protocol in 2005. The Commission did not raise concern on the failure by Mozambique to report about the implementation of the Maputo Protocol as an issue of concern in the concluding observation on the country's Second and Combined Periodic Report. Mozambique's report is mainly based on legislative action that the country has taken to implement the right to peace. This includes the domestication of Article 23 of the Charter into the constitution and the enactment of state

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<sup>63</sup> Rwanda's periodic report (n 62 above) 60.

security legislation.<sup>64</sup> However, the report does not indicate the extent to which the legislative instruments enacted are complied with in practice.

### **Mauritius**

The Republic of Mauritius' reports to the African Commission is on the ACHPR only since it did not ratify the Maputo Protocol. Mauritius' 2005 report outlines what the state has done to maintain peace and friendly relations with other states. This includes enacting constitutional provisions such as Section 71 of the constitution, which established the Mauritius Police Force responsible for maintaining public safety and order.

The report also highlights compliance with the obligation to maintain friendly relations by ensuring that the territory is not used for terrorist activities by members of regional and sub-regional organisations such as SADC and the AU. In compliance with this obligation, Mauritius does not accept refugees or issue asylum. However, the report suggests that the reason for refusing asylum seekers is mainly based on a lack of capacity. Mauritius refers asylum seekers to other countries which have the capacity to host. The report states that this approach is based on the fact that Mauritius is a small country that is 'densely populated' and lacks adequate resources to provide for refugees.<sup>65</sup>

In its 2019 report to the African Commission, the Government of Mauritius reiterated its commitment to implement the right to peace by maintaining diplomatic relations with other countries. It also reported that it enacted legislation that regulates the manufacture and sale of ammunition.

### **Mauritania**

The state of Mauritania ratified the Maputo Protocol in 2005. In its combined report, the government of Mauritania reported how it had implemented the Protocol so far. The report was divided into sections governing rights that fall within the same category, such as the social and economic rights covering Articles 13, 15, 16, 18, health, and marriage rights that cover Articles

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<sup>64</sup> Mozambique's second and combined periodic report to the African Commission on Human and Peoples' Rights 61.

<sup>65</sup> Mozambique report (n 64 above) 58.

6 to 7. However, the report omitted to state how the country was implementing section 10 of the Maputo Protocol.

There is absolutely nothing in the report about women's right to peace. The report has a category on the protection of women in armed conflicts, which is centred on Article 11. The section on Article 11 is based on a project undertaken that resulted in advocacy and awareness-raising activities, strengthening the capacity of women and men in conflict prevention. However, this section is too generalised and, as a result, becomes difficult to understand the participation of women in conflict prevention strategies. There is no indication of adequate representation of women from the capacity building projects mentioned in the report.<sup>66</sup>

However, the report extensively covers the implementation of violence against women provisions and the actions taken to protect women from such. These include implementing the action plan to combat gender-based violence, establishing national mechanisms to eradicate GBV, enacting family protection laws, legislation on trafficking and national strategy on abandoning female genital mutilation.<sup>67</sup> What is very clear is that although Mauritania did not report on Article 10 of the Maputo Protocol, the country's response to GBV is the actual implementation of the right to peace. Elimination of violence results in a peaceful existence for women. What can be deduced from this report is that African governments are not sure about the meaning of the right to peace, yet in practice, they implement the right.

## **Mali**

Mali's latest report was submitted in 2011 and reports on the Maputo Protocol. The report does not specifically address every paragraph of the Protocol like what other reports do. The report simply lumps how women's rights are observed in one broad category. This includes a review of the various codes of the law to eliminate discrimination against women. Mali reported that it did not outlaw female genital mutilation but rather sought its modification and subsequent eradication. The government of Mali reported the implementation of the Maputo Protocol under the broad category of women's rights. The report indicated the fact that the constitution is being amended to address gender inequalities present in public and political life

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<sup>66</sup> Mauritania state report to the African Commission on Human and Peoples' rights 66.

<sup>67</sup> Mauritania report (n 66 above).

participation.<sup>68</sup> Concerning the political participation of women, Mali simply reported that action had been taken to integrate the gender dimension in state institutions in the area of representation of women in decision-making bodies.<sup>69</sup>

In relation to Article 23, the Mali report highlights the co-operation agreements the state has entered into with Algeria, Mauritania and Niger to establish a Joint Military Staff Operational Committee to fight terrorism.<sup>70</sup> In addition, Mali's report submitted that it has a peace-keeping school that trains members of the security forces.<sup>71</sup>

## **Malawi**

Malawi's latest report to the ACHPR was submitted in 2019. The report covers 2015 to 2019 concerning both the ACHPR and the Maputo Protocol. Malawi reported that it domesticated the Maputo Protocol by enacting national legislation such as 'the Gender Equality Act, the Marriage Divorce and Family Relations Act, the Prevention of Domestic Violence Act, and the Deceased Estates Wills, Inheritance and Protection Act.'<sup>72</sup>

The report did not address the right to peace. It addresses what the state had done to implement Articles 3, 4,5,6,7,8,9,12,13,14,20,21,22,23 of the Maputo Protocol.

## **Liberia**

Liberia's report does not provide a detailed narration of the implementation of every right in the Charter. Women's rights are also just addressed in the broader report on how the country has implemented the provisions of ACHPR without a specific focus on women's rights. The country promulgated a 'National Gender-Based Violence Plan of Action to reduce domestic violence' and made provision for physical, psychological, economic and legal support to

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<sup>68</sup> Mali state report to the African Commission on Human and Peoples' Rights 62.

<sup>69</sup> Mali report (n 68 above) 61.

<sup>70</sup> Mali report (n 68 above) 69.

<sup>71</sup> Mali report (n 68 above) 70.

<sup>72</sup> Malawi Country Report to the African Commission on Human and Peoples' Rights 84.



victims of gender-based violence.<sup>73</sup> The state has also adopted measures aimed at addressing the causes of exclusion of women in politics and decision making. The report simply provides that women constitute ‘a significant portion of military as well as law enforcement institutions,’ without showing how many women are holders of public offices and to what extent they are decision makers in those institutions.

## **Kenya**

Kenya submitted its combined 8th-11th periodic report in 2014. The report does not cover how Kenya has implemented the Maputo Protocol even though Kenya ratified the Protocol in 2010. This report was submitted after the ratification of the Protocol. Kenya reported on Article 23 of the Charter. It submitted that it has legislative provisions that ensure the suppression of terrorism. Kenya submitted that the constitution establishes national security organs such as the defence, intelligence and police forces. These forces have the mandate to promote and guarantee national security. Kenya’s report on implementing the right to peace mainly focuses on state security.

## **Djibouti**

Djibouti ratified the Maputo Protocol in 2005. It submitted an initial and combined report in 2015. The report outlines the action that the country has taken concerning observing the ACHPR from the period 1993 to 2013. Djibouti ratified the Maputo Protocol in 2005, but the report is silent about the action taken to implement the Protocol. The country reported on the general implementation of women’s rights under the ACHPR. The report indicates that Djibouti has enacted legislation that outlaw discrimination against women in employment. The criminal code of the country criminalises discrimination. The family code guarantees women’s fundamental human rights. With specific reference to the right to peace, the report indicated that the country has participated in peace keeping missions.

## **Burkina Faso**

Burkina Faso is up to date with its reporting obligations after submitting its report in 2015. Burkina Faso’s report does not provide any useful information to assess the implementation of

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<sup>73</sup> Liberia state report to the African Commission on Human and Peoples’ Rights 17.

the right to peace. The report does not have anything on Article 23 of the ACHPR. The report has scanty information on the implementation of the Maputo Protocol. It states as follows:

In December 2012, Burkina Faso benefitted from the development and validation of action plans for the implementation of resolution 1325 (women, peace and security) and 1820 (sexual violence against civilians –weapons of war) of the United Nations Security Council. Furthermore, two (2) Burkinabe women received training on the contribution of women to conflict resolution organised by ECOWAS. Finally, the government has started enriching the programmes with themes such as, “education for peace”, and, “social education and gender”, which provide for equitable education of girls and boys.<sup>74</sup>

This report indicates a lack of understanding of state obligations pertaining to this right. The report does not even address how women participate in conflict resolution processes. It does not address how the state has reduced military expenditure, favouring social development. It neither highlights how the right to peaceful existence under Article 10(1) is being implemented.

### **Cameroon**

Cameroon is up to date with its reporting obligations after submitting its report in January 2020. Its latest report covered the period from 2015 to 2019. The government of Cameroon’s report indicates that the country adopts an expansive interpretation of the right to peace. It does not focus on negative peace only. Cameroon reported adopting a multi- dimensional approach to peace which combined military, security and socioeconomic means.<sup>75</sup> Cameroon reported that it participated in peacekeeping missions, enacted legislation that suppressed money laundering and financing terrorism, and implemented socioeconomic development programmes to realise the right to peace.<sup>76</sup>

In terms of implementing the right to peace under the Maputo Protocol, the government of Cameroon reported that women have participated in peacekeeping missions. The report highlights that Cameroon is not implementing Article 10(3) of the Maputo Protocol, which obligates states to reduce military spending in favour of social spending. The report stated that ‘the subsequent budgets allocated to military expenditure have indeed evolved since 2013 due

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<sup>74</sup> Burkina Faso state report to the African Commission on Human and Peoples’ Rights 87.

<sup>75</sup> Cameroon state report to the African Commission on Human and Peoples’ Rights 101

<sup>76</sup> Cameroon report (n 75 above) 101.

to the security challenges confronting the State, but this has however not led to a corresponding decrease in social expenditure.<sup>77</sup>

## **Zimbabwe**

Zimbabwe ratified the Maputo Protocol in 2008. Zimbabwe is up to date with its reporting obligations after submitting its 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> report under the ACHPR and its 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> report under the Maputo Protocol. In its combined 7<sup>th</sup> to 10<sup>th</sup> report submitted in 2006, in relation to article 23 of the ACHPR, Zimbabwe reported that it enacted the ‘Public Order and Security Act (POSA),’ which is the legislation designed to maintain order during public gatherings. However, this Act has been utilised to ban opposition party’s public gatherings by the Police. The Act’s provisions give law enforcement agencies the power to abuse and stop any political gatherings. The members of the Police Force have deliberately misinterpreted the Act to imply that they have to grant authority to event organisers to gather and yet what is required is just notification of a public gathering and not a request for permission.

The country report referred to the case of the Movement for Democratic Change (MDC) v Muzeze & Anor<sup>78</sup> as an example of where the Police denied the application by the opposition party, the MDC, to hold a gathering on the basis that they had no workforce since the Force was also present at a cricket match on the same day of the proposed public gathering. The court justified the denial of permission and held that it was made in good faith. The reason advanced by the Police did not even show good faith as Zimbabwe’s Police Force is quite huge such that there could not be a shortage of staff to provide security services at the rally. It is a fact that the whole Police Force was not at the cricket match.

The report highlighted Zimbabwe’s co-operation with Equatorial Guinea by arresting Simon Mann and his colleagues, who had planned a coup against the government of Equatorial Guinea. In its latest report, submitted in 2019, Zimbabwe only reported on the right to peace under Article 23 of the ACHPR. The report highlighted that the country participated in peacekeeping missions under the UN, SADC and AU. The report also acknowledges other

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<sup>77</sup> Cameroon report (n 75 above) 150.

<sup>78</sup> HB-25-03.

threats to peace that are not based on physical conflicts. It stipulates that Zimbabwe is under threats of human and economic security due to droughts and famine.<sup>79</sup> In relation to the Maputo Protocol, the report did not address the right to peace.

### ***Concluding observations***

The concluding observations and recommendations made by the African Commission after consideration of state reports do not address the states' obligations on the right to peace. In all the concluding observations given by the African Commission, nothing directly addresses the right to peace. The African Commission did not highlight how states are supposed to implement the right to peace in the areas of concern. An examination of the concluding observations revealed that the African Commission did not directly address the right to peace but touched on other issues that have a bearing on the right to peace, such as the participation of women and eliminating violence in all spheres of life.<sup>80</sup> In its concluding observations to Zimbabwe's report, it addressed the issue of peace in relation to police brutality and forced disappearances. In relation to women's right to peace, the African Commission, in its concluding observation, recommended Cameroon to adopt measures to fully implement the AU Solemn Declaration of Gender Equality.<sup>81</sup> It also recommends that Cameroon adopt a policy of gender representation of women in decision making.<sup>82</sup> In its concluding observation of Burkina Faso's combined Periodic Report of 2011 – 2013, the committee recommends the government of Burkina Faso for implementing the right to peace through the adoption of an action plan on implementation of the UN Security Council Resolution 1325 of 2000 on women, peace and security. Moreover, the attendance of two Burkinabe women to the training programme on women's contribution to conflict resolution was organised by ECOWAS.<sup>83</sup>

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<sup>79</sup> Zimbabwe state report to the African Commission on Human and Peoples' Rights 58.

<sup>80</sup> See Concluding observations on the 3rd and 4th combined periodic reports of the Peoples' Democratic Republic of Algeria.

<sup>81</sup> Para 43.

<sup>82</sup> Para 44.

<sup>83</sup> Concluding observations were adopted at 21st Extraordinary Session in 2017 in Banjul, Gambia.

### 6.2.3 Interpretative mandate

The African Commission is endowed with an important mandate of interpreting the provisions of the ACHPR.<sup>84</sup> In terms of Article 45(3), the role in interpreting the ACHP can be ‘at the request of a state party, OAU institutions and any African organisation recognised by the AU.’ The provision provides an opportunity for the PSC to seek the interpretation of the right to peace so that it is able to fully implement its obligations. Desire argues that this provision seems to clothe the Commission with the capacity to give advisory opinions.<sup>85</sup> This provision is yet to be utilised by the Commission.

Articles 60 of the ACHPR empowers the Commission with the leeway to ‘draw inspiration from other human rights jurisdictions and international law’ in interpreting the provisions of ACHPR. Mugwanya<sup>86</sup> argues that the African Commission has also borrowed from other jurisdictions in interpreting the provisions of the ACHPR and, in the process, ‘dispelled notions that the Charter was designed to pursue a trend towards cultural relativism in human rights.’ However, this provision is not useful in terms of interpreting Article 23 of the ACHPR and Article 10 of the Maputo Protocol since the ACHPR is the only international instrument that has guaranteed the right to peace in explicit terms. The African Commission has nowhere to draw inspiration from in this regard.

### 6.2.4 Missions conducted

The African Commission conducted various ‘promotional and fact-finding missions’ on general issues and women’s rights. The Commission’s website indicates that five missions on women’s rights were conducted in Sudan, Ivory Coast, Nigeria, Djibouti and Angola.

#### Promotional mission to Sudan

The Commission wanted to investigate the effect of the civil war on violence against women. The Commission further explored the peace negotiations between the government and the rebel

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<sup>84</sup> Art 45(3) of the ACHPR.

<sup>85</sup> JD Ingange-Wa-ingange ‘The African human rights system: challenges and prospects’ Unpublished PHD Thesis University of South Africa 2010 191.

<sup>86</sup> GW Mugwanya *Human rights in Africa: enhancing human rights through the African regional human rights system* (2003) 303.

groups. The Commission observed that women in Sudan are ‘integrated and hold senior positions at all levels of the Police, Judicial and Political Systems.’ However, the report did not further say whether the representation is adequate. However, the Commission’s report is silent on how women have participated in the peace negotiations.

The Commission recommended the government of Sudan to-

- a) Timeously submit detailed state reports on the status of women to the African Commission.
- b) Examine the applicability of Shari’a law and family law in compliance with international human rights standards.
- c) Eliminate the discriminatory practice that mandates women to have their husband’s consent if they want to travel outside the country.

### **Djibouti: Mission on Rights of Women 2002**

The Commission conducted a promotional visit to Djibouti in 2002 to discuss various issues on women’s rights. The Commission observed the violation of women’s rights in family law matters due to the use of Shari’a Law. The mission report noted that women face difficulties in appealing against their husbands’ decisions in matters of divorce. The Commission made recommendations to Djibouti to take practical steps to implement women’s rights, ‘particularly in the area of health, food security, education and training through provision of resources.’ The Commission further encouraged Djibouti to eliminate social constraints that look down upon women and resultantly prevent women from fully exercising their rights.

The Special Rapporteur recommended that the government of Djibouti work with women’s organisations to address awareness-raising to change attitudes towards democracy, women’s rights and environmental sustainability. The Rapporteur also implored Djibouti to take action to promote women’s participation in decision making.<sup>87</sup>

### **Promotional mission to Angola**

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<sup>87</sup> Report Djibouti Mission on Rights of Women 2002 available at <https://www.achpr.org/states/missionreport?id=36> accessed 10 May 2018.

The Commission undertook a promotional visit to Angola in 2002 to determine how women's rights are protected after a lengthy armed conflict in the country.<sup>88</sup> The Commission observed that despite widespread incidences of 'violence against women', there was no specific legislation to combat such type of violence. It was further noted that poverty and the consequences of unemployment are taking a heavier toll on women because of their care work. The Commission recommended that Angola promote the 'equal representation of women in the decision-making process.'<sup>89</sup> It further implored Angola to do everything necessary to ensure compliance with the obligations imposed on the ACHPR and other regional and international conventions to which the country subscribes.

### **Promotional Mission to Nigeria**

The mission was conducted in 2011. The Commission noted the lack of representation of women at all levels due to socio-cultural prejudices against women in Nigeria. The consultations between the Commission and various stakeholders in Nigeria revealed wide and systematic perpetration of violence against women. The forms of violence identified include the following:

- a) Rape targeted at certain ethnic groups.
- b) Aggravated assault.
- c) Forced early marriages and unwanted early pregnancies.
- d) Sexual harassment at the workplace.
- e) Female genital mutilation.
- f) Widespread polygamy.
- g) Discrimination against women in inheritance.
- h) The cultural practice of burying widows alive with the corpses of their dead husbands.
- i) The assassination of women by husbands if they institute divorce proceedings.

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<sup>88</sup> Promotional Mission to Angola Report available <https://www.achpr.org/states/missionreport?id=36> accessed 10 May 2018.

<sup>89</sup> Promotional mission report to Angola (n 88 above).

The Commission recommended that Nigeria take appropriate measures to protect women against all forms of violence.<sup>90</sup>

The African Commission has conducted ‘fact-finding missions’ to protect the right to peace. It conducted fact-finding missions in the Sahrawi Arab Democratic Republic in 2012 on the right to self-determination, the Republic of Mali in 2013 and on the Darfur conflict in 2004. The Commission also conducted a ‘fact-finding mission’ to Zimbabwe in 2002 on violations that took place after the land reform programme.

The undertaking of promotional and fact-finding missions have been affected by the challenge of lack of co-operation by states, particularly the lack of response to requests to conduct missions.<sup>91</sup> In 2012, Cameroon refused to facilitate access for the Commission to the country’s southern parts. The lack of co-operation by states can be attributed to the limited enforcement powers of the Commission. The Commission lacks the power to condemn an offending state save to make recommendations only.<sup>92</sup>

The Commission also issues press releases as part of its promotional mandate. It has constantly issued press releases on commemorating calendar events such as Women’s Day. The Commission made a press release was on the Cyclone Idai that affected Mozambique, Malawi and Zimbabwe. The Commission called on all African countries and the “international community” to assist in the calamity. The Commission further urged the governments of the respective states to attend to the special needs of women to access shelter and food because they usually “bear the brunt of such disasters.”<sup>93</sup> The Commission also utilises press releases as an opportunity to remind states of their obligation to promote and protect women’s rights.

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<sup>90</sup> Promotional mission to Nigeria report available at <https://www.achpr.org/states/missionreport?id=36> accessed 10 May 2018.

<sup>91</sup> Killander (n 4 above) 242.

<sup>92</sup> G Muigai ‘From the African Court on Human and Peoples’ Rights to the African Court of Justice and Human Rights’ in M Ssenyonjo (ed) *The African human rights system 30 years after the African Charter on Human and Peoples’ Rights* (2012) 270.

<sup>93</sup> Press Release on ‘Cyclone Idai and the subsequent flooding in Mozambique, Malawi and Zimbabwe’. 8 April 2019. Available at <http://www.achpr.org/press/2019/04/d452/> accessed 19 April 2019.



### 6.2.5 Resolutions

These can be divided into four categories. These are ‘resolutions dealing with specific issues of concern to the continent, resolutions dealing with mandates of special rapporteurs and working groups, country-specific resolutions and resolutions interpreting the provisions of the Charter.’<sup>94</sup> The challenge with resolutions, particularly, has been on how Article 59, which pertains to the publication of resolutions of the ACCHPR, is interpreted. Killander argues that the AU Assembly has interpreted the provision as a means to prevent the Commission from publishing reports and country-specific resolutions.<sup>95</sup> This happened in a resolution about Zimbabwe where the country argued that it was not given a chance to respond to the report before the report was tabled before the AU Assembly.<sup>96</sup> The report was not published, and it was never placed on the AU agenda again.

Killander also argues that ‘resolutions also have an interpretative effect and act as guidelines for States to enact legislation and give effect to the provisions of the Charter in terms of Article 45(1) (b).’<sup>97</sup> It seems the Commission has been unwilling to utilise this provision to interpret the right to peace.

### 6.3 The relationship between the Commission and the PSC in protecting the right to peace

Article 19 highlights the relationship between the Commission and the PSC. Article 19 provides that the ‘PSC shall seek close co-operation with the Commission in all matters relevant to its objectives.’ Gumedze argues that Article 19 is not clear as to whose objectives are being referred to.<sup>98</sup> The author argues that ‘the use of the words ‘its objectives and mandate’ is confusing because it is not clear whether they refer to the objectives and mandate of the Peace and Security Council or those of the African Commission.’<sup>99</sup>

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<sup>94</sup> Killander (n 4 above) 243.

<sup>95</sup> Killander (n 4 above).

<sup>96</sup> Killander (n 4 above)

<sup>97</sup> Killander (n 4 above) 244.

<sup>98</sup> S Gumedze *The Peace and Security Council of the African Union its relationship with the United Nations, the African Union and sub-regional Mechanisms* (2011) 156.

<sup>99</sup> Gumedze (n 98 above) 157.

The author problematises the omission to mention the African Charter in any of the provisions of the PSC Protocol.<sup>100</sup> The provision on the right to peace is not mentioned in the PSC Protocol. This is surprising given the fact that the PSC Protocol mandates the Commission to complement its work on human rights protection relating to peace. The Commission itself is established in terms of the Charter, and it would be proper to mention the Charter because of its novelty in guaranteeing the right to peace in a binding human rights instrument.

The function of the Commission in terms of complementing the PSC can be achieved through the mandates of the Commission. This can be achieved in the following ways such as the Commission's promotional mandate, the Commission's protective mandate as a quasi-judicial organ that hears human rights complaints and lastly, as an institution responsible for receiving and considering state reports.

Article 62 of the ACHPR mandates states to submit reports indicating how they are implementing rights. The country periodic reports should highlight what states have actually done to implement the provisions of the Charter. State reporting is not a hostile process but rather an interactive process where challenges of human rights implementation are discussed.<sup>101</sup> Honest and presentation of a true picture is mandatory so as to get assistance from the Commission on how to address the challenges raised.<sup>102</sup>

#### **6.4 The African Court on Human and Peoples' Rights**

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights founded the African Court on Human and Peoples' Rights (hereinafter referred to as the African Court).<sup>103</sup> The main purpose of the Court is to 'complement the protective mandate of the African Commission.'<sup>104</sup> The Court is manned by eleven judges who should be citizens of African countries.<sup>105</sup> These judges are appointed in

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<sup>100</sup> Gumedze (n 98 above) 157.

<sup>101</sup> Mugwanya (n 92 above).

<sup>102</sup> Gumedze (n 92 above) 157.

<sup>103</sup> The Protocol entered into force in 2004 after the ratification and deposit of the required signatures.

<sup>104</sup> Art 2 of the Protocol on the African Human Rights Court.

<sup>105</sup> Art 11(1).

their individual capacities.<sup>106</sup> To counter collusion and bias in decision making, the Protocol does not allow the appointment of more than one judge of the same nationality. This provision allows fair representation of the continent's fifty countries. If more than one judge is to be appointed, it would definitely mean that other nationals would not have an opportunity to be elected as judges. The provision also counters collusion by judges and biased decisions. The judges' term is six years, with an opportunity for election for another year.<sup>107</sup>

The Court has been criticised for its restrictive access to individuals, which appear to defeat the objective of its creation. Direct access to the court is open to the following:

- a) State parties that would have made a complaint.
- b) State parties that are respondents
- c) 'a state party whose citizen is a victim of human rights violations and African intergovernmental organisations.'<sup>108</sup>

Udombana criticised the limited access to individuals and the unlimited one to states. He argues that "the cynicism of this discrepancy is revealed by the fact that States are the least likely of parties to seek vindication of human rights."<sup>109</sup>

Viljoen argues that 'this provision implies that organisations such as the African Committee of Experts on the Rights and Welfare of the Child, regional economic arrangements, or even the AU itself, can submit cases directly to the African Court.'<sup>110</sup> In its advisory opinion on the request submitted by the African Committee on the Rights and Welfare of the Child, the Commission defined international organisation to refer to 'entities whose membership is exclusively or primarily for States and that such organizations would also ordinarily have State

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<sup>106</sup> Art 11(1).

<sup>107</sup> Art 15.

<sup>108</sup> Art 5.

<sup>109</sup> Udombana (n 44 above) 67.

<sup>110</sup> Viljoen (n 42 above) 37.

representatives directing the affairs of the organization.’<sup>111</sup>This, therefore, implies that the PSC can utilise this provision to bring violations of the human right to peace before the Commission.

The Protocol also provides direct access to the Court by the non-governmental organisations that have been granted ‘observer status before the Commission.’<sup>112</sup> Direct access to the Court by individuals is only possible if the country has accepted the ‘competence of the court to receive petitions at the time of ratification.’<sup>113</sup> So far, only eight countries have made a declaration that allows NGOs and individuals to have direct access to the Court.<sup>114</sup> The Court has received 343 applications and 330 contentious cases to date.<sup>115</sup> None of the communications is on the right to peace.

The strength of the African Court is in the fact that its decisions are final and cannot be appealed against.<sup>116</sup> Countries that have ratified the Protocol make an undertaking to comply with the decisions and also ensure their execution. This provision makes the Court’s decision binding on the state parties. The Court’s protective mandate is stronger than that of the Commission and can offer better remedies to women whose right to peace have been violated. The Court also has the power to order reparations.<sup>117</sup>

The Court will be replaced by the African Court of Justice and Human Rights. The latter combines the African Court on Human and Peoples’ Rights and the African Court of Justice. The African Court of Justice and Human Rights was established by the Protocol on the Statute of the African Court of Justice and Human Rights, which was adopted in Sharmel-Sheikh, Egypt, on 1 July 2008. The African Court on Human and Peoples’ Rights remains functional

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<sup>111</sup>Request for Advisory Opinion by the ACERWC on the Standing of the ACERWC before the ACHPR - Advisory Opinion 002/2013 para 67.

<sup>112</sup> Art 5(3) of the Protocol.

<sup>113</sup> Art 34(6).

<sup>114</sup> <http://www.african-court.org/en/> The eight countries are Benin, Burkina Faso, Côte d’Ivoire, Ghana, Mali, Malawi, Tanzania and Rep. of Tunisia.

<sup>115</sup> As at August 2017 for further information see the website of the Court available <http://www.african-court.org/en/>.

<sup>116</sup> Art 28(2).

<sup>117</sup> Art 27(1) of the Protocol.

pending adequate ratifications for the Protocol to enter into force and operationalise the merged court.

The merged court has been provided with the jurisdiction to hear criminal matters by the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (The Malabo Protocol). The Protocol was adopted by the African Union on 27 June 2014. The court will have jurisdiction over international crimes. The criminal jurisdiction of the court has the potential to contribute towards women's rights to peace since it has jurisdiction to deal with crimes such as genocide, human trafficking. Women and girls are the highest victims of human trafficking.

### **Advisory opinions**

Article 53 of the Protocol Establishing the African Court of Justice and Human Rights also provides for advisory opinions.<sup>118</sup> It states that an opinion may be requested by 'the Assembly, the parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council, the Financial Institutions or any other organ of the Union as may be authorised by the Assembly.'<sup>119</sup> The request should be specific on the exact question upon which the opinion is being sought.<sup>120</sup> An opinion should not be sought on pending matters before the African Commission or the African Committee of Experts.<sup>121</sup>

Article 4 of the Protocol to the African Charter on Human and Peoples' rights on the Establishment of an African Court on Human and Peoples' Rights gives the Court the power to give advisory opinions to African countries, the AU and its organs, and any African Organisation recognised by the AU. The opinion is not limited to provisions of the African Charter only; it can be based on any human rights instrument.<sup>122</sup> Judges are entitled to give dissenting opinions. To date, this provision has been underutilised as none of the entities

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<sup>118</sup> Art 53.

<sup>119</sup> Art 53(1).

<sup>120</sup> Art 53(2).

<sup>121</sup> Art 53(3).

<sup>122</sup> Udombana argues that 'the African Court's advisory jurisdiction is broader as compared to other human rights system such as the European and American jurisdictions.' See Udombana (n 42 above).

mentioned have requested an opinion. This provision should be utilised to enable a thorough interpretation and enforcement of human rights in Africa. Although the Court's advisory opinions are not binding, they create jurisprudence and the elaboration of state obligations and duties of citizens. They are of persuasive value. Their value is based on the fact that a Court is a judicial institution, and therefore the advisory opinion has legal authority.<sup>123</sup>

The African Commission can also utilise the power of the African Court to give advisory opinions and request the interpretation of the provisions on the right to peace. This is against the backdrop of the fact that the Commission is inundated with communications and other promotional mandates, whereas the court is idle because of the non-submission of cases before it.

One of the requests for advisory opinions received by the Court relates to the interpretation of Article 6 of the Maputo Protocol.<sup>124</sup> The opinion requested was on interpreting the Protocol's provisions on the registration of marriages. The request was filed by five non-governmental organisations: 'the Centre for Human Rights, the Federation of Women Lawyers Kenya, the Women's Legal Centre, the Women Advocates' Research and Documentation Centre and the Zimbabwe Women Lawyers Association.' The organisations are from Kenya, Nigeria, South Africa and Zimbabwe and all have observer status before the Commission. The Court declined to give advisory opinion on the basis that the organisations were not recognised by the African Union. is yet to write its judgement on the request.

### **6.5 Challenges limiting the implementation of the Maputo Protocol**

The general challenge that limits the broader implementation of the Maputo Protocol also negatively impacts the realisation of the right to peace. Some of the challenges identified include the non-ratification of the Protocol, the culture of violence and the failure to implement the Commission's recommendations.

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<sup>123</sup> Udombana (n 44 above) 93.

<sup>124</sup> Request for Advisory Opinion 001/2016.

### 6.5.1 Non-ratification and reservations

The first challenge that affects the implementation of the Maputo Protocol is the states' failure to ratify the Protocol.<sup>125</sup> The Maputo Protocol was adopted in 2003. Only 37 countries in Africa have ratified the Protocol.<sup>126</sup> Some countries that ratified have also made reservations to the Protocol. These reservations reduce the effective implementation of the Protocol. Cameroon, Kenya, Namibia, Uganda, Rwanda, Namibia and South Africa are some of the countries that entered reservations on the Protocol. The majority of the reservations were on Article 14, which provides for reproductive health and legalised abortion in cases of pregnancy as a result of rape.

Kenya is the only country that has made a reservation concerning the right to peace. Kenya's reservations read as follows:

'The Government of the Republic of Kenya does not consider as binding upon itself the provisions of Article 10(3) and Article 14(2)(c) which are inconsistent with the provisions of the Laws of Kenya on health and reproductive rights.'

This reservation clearly expresses Kenya's desire not to reduce military expenditure for the social development of women. This kind of reservation negatively affects the implementation of the Protocol since monetary resources are required to implement women's rights. It also defeats the purpose of the Protocol and is therefore inadmissible.

### 6.5.2 Culture of violence

The Special Rapporteur's report on the status of the implementation of the Maputo Protocol highlighted the challenges that the continent is facing with the issue of the violation of women's rights despite the ratification of the Maputo Protocol. The report highlighted that states are still failing to protect women from violence by failing to punish the perpetrators despite having ratified the Maputo Protocol. Further, women cannot claim their rights under the Protocol due

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<sup>125</sup> L Asuagbor 'Status of implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 60th meeting, commission on the status of women'(2016)  
<https://reliefweb.int/sites/reliefweb.int/files/resources/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf>.

<sup>126</sup> The 17 countries that have not ratified the Protocol are 'Algeria, Botswana, Burundi, Central African Republic, Chad, Egypt, Eritrea, Ethiopia, Madagascar, Mauritius, Niger, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Somalia, South Sudan, Sudan and Tunisia.'

to ignorance and limited resources.<sup>127</sup> Poverty also limits their capacity to access justice. Resultantly, even if they are aware of their rights, limited resources are a stumbling block to accessing justice. The report also noted that legal aid is not fully available. As a result, litigants do not approach the Commission because of the lack of legal aid.<sup>128</sup> This reason perhaps explains why there are few cases on women's rights that are brought before the Commission.

### **6.5.3 Non-implementation of the recommendations by the Commission**

The non-implementation of the recommendations by the Commission is the greatest challenge affecting the observance of women's rights in Africa. The heads of states lack the political will and sincerity in adhering to their human rights commitment under the ratified instruments. This is a disservice to the human rights mandate of the Commission. It seems that the fact that no effective penalty can be imposed by the Commission or by the AU Assembly is the cause of non-compliance with the recommendations.

The AU leaders exhibit double-standards behaviour by agreeing to principles by which they do not wish to abide. The AU Assembly is conflicted by the need to hold African values, sovereignty, and the fight against foreign domination. The way the Zimbabwean situation was handled clearly shows that the AU was concerned mostly with issues of sovereignty and the need to resist perspectives from the North at the expense of human rights. Zimbabwe justified unlawful land invasions and abuse of human rights because it exercised the right to self-determination and therefore was well within its power to make decisions on its natural resources.

Whilst it is agreed that Africans need to exercise freedom and total control of their resources, the law should always be observed. Legitimate ways of exercising that right need to be followed. The AU is failing to draw the line between a genuine pursuit of African interests and blatant human rights abuse. As an African, I advocate that natural resources should definitely benefit the interests of African people, but the process towards that should not result in the violation of human rights.

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<sup>127</sup> Asuagbor (n 125 above).

<sup>128</sup> Asuagbor (n 125 above).



Secondly, there is a constant need to interrogate the inclusiveness of the acquisition processes of natural resources for the benefit of Africans. An analysis of how many people actually benefitted from land reforms is necessary because sometimes, the need to act for a common good might be a smokescreen to loot and plunder resources from poor citizens. An example is Zimbabwe's land reform, which has revealed that the land reform only benefitted the majority of the ruling party members and their supporters.<sup>129</sup>

## 6.6 Conclusion

The chapter has highlighted the mandate of the African Court and the African Commission in implementing the right to peace. As discussed above, the PSC Protocol mandates the Commission to complement its efforts on conflict management and the maintenance of peace in Africa. The complementarity aspect comes out through the 'protection and promotion mandate' of the Commission. When the Commission comes across information that it perceives as a serious threat to peace, it should inform the PSC and the AU General Assembly.

The Commission's role in examining states' reports allows it to improve the realisation of the right to peace. The African Commission has failed to do that as its guidelines do not assist in clarifying the nature of the obligations on the right to peace. The African Court has also not utilised its advisory jurisdiction for the same purpose. However, it cannot be blamed as there have been no requests for such opinions. The interpretive mandate of the Commission has not been fully utilised to protect the right to peace. It has not adopted a general comment clarifying Article 10, as it did on Article 14 of the Maputo Protocol. The Commission issued a general comment on Article 14, which outlines the elements of the right to sexual and reproductive rights.

In this chapter, it has been shown that the right to peace remains vague without clear entitlements and obligations. The recognition of the right to peace at a global level has been a contentious issue. Therefore, the African Commission could not draw any inspiration from other human rights treaty bodies. The chapter has also indicated that despite being presented with an opportunity to interpret the right to peace in the litigated cases on the right to peace, the African Commission has not lived up to expectations. The cases of Mauritania; Malawi

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<sup>129</sup> See M Chiweshe 'Analysis of land-related corruption in Zimbabwe' (2017) 46 (1) *Africa Insight* 112 112.

African Association and Others v Mauritania, the DRC case and the case of Association Pour la Sauverhgade de la Paix au Burundi v Tanzania and others, could have been utilised to clarify the content of the right to peace. The communications on peace discussed above reflect the lack of judicial activism on the part of the Commission to progressively interpret Article 23 of the Charter and enrich the jurisprudence. Thus, Udombana argues that ‘the Commission has also failed to use its wide powers to interpret the Banjul Charter in a progressive manner consistent with current international standards.’<sup>130</sup>

Further, the African Commission has not used its authority to issue general comments on how states can implement Article 10 of the Maputo Protocol. Neither has the Commission issued guidelines on what states are expected to report on under Article 10 of the Maputo Protocol when they submit the periodic national reports to the Commission under the ACHPR. The general guidelines on state reporting under the ACHPR are silent on what states are expected to report under the right to peace.

The chapter also established that the Commission has several challenges that affect its impact on protecting human rights on the Continent in general. The Commission does not have the power to enforce its decision. It relies on the goodwill of states to implement its recommendations and the AU Assembly to enforce its decision. Further, the requirement under Article 59(1) of the Charter that the Assembly determines when the activities of the Commission can be made public has reduced its independence. The requirement to pursue friendly relations has masked some of the states’ abuse of human rights and compromised the Commission’s credibility to protect human rights.<sup>131</sup>

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<sup>130</sup> Udombana (n 44 above) 73.

<sup>131</sup> Udombana (n 44 above).

## Chapter 7: Conclusions and Recommendations

### 7.1 Introduction

This chapter synthesises the key findings and highlights the conclusions of the study. The study examined the implementation of the right to peace by the APSA. It examined the normative content of the right to peace as conceptualised by the African Charter and the Maputo Protocol, and other United Nations General Assembly Declarations on the right to peace. The study also interrogated the cases that have been brought before the African Commission on Human and Peoples' Rights alleging a violation of the right to peace. The roles of the APSA institutions such as the POW, the PSC, the CEWS and the ASF to prevent and manage conflicts in Africa were analysed.

The APSA is now in its 18<sup>th</sup> year, yet conflict continues to ravage the continent. APSA 's structures such as PSC, CEWS, ASF, PF and the POW are meant to protect and prevent conflicts in Africa. The CEWS and the POW are meant to identify possible conflicts before they erupt. The ASF intervenes in cases of war crimes, genocide and crimes against humanity. The PSC, the central structure in the peace and security agenda, has both the prevention and protection mandate. In addition to these structures, regional security and economic institutions are also part of the APSA. The African Commission and the African Court's mandate is also supposed to complement the APSA by interpreting the right to peace, by issuing advisory opinions, general comments and court judgments that elaborate the content of the right to peace. Further, the African Commission's promotional mandate enables it to implement the right to peace.

The AU has ambitious plans to promote and protect the right to peace. Some of these plans include the Agenda 2063 and the Silencing the Guns by 2020 Pledge. In addition to the above institutional frameworks, the African Union has several instruments that should result in gender equality in APSA's implementation of the right to peace. These instruments are the PSC Protocol, the Maputo Protocol, the Solemn Declaration on Gender Equality in Africa (SDGEA), the AU Action Plans on Gender Mainstreaming in Peace and Security, a Special Rapporteur on Women's Rights and a Special Envoy on Women, Peace, and Security. Despite these comprehensive frameworks, the implementation of women's right to peace has not been fully realised. This is a result of the institutional challenges that the APSA is facing. APSA is not fully making use of its prevention mandate. There is late detection of conflicts. As a result, African women are not fully benefiting from the right to peace as anticipated. In examining the challenges presented in the implementation of the right to peace, the thesis posed the following main question: To what extent does the APSA

implement women's right to peace. In answering this main question, four sub-questions were raised and answered in the thesis. The conclusions on each of the questions are presented below.

## **7.2 Conclusions from the study**

### **a) The normative content of the right to peace**

In summary, the study concludes that the right to peace is a recognised human right under Article 23 of the African Charter and Article 10 of the Maputo Protocol. The right to peace is also recognised in soft laws at the global levels, such as the UN Declaration on the Right of Peoples to Peace, the Universal Declaration of Human Rights and the UN General Assembly 2016 Declaration on the Right to Peace. The right to peace has, however, been extremely limited in practice.

Very few cases have been litigated on the right to peace before the African Commission. The African Commission has found violations of the right to peace in the cases of *Malawi African Association and Other v. Mauritania, the Democratic Republic of the Congo v. Burundi, Rwanda and Uganda and the Southern Cameroons Case*. The communications dealt with the right to peace in terms of Article 23 of the African Charter and not the Maputo Protocol. The African Commission simply ruled that the right to peace has been violated without elaborating the contents of the right. The work of the African Commission and the African Court has also not elaborated on the meaning of women's right to peace. Further, women's right to peace has not been litigated at the African Regional Human Rights system and global levels.

The Commission did not specify any concrete criteria for fulfilling or breaching this right. The African Commission guidelines on state party reports do not even shed light on the obligations of states towards the implementation of the right to peace. Hence, in their periodic reports submitted under the ACHPR, African countries have also adopted a minimalist approach to interpreting the right to peace. The reports have focused mainly on the steps that states have taken in implementing the right to peace only in relation to the action taken to preserve international relations, the protection of women in armed conflicts, and women's participation in peacekeeping missions. The African Commission should issue a general comment to elaborate the state duties on implementing the right to peace.

### **b) APSA's role in implementing the right to peace**

The study found that APSA has a solid institutional and normative framework that enables the implementation of the right to peace, but the structure faces many challenges. Some of the challenges

identified include inadequate funding, the lack of coordination of the APSA structures, the lack of political will by African leaders to implement recommendations of the APSA institutions and the delays in responding to conflicts. Despite the pledge to silence guns by 2020, conflicts in Africa seem to be unending. These conflicts expose women to insecurities such as sexual abuse and internal displacements. Further, the study noted that women have been generally excluded in peace talks in most of the conflicts that erupt in Africa, Resultantly, the peace settlements do not capture women's perspectives. The study also found that the APSA's work has been more reactive than proactive in implementing the right to peace. The APSA's prevention mechanisms, such as the CEWS and the POW, have failed to pay adequate attention to the root causes of conflict, such as economic instability and bad governance. Resultantly, the APSA reacts when the situation has escalated into armed conflicts.

The APSA has also failed to engage with women's right to peace. The APSA's work reveals that it pays attention to general conflicts that affect peace from a state security point of view at the expense of social and economic issues that equally affect the right to peace. It was also found that women are underrepresented in APSA structures. APSA structures are not complying with the gender parity principle.

### **c) The role of human rights institutions in protecting the human right to peace**

The African Commission and the African Court have the mandate to protect and interpret the right to peace. The utilisation of the African Commission's promotional mandate to implement the right to peace has been minimal. The Special Rapporteur on the Rights of Women in Africa has managed to put women's rights on the agenda by being instrumental in adopting the Maputo Protocol. The Special Rapporteur has also lobbied for ratification of the Protocol by the African states. However, the Rapporteur has not specifically dealt with the right to peace in its expansive form. The Rapporteur has focused on negative peace, which is limited to eliminating physical violence.

In its protective mandate, the Commission is yet to deal with communication on women's right to peace. However, on the few cases brought before it, the Commission simply ruled on the violation of the right to peace without elaborating on its contents. The Commission has not issued a single general comment on the right to peace, which could have assisted in defining state obligations and measuring compliance.

The African Court's advisory jurisdiction has not been utilised to enable the interpretation of the right to peace. The African Court Protocol provides that states and African institutions can request advisory

opinions on implementing the rights provided under the Charter or any other human rights instrument. The APSA structures have not utilised this provision. The court is yet to be seized with a case on the violation of women's right to peace. The institutional and legal framework of both the court and the Commission has the potential to protect women's right to peace effectively, but this potential has not been fully tapped into.

**d) Implementation of the right to peace in Zimbabwe and the role of APSA in Zimbabwe's political and economic crisis**

Women's right to peace in Zimbabwe is far from being realised. Women's participation in peace and conflict resolution structures is way below the expected threshold of 50% representation. Women are underrepresented in the judiciary, the armed forces, parliament and social spheres such as religious and traditional leadership. Since Independence, all the Cabinet appointments had less than 30% representation of women. Under the new President, the so-called new dispensation has not improved women's appointments into the Cabinet. Women continue to be assigned to inferior ministries that are underfunded. Women's right to peace is severely curtailed by structural violence. In the 2018 elections, women were harassed, intimidated and side-lined in the process. The ruling party and opposition parties did not have a 50 per cent representation of women candidates in the election process.

Positive peace for women in Zimbabwe is still a dream. Zimbabwe's economic situation has resulted in the feminisation of poverty. Access to affordable and quality maternal health is still a challenge as hospitals have also been severely affected by the economic decline. Access to resources such as land and mines remains a challenge for women in Zimbabwe as they are marginalised. Men remain the majority of landowners even after implementing the Fast Track Land Reform Programme. Land continues to be distributed on patriarchal lines. Similarly, women's access to mines is still very low in the mining sector. The mining sector is still a preserve of men.

The case study of Zimbabwe highlighted that the APSA adopts a minimalist approach to peace. Zimbabwe's economic and political challenges have resulted in the violation of the right to peace. The study concludes that Zimbabwe cannot be referred to as a peaceful country and therefore deserves the APSA's adequate attention.

The APSA engaged with Zimbabwe through SADC mediators only in situations where physical violence erupted or threatened to erupt. Zimbabwe has been on the agenda of SADC based on land reform conflicts, political violence and election disputes. Zimbabwe has been experiencing an

economic meltdown for decades, which has resulted in extreme levels of poverty, with women being the most affected. The APSA has not paid sufficient attention to the economic challenges that trigger political violence. SADC has not even addressed women's right to peace in Zimbabwe. SADC's focus was on achieving peace deals between the ruling party and the opposition. Women were underrepresented in the peace talks that SADC mediated.

**e) The role of national institutions in protecting women's right to peace in Zimbabwe**

The following institutions were examined to assess the extent to which they protect women's right to peace-

- The Human Rights Commission.
- The Gender Commission.
- The National Peace and Reconciliation Commission.
- The Ministry of Women's Affairs, Gender and Community Development.
- The Police Force.
- The Defence Force.

The study found that all the independent Commissions have the potential of effectively contributing towards the implementation of women's right to peace. However, they have faced funding challenges, which severely cripple their work. All of the Commissions are financially handicapped.

Another common challenge that these institutions face is the lack of implementation of their recommendations by the state. The lack of political will has reduced these institutions' findings to being theoretical without bringing any tangible relief to Zimbabweans. All of the Commissions have issued reports and press releases condemning human rights violations. Their recommendations and observations have remained on the shelves without positively impacting women's lives.

It has also been noted that the NPRC's independence is compromised by the interference of political figures. The NPRC's proposed national dialogue to resolve the country's political and economic challenges was high-jacked by the President. The NPRC's constitutional role of conducting national dialogue was usurped by the President, who established the POLAD framework. This severely undermines its potential to execute its mandate.

It was observed that women are fairly represented in all the national human rights institutions. The Gender Commission and the Human Rights Commission have more women than men. However, except for the Gender Commission, all the Chairpersons of the Commissions are men. The fact that a woman heads the Gender Commission reflects the government's stereotypes that gender issues are for women, and as such, they should be the ones to spearhead the institutions that deal with gender.

The study also found that women's organisations are not aware of the existence of the APSA and how they can utilise this mechanism to protect women's rights. The PSC has a platform for NGOs, but Zimbabwe's civil society has not utilised this platform despite the flagrant violation of women's right to peace. The study also found out that women's organisations' work does not adopt a broader view of women's right to peace, which is inclusive of all generations of rights.

The work of women's organisations is structured in a fragmented manner which does not enable the implementation of women's right to peace in its broader sense. Funding was also discovered to be one of the limitations of these NGOs. They tend to implement donor-funded projects, and as such, there is recognition of the diverse factors that affect women.

### **7.3 Recommendations**

#### **7.3.1 Areas for future research**

In this study, I acknowledge that the definitions of peace have not been exhausted. Chapter 2 only provided the different conceptions of peace from religious and legal perspectives. The research provided a critique of the right to peace as provided in the Maputo Protocol and the African Charter. There is still a need to conduct further research on the societal perceptions of peace from one context to another. There is also a need to interrogate what circumstances are considered necessary for peace to prevail in a different context?

Further, the impact that dynamics such as race, class, age and gender have on the definition of peace should be explored. It was not the objective of this study to interrogate why countries from the Global North have resisted the adoption of peace as a binding human right. That interrogation is necessary as it would shed light on the necessity of having peace as a right rather than an aspiration.

#### **A need for further research on the place of gender in the African society**

Culture is often vilified for being the source of women's oppression. However, research has shown that the African culture is not entirely oppressive. It has positive aspects that can be utilised to



promote women's participation in peace and conflict resolution processes. It has been argued that gender roles in pre-colonial Africa were complementary. It was only after colonisation that African traditions adopted western concepts of gender that viewed women as the inferior sex.

Therefore, it is recommended that there is a need for more research to find out the role of women in peace and conflict resolution processes in pre-colonial Africa. This research will assist Africa in general to shape its own gender identities, which are context-specific when it comes to the implementation of the right to peace.

The positive aspects of the African culture can be utilised to protect women's right to peace. For instance, the mother and the aunt have always exercised leadership roles in the family. The status of a mother and an aunt is highly valued. In Zimbabwe, an aunt is also called a 'husband' and can sometimes take the father's position. The very fact that at some point, women can take leadership positions indicates that gender identities have never been fixed. The role of a mother under African culture is supreme. In Zimbabwe, it is alleged that bad luck will befall you if you beat your mother. The same consequences will not happen if you beat your father. The respect bestowed on mothers can be channelled towards protecting women's right to peace. It is therefore important to dialogue on gender roles in post-colonial Africa and aligns cultural practices with human rights principles of equality and non-discrimination.

### **7.3.2 The need to adopt general comments and guidelines on the implementation of the right to peace**

The lack of clear state obligations on women's right to peace detracts from the full realisation of the right. The right has remained abstract without elaborating its entitlements to rights holders. The African Commission should issue a general comment outlining state obligations on implementing women's right to peace.

The African Commission should closely monitor women's right to peace in the states reports. It should utilise that opportunity to elaborate on the nature of state obligations on the right to peace. Further, the African Commission should urge states to recognise the right to peace in the national constitutions and subordinate legislation. As highlighted in Chapter 2, very few states recognise peace as a human right in their national constitutions.

The Commission should encourage outstanding states to ratify the Maputo Protocol and urge those that have entered reservations to withdraw, particularly Kenya, which indicated that it is not bound by Article 10(3) of the Protocol.

### 7.3.3 Proposed elements of the right to peace

Due to the complexity and fluidity nature of peace, it is proposed that the following elements should constitute the right to peace:

#### a) Participation

The feminist standpoint theory postulates that there cannot be universally true claims. Similarly, the definition of peace cannot be universal. Thus, women's experiences should be at the centre of the legal conceptualisation of peace. Participation of women enables women to define their understanding of peace. Garbutt argues that due to the fluidity of peace, it should be defined in its everyday context.<sup>1</sup> Current notions of peace have been defined from a masculine perspective which aligns more to militaristic solutions. The approach neglects critical non-military issues that negatively affect women's right to peace. The principle of participation is an essential element of the right to peace which gives women the voice to implement peace from their standpoint. Further participation is also a pre-requisite to the enjoyment of other rights.

#### b) Equality

The principle of equality and non-discrimination is a critical component of the right to peace. Violence in its diverse forms is a violation of the right to equality. The CEDAW Committee in its General Recommendation Number 19 has already emphasised that violence against women is a form of discrimination and a violation of the right to equality.<sup>2</sup> The right to peace can only be fully realised when there is full recognition of the equality of persons and equal protection of the law. Equality ensures meaningful participation and equal respect of the perspectives of the participants towards the realisation of the right to peace. Further, equality is already enshrined as a core human right in numerous international and regional human rights treaties including the ACHPR and the Maputo Protocol. A reading of the framing of the right to peace in article 10(2) of the Maputo Protocol indicates that equality is a central tenet of the participation of women in peace structures.

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<sup>1</sup> RA Garbutt 'Everyday peace, human rights, belonging and local activism a 'peaceful' nation in GB Chen et al in *Activating human rights and peace, theories, practices and contexts* (2012) 144.

<sup>2</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992, available at: <https://www.refworld.org/docid/52d920c54.html> [accessed 23 May 2022]

### c) **Human dignity**

Respect for human dignity is the main rationale for the recognition of human rights. Human dignity is strongly linked to the principle of participation. It is argued so because equal participation recognises every one's inherent right to dignity. It recognises the fact that women should not be treated as less humans and as such their view deserves to be taken into consideration. Human dignity also contributes towards the equal treatment of persons and their equal right to participate in peace processes. Further, the right to dignity is non-derogable right. Recognition of the right to dignity is mandatory and is of immediate obligation unlike other rights that can be suspended in cases of emergency. Hence, this study adopts a concept of peace that takes into account human rights principles of participation, human dignity and equality as the 'foundation of positive peace.

#### **7.3.4 A total revamp of APSA**

There is a need to undertake a complete overhaul of the APSA mechanisms for conflict prevention and protection of peace. As it currently stands, the APSA's main setback is limited funding due to the proliferation of institutions. As such, it is critical that the mandate of the PSC, the POW, the Special Rapporteurs, the Working Groups, and the RECs should be redefined with clear demarcations of roles and responsibilities to avoid duplication and ensure effective coordination by the PSC. There is a need to consolidate the work of the APSA. For instance, the POW and the PSC perform conflict prevention roles. These are not the only African institutions that have conflict preventive roles. The Special Rapporteur for Women's Rights and the Special Rapporteur on Peace and Security also perform conflict prevention roles through fact-finding missions. The African Commission, in its promotional mandate, also undertake fact-finding missions. In the light of the inadequate funding, there is a need for a clear delineation of roles. There is a need to synchronise all promotional and conflict prevention activities and decide which structure of APSA will handle a particular issue. This will avoid situations of overlapping roles and minimise duplication of efforts.

The APSA structures such as the POW, the ASF, and the PSC should increase female representation in their compositions. Women should also be appointed as Chairpersons of these institutions. Further, the practice of appointing former heads of states in the PSC or the POW should be discontinued. It is not a binding rule that a regional representative on PSC should be a former head of state or an ambassador. This has been the general practice that has become the acceptable way of selecting members for these structures but has no legal authority. Member states should consider the gender parity principle in the appointment of ambassadors since the PSC members are elected by countries.

There should be a mandatory implementation of the gender parity principle provided for in the AU Solemn Declaration of Gender to the effect that half of the membership of all the APSA structures should be women. The Chairpersons of the APSA structures should rotate between men and women to give women an opportunity to lead the process.

The PSC should encourage member states to recruit more women in the army so that they form part of the African Standby Force. There is a need for constant monitoring by the PSC of the composition of peace-keeping mission teams in the military component of ASF since evidence has shown that women constitute more of the civilian component in those teams.

The PSC should strictly follow the eligibility criteria for membership to the PSC as stipulated in Article 5(2) of the PSC Protocol. Despite allegations of human rights abuse, Zimbabwe is a member of the PSC in contravention of the provisions of PSC, which require a clean record on human rights. Adherence to such criteria will strengthen the credibility of the APSA.

The PSC should strengthen the principle of subsidiarity and complementarity in regional economic communities. These assist the APSA in implementing the right to peace.

There is a need for strict adherence to norms in the AU's statutes on good governance and respect for human rights, such as the AU Constitutive Act, the PSC Protocol and the African Charter on Democracy, Elections and Governance. The SADC Tribunal was disbanded because of a divided opinion on dealing with Zimbabwe's case after Zimbabwe refused to comply with the SADC tribunal ruling against it. When the former President of Zimbabwe indicated that he was put under house arrest and forced to resign in 2017, SADC did not bother to investigate the complaints of the former President but rather issued a statement that it was prepared to work with the new government despite indications of unlawful seizure of power by the military.

AU member states should cooperate with all the APSA structures in order for it to achieve its mandate. The limited co-operation of states renders the work of the PSC, the POW and the CEWS ineffective. The APSA's success rests on the goodwill of the states.

The PSC should request advisory opinions from the African Court on the content and the state obligations towards implementing the right to peace.

The PSC should initiate engagement platforms with NGOs in compliance with Article 20 of the PSC Protocol. The PSC's work is not widely known by women's NGOs across the continent. It is

recommended that the PSC should embark on increasing its visibility within the Continent. It should invite NGOs that frequently protect women's right to peace to address it at its meetings.

PSC should adopt a human rights-based approach to peace. The way peace is currently being implemented by the APSA is more aligned to political perspectives rather than human rights. Human rights frameworks should be the guiding frameworks in the APSA's work on conflict prevention and management.

CEWS should focus on all potential threats to peace. Conflict prevention has two approaches, namely: operational prevention and structural prevention. The data from CEWS has mainly been paying more attention to operational prevention instead of examining how structural factors threaten peace and security in Africa. Because of this focus, the response advocated by the CEWS is only short term and do not permanently eradicate the threats to peace.

The APSA structures should broaden the participatory framework to ensure a wider representation of views from women's perspectives. APSA should adopt the bottom-up approach by incorporating the perspectives of all classes of women, including women in the rural areas and those leaving in marginalised communities. This can be done through frequent interaction with CSOs representing women from different backgrounds. The PSC already has a framework for CSOs engagement that is not being fully utilised.

The APSA should move from an integrationist approach of co-opting women into male-dominated structures without access to echelons of power. The implementation of gender equality in APSA structures does not disrupt the structures' unequal power relations. This has resulted in masculine perceptions of peace which mainly gives preference to the eradication of physical violence at the neglect of structural inequalities. Women should not be included in the peace processes because of the social stereotypes that they are inherently peaceful. Neither should they be included in peace processes because of the need to protect them from sexual violence in conflict situations. The right to equality should be the main rationale behind the inclusion of women in peace processes.

The implementation of gender equality should not overemphasise gender training and promulgation of statutes that remain theoretical. All APSA institutions should implement the gender parity principle of 50% female representation. The APSA should implement the gender equality provisions contextually without over-reliance on templated training frameworks on gender issues.

### **7.3.5 Implementation of the right to peace at the national level**

The case study of Zimbabwe has highlighted the inherent structural and systematic deficiencies in the implementation of the right to peace. Very few African countries recognise peace as a human right, yet they have ratified the African Charter and the Maputo Protocol, which recognise the right to peace. Further, the implementation of peace is within limited approaches, which emphasises reactive approaches rather than dealing with root causes of the conflict.

States should strengthen the conflict warning mechanisms. Emphasis should be placed on solving root causes of conflict such as inequality, structural violence, poverty, economic meltdown and unequal access to resources.

National peace infrastructures should be capacitated to effectively deal with all aspects of peace by recognising institutional independence and adequate resources allocation. The institutions should be all-inclusive of age and gender.

States should implement the recommendations made by the African Commission. Although the concluding observations in the state obligations do not directly give recommendations on the right to peace, there are elements of the right to peace that should be upheld. The recommendations by the African Commission places emphasis on the participation and inclusion of women in all peace structures.

The early warning mechanisms for states should be strengthened in order to avoid a reactive approach to peace.

#### ***Women's rights organisations***

The PSC has a platform for engagement with the CSOs. Such a platform is being underutilised. Women's rights organisations should also familiarise themselves with all the regional and international institutions on peace. They should fully utilise structures such as the African Commission, the African Court, and the PSC to hold states to account for the non-implementation of the right to peace. There is a need for public interest litigation on women's right to peace to create jurisprudence.

Women's NGOs should create a database to identify women who have leadership potential and build their capacity on issues of political participation. They should also lobby for the transparent appointment of women in APSA structures. Appointments should be based on merit and not tied to political connections.

Further, NGOs should mentor women to claim the power within the spaces they participate. Lack of confidence has been identified as one of the reasons why women do not influence public spaces. These women must be empowered so that they can articulate their perspectives on peace. Women should move from being confined to stereotypical gender roles of care work and small projects such as cross border trading. In order to be taken seriously, women's fora should not merely focus on women's issues but broader fundamental cross-cutting issues that result in the holistic implementation of the right to peace. Women's rights organisations need to strengthen collaborations amongst themselves towards implementing women's right to peace.

### **7.3.6 Interrogating the relevance of FEMWISE**

FEMWISE was established as an organising mechanism for women to push for participation in the peace process. It is necessary to interrogate whether a stand-alone women's institution is necessary to address women's issues related to peace. APSA already has numerous structures of peace. These structures do not have adequate representation of women. There is a need to reflect on whether the establishment of FEMWISE is also contributing to the duplication of institutions. Is it not better to ensure both substantive and numerical representation of women in the main APSA structures without establishing a separate women-dominated structure? It is critical to interrogate whether the establishment of separate female institutions will not result in ghettoising of women. Will it not detract women from claiming power in the critical structures?

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