

Article 11

Protection of women in armed conflicts

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1. States parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women.
2. States parties shall, in accordance with the obligations incumbent upon them under international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.
3. States parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.
4. States parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.

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1 Introduction

Africa has witnessed numerous armed conflicts, claiming the lives of countless civilians and forcing millions of people to flee within or outside their countries.¹ These conflicts have taken various forms: international or non-international armed conflicts, foreign military occupation, violent tensions and disturbances and terrorist attacks. While no segment of the civilian population has been spared, women

1 SA Rustad *Conflict trends in Africa, 1989-2018: an update* (2019) 5-19.

and children have been hardest hit.² Globally, 90 per cent of the victims of armed conflicts are civilians, and 80 per cent of these victims are women and children.³ At the time of writing, there were 110 international armed conflicts worldwide, 35 of which are taking place on the African continent.⁴ In addition, there were another four African countries experiencing non-international armed conflicts.⁵

Despite the existence of treaty and customary law rules protecting women and girls, their lived realities in armed conflict zones paint a bleak picture.⁶ As one example, Africa has the largest number of internally displaced women, 8.2 million, or 40 per cent of the global figure.⁷ Moreover, displaced women and girls are particularly affected by sexual and gender-based violence and chronic poverty and are less likely to access humanitarian assistance due to poor or non-existent roads and lack of security.⁸

Article 11 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) protects women in armed conflicts. The provision was preceded by the UN Security Council Resolution 1325,⁹ which deplores the plight of women and girls as the primary victims of armed conflict and calls on parties to armed conflict to protect and save women and girls, as civilian populations, from the adverse effects of war.¹⁰ Article 11 stipulates that its primary objective is the respect of the existing rules of international humanitarian law (IHL) applicable in armed conflict. These rules include custom, international treaties, general principles and resolutions related to women.¹¹ Article 11 is not the first treaty provision to refer to the obligation to respect and ensure IHL. Article 38(1) of the UN Convention on the Rights of the Child (CRC) and article 22(1) of the African Charter on the Rights and Welfare of the Child (African Children's Charter), respectively, impose similar obligations. Comparably, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), although referring to conflicts in its Preamble, does not include any specific protection of women in armed conflict.¹²

2 They account for more than 71% of victims of conflict in the DRC. See Democratic Republic of Congo Report to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights From 2008 to 2015 (11th, 12th and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women from 2005 to 2015 (Initial Report and 1st, 2nd and 3rd Periodic Reports) (2017) para 332.

3 A Escorial et al *La violation et la protection internationale des droits de l'enfant* (2008) 6; 'Les femmes dans les conflits armés' <https://www.un.org/french/womenwatch/followup/beijing5/session/fiche5.html> (accessed 23 June 2023).

4 In Burkina Faso, Cameroon, the Central African Republic (CAR), the Democratic Republic of Congo (DRC), Ethiopia, Mali, Mozambique, Nigeria, Senegal, Somalia, South Sudan and Sudan.

5 Egypt, Libya, Morocco and Western Sahara. Section 4.1 below unpacks the notion of 'armed conflict' and distinguishes it from other conflict situations.

6 See also African Commission Resolution on the fact-finding mission to the Tigray region of the Federal Democratic Republic of Ethiopia, ACHPR/Res.482 (EXT.OS/XXXII) 2021; Report of the Ethiopian Human Rights Commission (EHRC)/Office of the United Nations High Commissioner for Human Rights (OHCHR) Joint Investigation into Alleged Violations of International Human Rights, Humanitarian and Refugee Law Committed by all Parties to the Conflict in the Tigray Region of the Federal Democratic Republic of Ethiopia (2021) 3 <https://www.ohchr.org/sites/default/files/2021-11/OHCHR-EHRC-Tigray-Report.pdf> (accessed 27 February 2023); see African Union Commission of Inquiry on South Sudan, 'Final Report of the African Union Commission of Inquiry on South Sudan' (15 October 2014) para 380, <http://www.peaceau.org/uploads/auciss.final.report.pdf> (accessed 27 February 2023).

7 Union africaine et al *La situation des droits des femmes dans les camps de réfugiés et les camps pour personnes déplacées dans leur propre pays en Afrique: Le contexte de l'AAG et de l'AAPS* (December 2020) 20.

8 Union africaine (n 7) 19.

9 United Nations Security Council Resolution 1325 on Women, Peace and Security, S/RES/1325 (2000) Adopted by the Security Council at its 4213th meeting, on 31 October 2000 (UN Security Council Resolution 1325).

10 UN Security Council Resolution 1325 (n 9) para 9.

11 JM Abelungu 'Le système africain de protection des droits de l'homme et la question des enfants soldats' (2019) 3 *Annuaire africain des droits de l'homme* 5.

12 M Verdussen & N Cambier 'Préambule' in MH Randall et al *CEDEF – La Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes et son protocole facultatif. Commentaire* (2019) 13-14.

To engage with the different aspects of article 11, this chapter is divided into seven sections. Section 2 reviews the drafting history of article 11 from 1997 to 2003, while section 3 analyses the link between the article and other relevant treaty provisions. Section 4 defines relevant concepts under the provision, including armed conflict situations, rape and other forms of sexual exploitation and child participation in hostilities. Section 5 looks at obligations deriving from article 11, while section 6 reviews its implementation status. Section 7 concludes by highlighting the normative and institutional significance of article 11 and the need for synergy among various judicial and quasi-judicial institutions to enforce it.

2 Drafting history

The provision protecting women in situations of armed conflict was included at the last stage of the drafting of the Maputo Protocol. Neither the Nouakchott Draft¹³ nor the Kigali Draft¹⁴ specifically mentioned the protection of women's rights during armed conflict. Yet, these two drafts, and the Protocol in general, were developed during a time when conflicts were ravaging many parts of the continent. However, article 11 of the Nouakchott Draft set out one important conflict-related obligation: to 'protect women from rape and other sexual assaults' by ensuring that these are considered war crimes for which perpetrators must be held accountable.¹⁵

The Maputo Protocol was drafted at a time when the recognition of gross violations against women during armed conflicts had begun to gain momentum within the international community. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were created in 1993 and 1994, respectively.¹⁶ Three months before the adoption of the Nouakchott Draft, the ICTR began proceedings in the case where the court subsequently, in 1998, for the first time, defined rape as a crime against humanity.¹⁷ Moreover, the 1995 Beijing Platform for Action, to which the Preamble to the Nouakchott Draft, and ultimately the Maputo Protocol, refer contains an entire section on the protection of women's rights during armed conflict.¹⁸ In addition, the Rome Statute of the International Criminal Court (Rome Statute) and the ICTR Statute both criminalise rape and other forms of sexual violence.¹⁹

The reference to protection against 'rape and other sexual assaults' and the obligation to criminalise such acts as war crimes and punish perpetrators in article 11 of the Nouakchott Draft was a novel approach. It was the first time that such an obligation was included in a human rights treaty. The Nouakchott Draft illustrates the need to protect women in armed conflict, given that war crimes by their very nature are committed during 'armed conflict' and that 'rape' is the most common crime committed against women, particularly as a strategy or weapon of war. However, article 11 of the

13 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

14 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights, 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

15 Nouakchott Draft (n 13) art 11(2).

16 The ICTY was established by the United Nations Security Council Resolution 827 (1993) on the establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993 UN Doc S/RES/827(1993) and the ICTR by the UN Security Council, Security Council resolution 955 (1994) on the establishment of the International Criminal Tribunal for Rwanda, 8 November 1994, UN Doc S/RES/955 (1994).

17 *The Prosecutor v Jean-Paul Akayesu* (Trial Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para 744(13).

18 Section E.

19 Statute of the International Criminal Tribunal for Rwanda (1994), arts 3(g) & 4(e); Rome Statute of the ICC (1998), art 7(g); art 8(2)(b)(xxii); art 8(2)(e)(vi).

Nouakchott Draft was limited in scope since rape and other sexual assaults are the main but not the only violations suffered by women during armed conflict.

The reference to ‘rape and other sexual assaults’ was not included in the following Kigali Draft and Final Draft.²⁰ It should be noted that the Kigali Draft was adopted by the African Commission on Human and Peoples’ Rights (African Commission) in the very city where, five years prior, thousands of women were raped and subjected to various forms of atrocities during the Rwandan genocide. However, article 13(1) of the Kigali Draft contained a provision which protected women against violence ‘in peace time and during situation of conflict’.²¹ Under article 11 on the right to peace, the Final Draft recognised the need to protect women and children in ‘emergency and conflict situations’.²² It also provided for the protection of refugee, returnee and displaced women and children. The notion of ‘conflict situations’ used in both drafts is inclusive of armed conflicts and calls for the application of IHL rules.

Article 10(4) of the Revised Final Draft makes the first reference to IHL.²³ The proposal to refer to IHL was made at the Meeting of Experts that took place in November 2001 to consider the Final Draft.²⁴ The Revised Final Draft imposed under article 10(4)(a), dealing with the right to peace, the obligation to ‘take special measures’ in accordance with IHL for the protection of women and children in emergency and conflict situations, to protect women and girls’ asylum seekers, refugees, returnees and displaced persons as well as to ensure their participation in post-conflict reconstruction and rehabilitation. These measures are provided for under article 10(4)(b) and article 10(4)(c) respectively as was the case with article 11(2) of the Nouakchott Draft and not under ‘violence against women’ as in the Kigali Draft.

Article 10(4) of the Revised Final Draft has technical and conceptual problems, at least at three levels. First, not any ‘emergency’ – understood as exceptional circumstances threatening the survival of a nation and leading to the adoption of derogative human rights measures – or ‘conflict’ situations qualify as ‘armed conflict’ or ‘war’ to warrant the application of IHL.²⁵ Emergency situations are regulated by human rights law, and not the humanitarian law regime, unless a state of emergency is declared as part of an armed conflict, in which case, both IHL and international human rights law (IHRL) apply. Secondly, the distinction the provision makes between women and girls is presumably intended to emphasise intersectionality. The needs of and violations experienced by women broadly (persons of the female gender as defined under article 1(i)) may significantly differ from those of or against girls (female child or adolescent). However, the African Union Office of the Legal Counsel (AUOLC) and a coalition of women’s rights organisations that gathered to comment on the Revised Final Draft in January 2003 successfully advocated for the removal of the concept of ‘girl’.²⁶ Thirdly, aspects of women’s participation in peacebuilding processes are beyond the scope of IHL as they fall under the ambit of IHRL and domestic laws.²⁷

20 Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa ‘A brief analysis of the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women’ (2001) 1 *African Human Rights Law Journal* 53-63.

21 Kigali Draft (n 14) art 13.

22 Final Draft (n 20) art 11(4)(a).

23 Revised Final Draft CAB/LEG/66.6/Rev.1, 22 November 2001.

24 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts) para 86.

25 See clarifications under sec 4.1 below.

26 See the mark-up draft and the commentary by the Legal Counsel. On file with the author.

27 TM Makunya ‘Fostering a gendered approach to peacebuilding in the African Great Lakes Region: perspectives from the Democratic Republic of Congo’ (*Kujenga Amani*, 13 October 2021) <https://kujenga-amani.ssrc.org/2021/10/13/fostering-a-gendered-approach-to-peacebuilding-in-the-african-great-lakes-region-perspectives-from-the-democratic-republic-of-congo/> (accessed 28 February 2023).

On 28 March 2003, Ministers in charge of human rights adopted the Addis Ababa Draft, which considered comments made by the AUOLC and reservations by member states.²⁸ They separated concerns on women's rights during armed conflicts from those in peacetime and instituted a separate article 11 to cover the former aspects. Most importantly, the Addis Ababa Draft uses the concept of 'armed conflicts' and broadly extends the protection to women and children, specifically asylum seekers, refugees, returnees and internally displaced persons (IDPs).

The content of article 11 is a culmination of debates on the relevance of a women's rights protocol which started during a seminar in Lomé in 1995 all the way through to the adoption of the Maputo Protocol.²⁹ Article 11 systematises overt and covert attempts in earlier drafts to protect women during armed conflict. The final wording of the provision was influenced by normative, jurisprudential and political events at the continental and global levels, which had given much consideration to the plight of women during armed conflicts and reiterated humanity's quest to sanction those responsible for committing these crimes.³⁰

3 Linkages to other treaty provisions

The wording of article 11 builds on several existing IHRL and IHL treaties which aim to 'humanise' armed conflicts. As a provision in a 'Protocol to the African Charter' article 11 of the Maputo Protocol extends to armed conflicts the protection the African Charter already confers on women.³¹ Article 11 intersects with several articles of the Protocol and the Charter, which protect women's dignity, personal security, integrity, security, life, movement, participation and livelihoods during armed conflicts and enable them to access justice for war-related violations perpetrated against them. Any treatment of women during armed conflict should not undermine their dignity (article 3), life, integrity and security (article 4), which are essential in the realisation of many other rights during armed conflict situations. The African Commission and the African Court have adopted an approach protecting women's access to justice, including for violations committed during armed conflicts.³² They emphasise that amnesty laws – which tend to guarantee impunity for mass atrocities – should not impede victims of human rights violations' access to justice.³³ The African Commission further clarified in General Comment 5 the obligation not to deprive civilian populations of their right to movement unless for military necessity, not to forcibly displace people, and the obligation to allow IDPs to return to their homes.³⁴ The same applies to article 4 on the right to life. According to the African Commission,

28 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

29 Report of the Meeting of Experts (n 24) para 11.

30 See broadly C O'Rourke *Women's rights in armed conflict under international law* (2020) 6-7; C Eboe-Osuji *International law and sexual violence in armed conflicts* (2012) 145-149; A Barrow 'UN Security Council Resolutions 1325 and 1820: Constructing gender in armed conflict and international humanitarian law' (2010) 92(877) *International Review of the Red Cross* 228-232.

31 Article 18(3). For a review, see F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 18-21.

32 *Thomas Kwoyelo v Uganda*, Communication 431/12, African Commission on Human and Peoples' Rights, para 293; *Sébastien Germain Marie Aikoué Ajavon v Benin* (merits and reparation) (4 December 2020) 4 AfCLR 133, para 239.

33 *Kwoyelo* (n 32) para 293; *Ajavon* (n 32) para 239. See broadly SA Dersso 'Interrogating the status of amnesty provisions in situations of transition under the Banjul Charter: review of the recent jurisprudence of the African Commission on Human and Peoples' Rights' (2019) 3 *African Human Rights Yearbook* 383; TM Makunya 'The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin' in F Viljoen et al (eds) *A life interrupted: essays in honour of the lives and legacies of Christof Heyns* (2022) 483-484.

34 African Commission General Comment 5 on the African Charter on Human and Peoples' Rights: The right to freedom of movement and residence (art 12(1)), adopted during the 64th ordinary session of the African Commission on Human and Peoples' Rights (24 April-14 May 2019) para 20-23.

where military necessity does not require parties to an armed conflict to use lethal force in achieving a legitimate military objective against otherwise lawful targets, but allows the target for example to be captured rather than killed, the respect for the right to life can be best ensured by pursuing this option.³⁵

As technological advancements are prompting parties to conflicts to use autonomous weapons,³⁶ the link between article 4 of the African Charter and article 11 of the Protocol becomes clear, given that these weapons cannot be used to violate women's rights.

Beyond the normative link between article 11 and provisions of the African Charter, institutional quasi-judicial mechanisms that monitor the implementation of the Charter (article 62) and the Protocol (article 26)³⁷ and the African Court on Human and Peoples' Rights can ensure the enforcement of article 11.³⁸ In other words, and pending the entry into force of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), which institutes an international criminal law section within the to-be-established African Court of Justice and Human and Peoples' Rights,³⁹ behaviours of states and their agents during armed conflict in Africa can also be scrutinised and sanctioned by African human rights mechanisms.⁴⁰

The combination of article 11 with other provisions of the Protocol strengthens the protection of women during armed conflict.⁴¹ Four specific provisions need to be highlighted due, on the one hand, to their historical tie with article 11 and, on the other, to the need for considering intersectionality when protecting women during armed conflict. The observance of article 10 can shield women against most harms occurring to them during armed conflicts if they are allowed to partake in 'processes for conflict prevention, management and resolution' at all levels and can allow states to swiftly respond to those harms after the conflict.⁴² Measures adopted under article 10(2)(c) and 10(2)(d) can facilitate the implementation of article 11(3) as the participation of refugees and asylum-seeking women can help the state to understand how they can be better protected. The vulnerability of women in armed conflict is reinforced on account of being elderly, with disabilities or in distress, but states can minimise adverse effects by implementing their obligations under articles 22, 23 and 24 of the Protocol in times of peace.

The African Children's Charter, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) and the OAU Convention Governing the

35 African Commission General Comment 3 on the African Charter on Human and Peoples' Rights: the right to life (art 4), adopted during the 57th ordinary session of the African Commission held in Banjul, The Gambia from 4-18 November 2015, para 34.

36 C Heyns 'Autonomous weapons in armed conflict and the right to a dignified life: an African perspective' (2017) 33(1) *South African Journal on Human Rights* 48. Autonomous weapons are weapons that do not require human intervention to attack the targets for which they have been programmed.

37 On reporting, see A Johnson 'Barriers to fulfilling reporting obligations in Africa under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2021) 21 *African Human Rights Law Journal* 176.

38 On an evaluative review of the application of the Protocol by the African Court see BK Kombo 'Silences that speak volumes: the significance of the African Court decision in *APDF and IHRDA v Mali* for women's human rights on the continent' (2019) 3 *African Human Rights Yearbook* 389-413.

39 A Sylla 'Les réformes du système judiciaire de l'Union africaine: enjeux juridico-institutionnels sur la Cour africaine des droits de l'homme et des peuples' (2022) 6 *Annuaire africain des droits de l'homme* 219-225.

40 See eg *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) paras 86-87. For a commentary, JM Abelungu & EA Cirimwami 'Le système africain de protection des droits de l'homme et le droit international humanitaire' (2018) 2 *Annuaire africain des droits de l'homme* 9-10.

41 Article 2 (elimination of discrimination against women), art 3 (right to dignity), art 4 (the rights to life, integrity and security of person), art 5 (elimination of harmful practices), art 8 (access to justice and equal protection before the law), art 10 (right to peace), art 15 (right to food security), art 18 (right to a healthy and sustainable environment), art 19 (right to sustainable development) and art 25 (right to remedies).

42 See also Concluding Observations on the 6th Periodic Report of Namibia of the Committee on the Elimination of Discrimination against Women CEDAW/C/NAM/CO/6 (12 July 2022) para 34.

Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) all augment the protection provided for under article 11(4) and 11(3) respectively. Article 22(2) of the African Children's Charter and article 11(4) of the Protocol prohibit participation of the girl-child in hostilities and obligate states to adopt appropriate measures to prevent such participation. The African Children's Charter adopts a broader approach by covering children, including girls, 'affected by armed conflicts' – which are individuals not participating in hostilities – and tension and strife situations.⁴³ Interestingly, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) explains that a child rights-based approach should guide the understanding and application of article 22, which dictates that child rights considerations trump military necessities and objectives, so that 'children benefit from the highest protection possible'.⁴⁴ Some international human rights treaties do not offer such a high standard of protection.

Indeed, the CRC offers a lower protection to women and children during armed conflicts in comparison to article 11(4) of the Protocol and article 22(2) of the African Children's Charter. First, article 38(2) of the CRC obligates states to take 'feasible measures,' which denotes an obligation of means and not an obligation of result, evidenced by the wording 'necessary measures' under the Protocol and the Children's Charter. Second, the age is raised to 18 as compared to the 15-year age threshold under the CRC. While the age threshold seems to have been corrected under the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict,⁴⁵ it permits 'voluntary recruitment',⁴⁶ thus clawing back the semblance of progress it is meant to bring. Third, the Committee has clarified that article 22 prohibits any forms of participation of children (direct and indirect) in armed conflicts.⁴⁷ An interpretation that the wording 'direct part in hostilities' under the Charter and the Protocol permits indirect participation is therefore absurd.

A unique feature of article 11 is that it refers specifically to IHL while its substance remains closely linked to other branches of public international law, namely: international refugee law (IRL) and international criminal law (ICL). A number of provisions of the four Geneva Conventions on the laws of war and their additional protocols, as well as rules of customary IHL apply alongside IHRL to protect women during armed conflicts.⁴⁸ In line with article 11(1), the following categories of women are protected: wounded and sick,⁴⁹ pregnant women,⁵⁰ women deprived of liberty,⁵¹ prisoners of war⁵² and mothers with children under seven years.⁵³ This protection raises the age-old debate over

43 Article 22.

44 General Comment 6 on Article 22 of the African Charter on the Rights and Welfare of the Child on Children in Situations of Conflict adopted by the African Committee of Experts on the Rights and Welfare of the Child during the 35th ordinary session (September 2020) para 13.

45 Article 18 of the 2000/2002 Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (Optional Protocol on Children in Armed Conflict).

46 Optional Protocol on Children in Armed Conflict (n 45) art 3.

47 General Comment 6 (n 44) para 47.

48 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, arts 27(2), 76, 124 & 132.

49 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of War of 12 August 1949, art 12(4); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, art 12(4).

50 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, art 6(4).

51 Geneva Convention IV (n 48) art 85(4); art 75(5) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977; art 5(2)(a) of Protocol Additional II.

52 Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, art 14(2).

53 Geneva Convention IV (n 48) art 38(5). See M Sassòli *International humanitarian law: rules, controversies, and solutions to problems arising in welfare* (2019) 281-283.

the application of IHL and IHRL during armed conflict.⁵⁴ Human rights special mechanisms have generally adopted a complementarity approach by giving pre-eminence to rules that better protect women or children, given that, as highlighted above, IHL may permit violations which are justified by military necessities and objectives.⁵⁵ Article 11(3) raises questions of accountability for women's rights violations during armed conflict. As such, ICL, as a branch of public international law which defines serious crimes and procedures applicable before international criminal courts and tribunals is relevant for the understanding of article 11(3). ICL attaches particular attention to the prosecution of individuals with the highest responsibility in war crimes, crimes against humanity and genocide, some of which can derive from, among others, rape and other forms of sexual exploitation provided for under article 11(3) of the Protocol. ICL also determines the modalities of criminal responsibility. The Rome Statute, ratified by 33 African states (of which 28 have also ratified the Protocol),⁵⁶ provides for three modes of criminal responsibility: individual,⁵⁷ responsibility of commanders, and responsibility of other superiors.⁵⁸ Interestingly, and unlike the Malabo Protocol,⁵⁹ the official capacity of the perpetrator of the crime is irrelevant to their prosecution by the International Criminal Court (ICC).⁶⁰ Consequently, the ICC can prosecute crimes prohibited under article 11(3).

4 Concepts and definitions

Article 11 refers to a number of different concepts such as: 'armed conflict', 'rape', 'other forms of exploitation', 'war crimes', 'crimes against humanity', 'genocide'; 'child participation in hostilities', 'asylum seekers', 'refugees', 'returnees' and 'internally displaced persons'. As discussed above, different branches of international law are relevant to the conceptualisation of the rights in article 11. In fact, some of these concepts are borrowed directly from IHL, ICL or IRL. These different fields of international law may differ in their definition of these concepts. Therefore, it is of importance to clarify how these fields of law intersect under article 11 for the optimal implementation of its provisions.⁶¹ In the following sections, a discussion of the meaning of these concepts is presented. This analysis highlights how these concepts have been interpreted by human rights monitoring bodies and international (criminal) courts and tribunals.

4.1 Armed conflict

Armed conflict means the 'resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state'.⁶² This definition captures the traditional notion of 'war' – armed conflict that opposes two primary subjects

54 M Sassoli, AA Bouvier & A Quintin *How does law protect in war? Cases, documents and teaching materials on contemporary practice in international humanitarian law* (2011) (Chapter 14, 1).

55 General Comment 6 (n 44) para 10.

56 Senegal, Ghana, Mali, Lesotho, Sierra Leone, Uganda, Gabon, South Africa, Nigeria, Benin, Mauritius, DRC, Namibia, Gambia, Tanzania, Malawi, Djibouti, Zambia, Guinea, Burkina Faso, Congo, Liberia, Kenya, Comoros, Seychelles, Tunisia, Cape Verde and Côte d'Ivoire.

57 Art 25 of the Rome Statute.

58 Art 28 of the Rome Statute.

59 D Tladi 'Immunities (Article 46A*bis*)' in G Werle & M Vormbaum (eds) *The African Criminal Court: a commentary on the Malabo Protocol* (2017) 205-208.

60 Art 27 of the Rome Statute.

61 UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations, 18 October 2013, CEDAW/C/GC/30, para 12(a) (CEDAW Committee General Recommendation 30).

62 *The Prosecutor v Dusko Tadic* (Decision on the Defence Motion for interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, para 70.

of public international law, or high contracting parties as per the Geneva Conventions – and civil wars, which pit state armed forces against non-state armed groups or the latter among themselves.⁶³

Armed conflicts differ from internal tension, sporadic terrorist attacks, disturbances such as riots, isolated acts of violence or mass arrests of individuals because the level of violence required in armed conflicts must be higher than in other conflicts. Moreover, an armed conflict presupposes the existence of organised armed groups.⁶⁴ These groups should be able to engage in hostilities.⁶⁵ As distinguished by the International Committee of the Red Cross (ICRC), internal disturbances and tensions are ‘situations in which there ... exists a confrontation within a country, which is characterised by a certain seriousness or duration and which involves acts of violence’.⁶⁶ They fall under domestic law enforcement operations guided by domestic law and IHRL, not IHL.⁶⁷ Demarcating violent internal disturbances from armed conflict can sometimes require close scrutiny of facts and present parties.⁶⁸

IHL distinguishes between non-international armed conflict and international armed conflict. However, article 11 of the Maputo Protocol does not distinguish between these two types of armed conflict, thus supporting an emerging scholarly movement that disregards such a distinction as far as the protection of human rights and civilian population in armed conflict is concerned.⁶⁹

International armed conflict is understood as armed hostilities between two or more states, including situations of territorial occupation of one state by another;⁷⁰ while a non-international armed conflict involves the army or national law enforcement forces against organised non-state armed groups, or the latter among themselves.⁷¹ A non-international armed conflict can evolve into or co-exist with an international armed conflict when another state directly intervenes in the conflict, or any of the parties in the internal conflict are agents of another state which exercises ‘overall control’ over them.⁷² For an intervening state to be said to exercise overall control, it must be able to participate in the organisation, coordination, planning of military operations as well as the provision of financial support, training and equipment to the armed group.⁷³ Whatever the nature of the conflict, belligerents must abide by the obligation deriving from article 11 of the Protocol and IHL instruments, including customary IHL. In situations of occupation of a territory, obligations deriving from article 11 and other human rights instruments apply extraterritorially.⁷⁴

63 Sassoli, Bouvier & Quintin (n 54) 22.

64 *Juan Carlos Abella v Argentina* (Inter-American Commission (1997) para 152.

65 E David ‘La notion de conflit en droit international’ in J Belin, S-Y Laurent & A-M Tournepiche (dirs) *La conflictualité armée: Approches interdisciplinaires* (2021) 34.

66 *Abella* (n 64) para 149.

67 CEDAW Committee General Recommendation 30 (n 61) para 4.

68 *Abella* (n 64) para 153.

69 The African Commission does not distinguish between the two conflicts. See *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003).

70 Situation in the Democratic Republic of the Congo, in the case of *the Prosecutor v Thomas Lubanga Dyil*, ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012, para 541.

71 David (n 65) 36.

72 *Lubanga* (n 70) 541. The ‘effective control’ test applies in matters of international responsibility of states for internationally unlawful actions. See *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ, Reports 1986, para 115.

73 *Lubanga* (n 70) 541.

74 CEDAW Committee General Recommendation 30 (n 61) paras 8-9.

As the bulk of conflicts on the African continent are often of a non-international character but with armed forces of other states participating either unlawfully or by invitation⁷⁵ or as part of sub-regional organisations' collective security efforts, there is a need for the African Commission to provide conceptual clarity on and understand the nature of armed conflict in various countries. Furthermore, given that Africa harbours numerous peacekeeping operations⁷⁶ and although peacekeeping forces are not combatants (unless the UN Security Council sanctions the use of force to impose peace), the definition of the nature of their involvement is equally imperative. This is particularly important if they, too, are alleged to have committed violations of women's rights, such as rape and other forms of sexual exploitation.⁷⁷

4.2 Rape and other forms of sexual exploitation

Rape remains the most common violation against women during armed conflict and can result from or lead to other forms of sexual exploitation/enslavement like forced prostitution, pregnancy and sterilisation.⁷⁸ IHL prohibits rape irrespective of the nature of the conflict, while ICL determines individual criminal responsibility for those that commit it, whether as foot soldiers, military commanders or superiors.⁷⁹

Rape and other forms of sexual exploitation have been recognised as war crimes, crimes against humanity or genocide.⁸⁰ The prohibition of rape has acquired the status of customary IHL, thus generating an *erga omnes* obligation binding on all actors involved in armed conflicts, including non-state armed groups.⁸¹

Under IHRL, rape has also been recognised as torture, cruel and degrading treatment and a violation of a person's dignity.⁸² This recognition cements the protection already offered under IHL. Domestic criminal and international courts have provided various definitions of rape, which include a coercive, forced or threatened act of non-consensual or involuntary sexual intercourse with a victim, whether female or male. The Trial Chamber of the ICTY defined rape in *Prosecutor v Furundzija* as an act 'accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression'.⁸³ In *Akayesu*, the ICTR added that the commission of rape could include 'the insertion of objects and/or the use of bodily

75 L Visser 'Intervention by invitation and collective self-defence: two sides of the same coin?' (2020) 7(2) *Journal on the Use of Force and International Law* 292-316; E de Wet 'Modern practice of intervention by invitation in Africa and its implications for the prohibition of the use of force' (2015) 26(4) *European Journal of International Law* 979-998.

76 LM Howard 'UN peacekeeping in Africa is working better than you might think' 27 May 2022 *The Conversation* <https://theconversation.com/un-peacekeeping-in-africa-is-working-better-than-you-might-think-183748> (accessed 28 February 2023).

77 S Timmermans 'Sexual exploitation and abuse by peacekeepers in Central African Republic: applying international humanitarian law to MINUSCA' 6 September 2022 *Volkerrechtsblog* <https://voelkerrechtsblog.org/sexual-exploitation-and-abuse-by-peacekeepers-in-the-central-african-republic/> (accessed 28 February 2023).

78 CEDAW Committee General Recommendation 30 (n 61) para 23; art 7(2)(f) of the Rome Statute.

79 Geneva Convention IV (n 48) art 27; Protocol Additional I (n 51) art 76(1), Protocol Additional II (n 51) art 4(2)(e).

80 G Gaggioli 'Sexual violence in armed conflicts: a violation of international humanitarian law and human rights law' (2014) 96(894) *International Review of the Red Cross* 530-531.

81 Rule 93 of customary IHL, J-M Henckaerts & L Doswald-Beck *Customary international humanitarian law: rules* (2009) 323-327.

82 African Commission General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), adopted during the 21st extraordinary session of the African Commission, held in Banjul The Gambia, from 22 October to 5 November 2013, para 57 (African Commission General Comment 4).

83 *The Prosecutor v Anto Furundzija* (Trial judgment), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, para 174.

orifices not considered to be intrinsically sexual' while adding that rape was a form of aggression, the understanding of which goes beyond a mere description of 'objects and body parts'.⁸⁴ Rape can also be perpetrated against female or male soldiers present within the same armed group as the perpetrator.⁸⁵

While genocide and crimes against humanity can be committed in times of peace and war, war crimes occur in situations of armed conflict only. When a situation does not qualify as armed conflict, rape and other forms of sexual exploitation can fall into three categories. They can be crimes against humanity when committed as part of widespread and systematic attacks against the civilian population; genocide when committed as part of 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group', or violations of national law during law enforcement operations. At first glance, therefore, the Maputo Protocol would not have included genocide and crimes against humanity in a provision protecting women during armed conflict. However, the inclusion of these two crimes in article 11 was intended to widen the scope of protection for women, as some violations committed during armed conflict may not be directly related to the said conflict.⁸⁶ The African Children's Committee is emphatic that IHL may oftentimes offer lower protection when military actions targeting certain categories of civilian populations are proportionate to the expected advantage.⁸⁷ An approach favourable to women's rights should thus trump military necessities during armed conflicts.

4.3 The participation of girls in hostilities

The participation of girls in hostilities refers to the act of recruiting girls into regular armed forces or groups, whether as active participants in hostilities or to perform other military activities. While a girl may be affected by armed conflicts in the same way as any other civilian, the specific act of recruitment is one of the worst forms of violation of their rights during armed conflicts. It exposes them to several other harms that violate their fundamental rights, such as sexual violence and enslavement, torture, inhumane and degrading treatment and acts which are against their physical and psychological well-being.⁸⁸

Recruitment covers both conscription and enlistment. Conscription refers to forced recruitment, while enlistment is voluntary.⁸⁹ The ICC has held that both forms of recruitment are prohibited under customary international law and that this violation is continuous and only ends when the recruited children reach the age of majority or leave the armed forces or groups.⁹⁰ It should be noted that the 'three alternatives' used under the Rome Statute, 'enlisting', 'conscripting' and 'use' of children are separate offences. In other words, it would still be an offence if a girl were enlisted or conscripted for tasks other than active participation in hostilities. These three alternatives are relevant to the understanding of girls' participation under the Maputo Protocol which, read together with the African Children's Charter, adopts the best interest of the child's approach.⁹¹ The main purpose of preventing all child participation in armed conflict, according to the ICC, is to protect them,

84 *Akayesu* (n 17) paras 596-597.

85 *The Prosecutor v Bosco Ntaganda* (ICC, 30 March 2021) para 332.

86 African Committee General Comment 6 (n 44) para 13.

87 African Committee General Comment 6 (n 44) paras 13 & 19.

88 *Lubanga* (n 70) para 606.

89 *Lubanga* (n 70) para 607.

90 *Lubanga* (n 70) para 618.

91 African Committee General Comment 6 (n 44) para 27. In *Lubanga*, the ICC held that 'the interpretation of the Rome Statute must take account of internationally recognised human rights norms' which can include the Committee's General Comment. See *Lubanga* (n 70) para 602.

from the risks that are associated with armed conflict, and first and foremost they are directed at securing their physical and psychological well-being. This includes not only protection from violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment (including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear).⁹²

The Protocol offers greater protection than the Rome Statute because it sets the threshold age of the girl at 18 years and specifically prohibits the conscription, enlistment, and use of girls in armed conflict. This combined use of the three terms affords a higher level of protection, given the difficulty of demarcating between conscription and enlistment in practice and the near-impossible task of ascertaining informed consent when it comes to recruitment. Oftentimes, children join armed forces or groups in order to survive during conflict, to defend their ethnic group or to vindicate the death of their loved ones.⁹³ Most international criminal jurisdictions discount the ‘consent’ of the child as an element of defence, given that the purpose of the provision is to protect children due to their vulnerability ‘including when they lack information or alternatives’.⁹⁴

4.4 Asylum seekers, refugees, returnees and internally displaced persons

The OAU Refugee Convention replicates the definition of ‘refugee’ provided under the 1951 UN Convention related to the Status of Refugees (1951 Convention) and expands it to consider African specificities. The OAU Convention defines a refugee as,

every person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁹⁵

It adds, under article 1(2), situations of ‘external aggression, occupation, foreign domination or events seriously disturbing public order’ as grounds for seeking refuge.

An asylum seeker is a person whose request for refugee status is being or has not been processed.⁹⁶ A returnee is a refugee who has returned to their country of origin. An IDP is one who is forced to leave their place of habitual dwelling due to armed conflict situations, violence or human rights violations, or natural catastrophes, among others, but unlike a refugee, has not ‘crossed an internationally recognised state border’.⁹⁷

There are additional categories of women who stand to benefit from the Maputo Protocol’s protection in the context of armed conflict. These women are, *inter alia*, stateless women, those whose refugee status has been rejected, women awaiting an asylum seeker’s permit or women who recently arrived in the territory of the host country. Although the wording of article 11(3) of the Protocol does not explicitly protect women unlawfully present in the territory of another country, it cannot be said that violations of their rights during armed conflict are lawful.

92 *Lubanga* (n 70) para 605.

93 *Lubanga* (n 70) paras 611-613.

94 *Lubanga* (n 70) para 617.

95 Article 1(1) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.

96 Refugees Act 130 of 1998, sec 19(v).

97 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 2009/2012, art 1(k).

The African Commission has generally extended the protection of the Charter to persons unlawfully present in the territory of a member state to the African Charter. It has done this in order to ensure that domestic legislation does not bifurcate protection of the law on nationality grounds.⁹⁸ In General Recommendation 30, the CEDAW Committee is also emphatic that protection in conflict situations should be extended to citizens and non-citizens alike, both on the national territory and on the territory over which states exercise effective control.⁹⁹

5 Nature and scope of state obligations

Article 11 of the Protocol, related to provisions under treaty and customary IHL and the African Children's Charter, impose several obligations on states and non-state actors, including armed groups, to adequately protect women in situations of armed conflict. In this section, the nature and scope of the different obligations deriving from IHL are unpacked, given the complementarity reading that derives from article 11(1).

5.1 Obligations deriving under IHL

Article 11(1) is anchored in customary international law imposing obligations on each state, whether or not a party to the four Geneva Conventions.¹⁰⁰ The International Court of Justice (ICJ) has ruled that the obligation to 'respect' and 'ensure respect' 'does not derive only from the Geneva Conventions themselves but from the general principles of humanitarian law to which the Conventions merely give specific expression'.¹⁰¹ In the *Advisory Opinion on the Legal Consequences of the construction of a wall in the occupied Palestinian territory*, the ICJ argued that 'every state party to that Convention [Geneva], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with'.¹⁰²

Article 11(1) remains open-ended in its reference to IHL and does not indicate the measures to be taken for its implementation.¹⁰³ However, these measures must meet the criterion of legality under international law, as well as the criterion of effectiveness, to meet the victims' needs.¹⁰⁴ With regard to the obligation to 'respect' parties must ensure the application of IHL at the national level through various measures. These include awareness-raising through training of the military and other key actors, training in IHL by cooperating with IHL specialised institutions like the ICRC, adopting regulatory and legislative frameworks, and creating national IHL commissions. State may also establish national human rights commissions with the power to investigate and report on violations of human rights and IHL.¹⁰⁵ With regard to the obligation to 'ensure respect' for IHL, the widely prevailing view – as evidenced in the ICRC's commentary and by state practice within UN bodies, including the Security Council and the General Assembly – is that states must act to bring another

98 African Commission General Comment 5 (n 34) para 9.

99 CEDAW Committee General Recommendation 30 (n 45) para 5.

100 JM Abelungu 'Le droit international humanitaire et la protection des enfants en situations de conflits armés: Étude de cas de la République démocratique du Congo', Doctoral Thesis, Ghent University (2017) 136.

101 *Nicaragua* (n 72) para 220; F Shaygan *La compatibilité des sanctions économiques du Conseil de sécurité avec les droits de l'homme et le droit international humanitaire* (2008) 71.

102 *Legal Consequences of the construction of a wall in the occupied Palestinian territory*, Advisory Opinion, ICJ (Reports 2004) para 158.

103 CICR 'Protection des victimes de la guerre' Préparation de la Réunion du Groupe d'experts intergouvernemental pour la protection des victimes de la guerre, Genève 23-27 janvier 1995, Suggestions du CICR, Genève, avril 1994, 809 CICR (septembre-octobre 1994) 478.

104 CICR (n 103) 478.

105 African Committee General Comment 6 (n 44) paras 48 and 50. See broadly, HP Gasser *Le droit international humanitaire: introduction* (1993) 88-89; M Deyra *Le droit dans la guerre* (2009) 163; R Remacle 'La conduite des opérations militaires au regard du droit des conflits armés' (2001) *Actualité du Droit international humanitaire* 34 & 36.

state to comply with its commitments under the Geneva Convention in the event of a violation.¹⁰⁶ The African Union Constitutive Act codified this obligation in the form of a responsibility to protect under article 4(h) by allowing AU intervention in a member state that is committing war crimes, genocide and crimes against humanity.¹⁰⁷ Other approaches may be adopted at the bilateral or multilateral level, regional or universal, to comply with this obligation, including through discrete steps or protests, public denunciations, diplomatic pressure, coercive measures and retaliatory measures.¹⁰⁸ In addition, states must refrain from encouraging, aiding or assisting any other party to violate IHL.¹⁰⁹ Each of the obligations to respect or ensure respect involves both positive and negative obligations.

During armed conflicts, states have an obligation to treat women ‘with all due regard for their sex’.¹¹⁰ Treating women with all due regard for their sex implies ensuring that the parties have both a defined approach and the capacity to respond to the specific needs of women when they are wounded or ill. It is difficult to provide a general definition of the term ‘due regard for their sex’. According to the ICRC’s 1960 commentary on article 14(2) of Additional Protocol 1 to the Geneva Conventions (Additional Protocol 1), three elements were noted: weakness, honour and modesty, and pregnancy and childbirth.¹¹¹ These references clearly reflect a patriarchal view of women’s protection during armed conflict.¹¹² Some authors have argued that the concept of ‘weakness’ should be replaced by ‘physiological specificity’.¹¹³ The commentary on article 14(2) of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), taking into account international social and legal developments on the issue of gender equality, stipulates that the (special) ‘consideration’ due to women must be understood as a recognition that women have a distinct set of needs and may face physical and psychological risks peculiar to the female sex.¹¹⁴ Thus, article 27(2) of the Geneva Convention IV, echoed in article 76(1) of Additional Protocol 1, states that ‘women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault’.¹¹⁵ The protection offered is general in scope, covering all women in the territory of the parties to the conflict, both those affected by the armed conflict and other women protected or not by Geneva Convention IV.¹¹⁶ In the context of a non-international armed conflict, without expressly referring to ‘women’, article 4(2)(a)-(e) of the Additional Protocol 2 to the Geneva Conventions prohibits (sexual) mutilation, outrages upon personal dignity, including rape, enforced prostitution and any form of indecent assault among others. Thus, differential or more favourable treatment of women is automatically included even where it has not been expressly stated.¹¹⁷

106 F Dubuisson ‘Les obligations internationales de l’Union européenne et de ses États membres concernant les relations économiques avec les colonies israéliennes’ (2013) 2 *Revue belge de droit international* 428-432.

107 D Kuwali ‘Article 4(h), the responsibility to protect and the protection of civilians’ in D Kuwali & F Viljoen (eds) *By all means necessary: protecting civilians and preventing mass atrocities in Africa* (2017) 22-27.

108 M Veuthey ‘L’Union européenne et l’obligation de faire respecter le droit international humanitaire’ in A-S Millet-Devalle (dir) *L’Union européenne et le droit international humanitaire* (2010) 196-197.

109 Abelungu (n 100) 51; Dubuisson (n 106) 432-433.

110 Article 12(4) of GC I, art 12(4) of GC II and art 14(2) of GC III, although not applicable in the context of Article 11, reiterate this principle.

111 Commentaire de 1960 de l’art 14 de la CG III, para 157, <https://ihl-databases.icrc.org/applic/ihl/dih.nsf/Comment.xsp?action=openDocument&documentId=15B0A210CC8FAA3DC12563BD002CB545> (accessed 23 June 2023).

112 M-L Helbert-Dolbec ‘Femmes en guerre: Les conventions de Genève de 1949 et leurs Protocoles additionnels de 1977’ in D Bernard (dir) *Codes commentés 2020: droits des femmes* (2020) 365-367.

113 F Krill ‘La protection de la femme dans le droit international humanitaire’ (1985) 756 *Revue Internationale de la Croix-Rouge* 346.

114 2020 Commentary on art 14(2) of the Convention (IV) relative to the treatment of prisoners of war. Geneva, 12 August 1949, para 1682, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=752A4FC9875177D2C12585850043E743> (accessed 28 February 2023).

115 Geneva Convention IV (n 48) art 27(2) and Protocol Additional I (n 51) art 76(1).

116 M Deyra *Le droit dans la guerre* (2009) 154.

117 Krill (n 113) 346.

States must refrain from specifically targeting women during armed attacks. Article 8 of Additional Protocol I is emphatic that women in childbirth¹¹⁸ and pregnant women¹¹⁹ are entitled to preferential or more favourable treatment. This treatment also applies to nursing mothers or mothers of children under the age of seven or infants.¹²⁰ For example, it is the responsibility of the parties to the conflict to establish in their own territories or in occupied territories, health and safety zones and localities in order to protect these categories of women from the effects of war.¹²¹ Local arrangements may be made for their evacuation from a besieged or encircled area.¹²² Each state party shall permit the free passage of all shipments of essential foodstuffs, clothing and medicine for their benefit.¹²³ Essential foodstuffs refer to basic foodstuffs necessary for the health and normal physical and psychological development of these women.¹²⁴ The right to free passage of essential foodstuffs reiterated under article 70(1) of Protocol Additional I is also enshrined in customary IHL.¹²⁵

In order to protect this category of women from the effects of war, health zones and localities must be organised sustainably outside the zone of hostilities to protect the wounded and sick (soldiers and civilians) from long-range weapons and bombings.¹²⁶ Security zones and localities are used to secure civilians whose vulnerability requires special protection, such as pregnant women.¹²⁷ These zones differ from neutral zones. The latter is of a temporary nature, created not outside the combat zone but within it to shelter a large number of people (wounded and sick soldiers and civilians, the entire civilian population outside the hostilities in this region) from military operations.¹²⁸ The provisions establishing these zones and localities are flexible enough to leave room for various possible combinations.¹²⁹ However, the establishment of health and safety zones and localities is not formally required. Article 14 of Geneva Convention IV indicates that it is optional. Clearly though, drafters of the Geneva Conventions wanted to emphasise the humanitarian importance of such a system and to advocate its practical adoption.¹³⁰ Their 'legal existence' at the international level and their 'conventional protection' depend on their recognition by the other party. Hence the importance of an agreement between the parties recognising these zones.¹³¹ Viewed from a women's rights and child rights-based perspective, establishing these zones is part of the obligation to protect civilian populations and adopt all necessary measures to prevent child participation under the Protocol and the African Children's Charter.

118 See, eg, Geneva Convention IV (n 48) arts 17, 18(1), 21(1), 22(1) and 23(1) and Protocol Additional I (n 51) art 70(1).

119 See, eg, Geneva Convention IV (n 48) secs 14(1), 16(1), 23(1), 38(5), Protocol Additional I (n 51) arts 70(1) and Additional II (n 51) arts 76(2-3) & 6(4).

120 See, eg, Geneva Convention IV (n 48) secs 14(1), 38(5); Protocol Additional I (n 51) secs 70(1), 76(2-3) and Protocol Additional II (n 51) sec 6(4).

121 See Geneva Convention IV (n 48) art 14(1). It is therefore important to extend this protection to other categories not expressly listed.

122 Geneva Convention IV (n 48) art 17. It is important not to limit ourselves only to women in childbirth, expressly mentioned.

123 Geneva Convention IV (n 48) art 23(1). This provision is not limited to pregnant women or women in childbirth.

124 J Pictet (dir) *Commentaire de la Convention de Genève relative à la protection des personnes civiles en temps de guerre* Vol IV (1956) 194.

125 Henckaerts & Doswald-Beck (n 81) 258-267 (Rule 55); S Perrakis 'Le droit international humanitaire et ses relations avec les droits de l'homme: Quelques considérations' in P Tavernier & J-M Henckaerts (dirs) *Droit international humanitaire coutumier: enjeux et défis contemporains* (2008) 135.

126 Pictet (n 124) 130.

127 Pictet (n 124) 129.

128 Pictet (n 124) 130.

129 Pictet (n 124) 135.

130 Pictet (n 124) 134. See also Y Sandoz 'La notion de protection dans le droit international humanitaire et au sein du Mouvement de la Croix-Rouge' in C Swinarski (dir) *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean* (1984) 978.

131 Pictet (n 124) 137.

5.2 Obligations deriving from IHRL

Regarding girls, articles 11 of the Protocol and 22 of the African Children's Charter, read through a 'child-rights-focused and child-centred lens' impose several obligations states must comply with. These obligations have been further developed in the Committee's General Comment on article 22 without equivocation. States have an immediate obligation to refrain from violating the rights of children. Any violations should be legal, necessary, legitimate and proportional to the aim sought pursuant to the Charter.¹³² The obligation to respect requires states and non-state armed forces to refrain from recruiting and using boys and girls under the age of 18.¹³³ Besides, they must prevent the violation of article 22 and relevant IHL norms, adopt measures to ensure individuals comply with IHL and IHRL norms, ensure accountability and offer redress for victims.¹³⁴ States that provide assistance to other states or non-state armed groups that conscript, enlist and use girls violate article 11(4) of the Protocol and 22 of the African Children's Charter. This obligation is imposed on all states, whether they are part of the conflict or not.¹³⁵

5.3 The obligation to prosecute

States must prosecute or ensure (and not impede) the prosecution of those who commit acts prohibited under article 11(3) of the Protocol. They should refrain from providing blanket amnesties as part of peacebuilding or transitional justice processes, given victims' rights to access to justice. The four Geneva Conventions reiterate the obligation to prosecute individuals who have committed violations of IHL rules¹³⁶ and have been relied on by human rights mechanisms and international courts to combat impunity of mass atrocities.¹³⁷

Individuals alleged to have committed these crimes should be prosecuted by states irrespective of their nationalities and place of origin based on universal criminal jurisdiction. It goes without saying that states must demonstrate in their reports whether they have conferred universal jurisdictions to their military and/or civil courts and tribunals to combat impunity of those atrocities which, although they were not committed on their territories, have caused harm to the entire humanity.

ICRC Rule 157 of customary IHL reiterates this obligation concerning war crimes perpetrated during international and non-international armed conflict.¹³⁸ States may add to this genocide and crimes against humanity.¹³⁹ Oftentimes, states commit to prosecuting their agents (both military and civilian) who have allegedly perpetrated egregious human rights violations.¹⁴⁰ However, for political and other legal reasons, they fail to establish mechanisms to see to it that their obligations are complied with. It thus behoves human rights monitoring bodies to go beyond mere promises and assess steps that states have taken in this regard.

132 African Committee General Comment 6 (n 44) para 46.

133 African Committee General Comment 6 (n 44) para 47.

134 African Committee General Comment 6 (n 44) para 48.

135 African Committee General Comment 6 (n 44) para 51.

136 Geneva Convention I (n 49) art 49; Geneva Convention II (n 49) art 50(2); Geneva Convention III (n 52) art 129 and Geneva Convention IV (48) art 146.

137 *DRC v Burundi* (n 69) paras 79-82.

138 Henckaerts & Doswald-Beck (n 81) 604.

139 Article 91 of Act 13/011-B of 11 April 2013 on the Organisation, Functioning and Competences of Judicial Courts & Act 024/2002 of 18 November 2002, The Military Penal Code – Title V of the Democratic Republic of Congo.

140 *Armed activities on the territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ (Reports 2005) para 234.

While post-conflict countries may lack the capacity to prosecute perpetrators of serious crimes or may fear that prosecution might jeopardise fragile peace processes, cooperation with the ICC is key to ensuring the accountability gap is filled. This cooperation may extend to the UN Security Council and the African Union, which can help states to set up international, mixed or hybrid criminal courts or chambers in matters pertaining to violations of rights during armed conflicts, including violations of women's rights.¹⁴¹

The obligation to prosecute extends to non-state actors, including armed groups and can be implemented by ensuring that states do not enter into peace deals which guarantee impunity for women's rights violations. They must arrest and prosecute former and current warlords found on their territory or extradite them to countries that are willing to do so.

A state need not experience armed conflict on its territory in order to be bound by article 11. It may be bound through the actions of its soldiers on the territory of another state. The obligations imposed by article 11 extend to soldiers participating in peacekeeping or peace-imposing missions or those involved in military interventions by invitation. Agreements between the host state and states contributing troops (Status of Forces Agreements) under the United Nations, the African Union or sub-regional peacekeeping missions generally exempt these soldiers from prosecution by host state courts.¹⁴² However, their state of origin must prosecute them before its own domestic courts and/or establish special courts for that purpose. Pursuant to article 26 of the Protocol, the African Commission must thus scrutinise whether states that contribute troops to military operations outside their territories have established adequate mechanisms to prevent and respond to alleged violations of women's rights by their troops.

6 Implementation

This section presents an analysis of the implementation of article 11 as it emerges from the practice of states and the African Commission. As a point of departure, although article 11 imposes obligations on all the state parties to the Protocol, their practice depends on whether they experience or are affected by conflicts directly or indirectly or whether they participate in military activities as part of continental collective security initiatives. Expressed differently, a state on whose territory armed conflicts occur or have occurred has a heavy burden to implement obligations deriving from article 11 compared to those with no armed conflict on their territories. Similarly, a state that contributes troops to military operations must demonstrate that the troops are adequately trained and that its legal framework is robust enough to safeguard against violation of IHL and IHRL during armed conflicts. Understanding this is crucial for the African Commission and actors involved in improving the lived realities of women in Africa because it can help them identify states requiring an in-depth dialogue pursuant to article 11.

Furthermore, unlike article 22 of the African Children's Charter, which has been interpreted to cover situations other than armed conflicts, measures adopted within the framework of article 11 must be limited to improving the living conditions of women during armed conflict. Measures taken under article 11 must demonstrate how they protect women during armed conflict. Such measures must further be viewed in light of states' broader obligations under international humanitarian, human rights, and criminal law, as described under 5 above.

141 Agreement between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System <https://www.jstor.org/stable/48581907?seq=3> (accessed 6 May 2023).

142 *United Nations Mission in Democratic Republic of Congo (MONUC) Status of Forces Agreement (SOFA)* (8 March 2000). See broadly M Forteau, A Miron & A Pellet *Droit international public* (2022) 721.

6.1 African Commission

Article 11 of the Protocol has been implemented by the African Commission through various resolutions, for example, Resolution 492 on Violence against Women during Armed Conflicts in Africa,¹⁴³ Resolution 283 on the Situation of Women and Children in Armed Conflict,¹⁴⁴ and Resolution 282 on the Suppression of Sexual Violence against Women in the Democratic Republic of Congo.¹⁴⁵ In these resolutions, the Commission has reiterated the obligation of states to prosecute perpetrators of women's rights violations. Prosecution is viewed as a means to provide the right to truth, justice, and reparation, to train troops on IHL/IHRL and to develop programs to prevent violence.

In a study conducted pursuant to Resolution 332 on Human Rights in Conflict Situations,¹⁴⁶ the Commission broadened the scope of protection by interpreting the notion of 'conflict situations' to cover not only armed conflict but also 'crisis situations manifesting violent actions of various gravity short of armed conflict'.¹⁴⁷ The Commission noted that the African Charter, which also applies to its normative protocols, applies in peace time and during armed conflicts especially because it does not make provision for derogation during a state of emergency.¹⁴⁸ Therefore, no derogations from women's rights during conflicts are justifiable. The same reasoning applies to non-state armed groups that effectively control a territory.¹⁴⁹ Through its case law and general comments, the Commission has developed jurisprudence on the nature and extent of protection accorded to civilians, including women, in the context of the right to life and the right to freedom of movement. Clearly, while not being an IHL monitoring body, the Commission has developed a complementarity approach to IHL and IHRL, which shows its willingness to use the two bodies of law to buttress the protection of women's rights.¹⁵⁰ Interestingly, the Commission is of the view that the body of law which better protects the right of the victim, between IHL and IHRL, should be applied in case of doubt.¹⁵¹

6.2 Insufficient legislative and institutional measures

With the exception of the Democratic Republic of Congo (DRC), there is paucity of legislative and institutional measures adopted by states parties to comply with their obligations under article 11.¹⁵² Malawi, Nigeria, Senegal, Benin and Zimbabwe did not include in their reports measures adopted to realise article 11.¹⁵³ Given that most states are not experiencing situations of armed conflict, it can be assumed that the need to adopt such legislative or institutional measures is not as present and urgent as it is in countries affected by armed conflict, such as the DRC. This assumption may not always hold

143 ACHPR/Res.492 of 5 December 2021.

144 ACHPR/Res.283 of 2014.

145 As above.

146 ACHPR/Res.332 of 25 February 2016.

147 African Commission *Addressing human rights issues in conflict situations: towards a more systematic and effective role for the African Commission on Human and Peoples' Rights* (2019) paras 13 & 7-8.

148 African Commission (n 147) para 55; *Commission nationale des droits de l'homme et des libertés v Chad* (Communication 74/92) (1995) ACHPR, para 21.

149 African Commission (n 147) para 58.

150 See *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003).

151 African Commission General Comment 4 (n 82) para 64.

152 See the discussion in sec 6.3 below.

153 Malawi Periodic report on the African Charter and the Maputo Protocol (May 2015 to March 2019); 6th Periodic Country Report: 2015-2016 on the Implementation of the African Charter and the Maputo Protocol in Nigeria (August 2017); Periodic Report on the Implementation of the African Charter on Human and Peoples' Rights presented by the Republic of Senegal (April 2013), Benin Combined Periodic Report from the Sixth to the Tenth (6th-10th) Periodic Reports on the Implementation of the provisions of the African Charter (2009-2018) and the Maputo Protocol; Zimbabwe 11th, 12th, 13th, 14th and 15th Combined Report under the African Charter and 1st, 2nd, 3rd and 4th Combined Report under the Maputo Protocol.

true. States should demonstrate the existence of a robust legislative and institutional framework that can potentially protect women's rights should armed conflicts occur within their jurisdiction. Besides, several African states are involved in military activities outside their territory, making the application of article 11 on their troops automatic even if the conflict does not take place in a jurisdiction they directly control.

In its report to the African Commission, Cameroon indicates that it has ratified the four Geneva Conventions and/or their additional protocols.¹⁵⁴ Mauritania indicates that the four Geneva Conventions can be invoked before its national courts and public authorities as they form part and parcel of domestic law.¹⁵⁵ Nonetheless, the goal of humanising IHL requires the adoption of specific human rights measures. In this regard, Togo and the DRC have conferred on their tribunals jurisdictions to try war crimes, crimes against humanity and genocide committed in the context of an armed conflict.¹⁵⁶ An interesting development from this perspective is the adoption or amendment of defence laws or child rights acts in the DRC, Kenya, South Africa, The Gambia and Togo to prevent the recruitment of persons below 18 years of age in national armed forces.¹⁵⁷ Cameroon has implemented a program aimed at addressing the root causes of children's recruitment by armed groups and rehabilitating children associated with conflict.¹⁵⁸

As a war-torn country, particularly in its eastern part, the DRC has adopted a myriad of laws and established institutions to meet its obligations under article 11 of the Protocol. The measures DRC has adopted include a national army plan to combat sexual violence in armed conflict¹⁵⁹ and the institution of a gender focal point to bring gender-based violence (GBV) issues to the attention of the army's top leadership.¹⁶⁰ The head of state also established the position of Special Adviser to the Head of State on the Fight against Sexual Violence and the Recruitment of Children into Armed Groups.¹⁶¹ There have been several disarmament, demobilisation and reintegration programmes and security sector reform efforts to dissolve armed groups, ensure the return of IDPs and strengthen state authority.¹⁶² Between 2009 and 2012, over 13,584 children, including 5,000 girls, were either freed from armed groups or reintegrated into their community.¹⁶³ These initiatives are conducted on a continuous basis.

154 Single Report Comprising the 4th, 5th and 6th Periodic Reports of Cameroon relating to the African Charter and 1st Report relating to the Maputo Protocol and the Kampala Convention (2015-2019) para 940.

155 10th, 11th, 12th, 13th, and 14th Periodic reports of the Islamic Republic of Mauritania on the Implementation of the provisions of the African Charter (July 2016) 67.

156 6th, 7th and 8th Combined Periodic Reports of Togo on the Implementation of the African Charter and Initial Report on the Implementation of the Maputo Protocol (August 2017) para 642; DRC Article 91 of Act 13/011-B of 11 April 2013 on the Organisation, Functioning and Competences of Judicial Courts & Act 024/2002 of 18 November 2002, The Military Penal Code, Title V.

157 Togo Combined Periodic Reports (n 156) para 645; Gambia Combined Report on the African Charter (1994 and 2018) and Initial Report under the Maputo Protocol (August 2018) 165; *Kenya Combined Report of the 12th and 13th Combined Periodic Reports on the African Charter on Human and Peoples' Rights and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (April 2020) para 304, DRC Combined Report (n 2) para 342.

158 Cameroon Single Report (n 154) para 920.

159 DRC Combined Report (n 2) para 333.

160 As above.

161 DRC Combined Report (n 2) para 334.

162 DRC Combined Report (n 2) para 335.

163 DRC Combined Report (n 2) para 352.

6.3 Poor understanding of basic obligations arising from article 11

Often, states seem not to accurately grasp the nature of measures they should adopt pursuant to article 11. First, a review of state reports suggests that states view the adoption of legislation to protect refugee and asylum-seeking women as sufficient to fulfil their obligations under article 11. Their reports show that Angola, The Gambia, Kenya, Lesotho, and South Africa follow this trend.¹⁶⁴ While such legislation protects women's rights, it does not address women's specific needs during armed conflict, which is at the heart of article 11. In addition, states rarely make the connection between the legislative measures adopted and their impact on conflict situations. The African Commission and states should always be mindful that article 11 focuses on armed conflict situations as defined under section 4.1.

Moreover, the African Commission and some states conflate measures adopted under articles 10 and 11, thus missing an opportunity to clarify measures required under articles 11.¹⁶⁵ As an example, Rwanda and Namibia conflate measures under article 10 and article 11 as they do not indicate the measures they have adopted specifically to protect women during armed conflict.¹⁶⁶ Under the sub-heading dedicated to article 11 in its report, Namibia lists efforts it is making to ensure women participate in decision-making processes 'in conflict and peacebuilding processes' and to draft the National Plan of Action on Women, Peace and Security, which hardly relate to article 11.¹⁶⁷ Namibia also mentions the adoption of laws against GBV but these laws are not tailored to armed conflict situations. The same weakness appears in the reports by Cameroon and Eswatini.¹⁶⁸

There are several other problems in state reports concerning article 11. The report of Seychelles suggests that it did not understand what is expected of it regarding the implementation of article 11. One passage of the report reads as follows:¹⁶⁹

Seychellois personnel have been dispatched to various zones either to preserve national sovereignty or to assist allies. The country has adopted the four Acts of the 1949 Geneva Protocol, which protects the Human rights of both men and women who are combatants on land and at sea. The protocol entered into force on 8 May 1985 and acceded to on 8 November that same year. Similarly, Seychelles has adopted the Optional Protocol of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on 4 April 1992.

The above passage is difficult to understand. A similar sentence can be found in the report submitted by Burkina Faso.¹⁷⁰ In its report, Kenya confuses situations of armed conflict with internal disturbance

164 Angola Sixth and Seventh Report on the Implementation of the African Charter on Human and Peoples' Rights and Initial Report on the Maputo Protocol (January 2017) paras 62-65; South Africa Combined Second Periodic Report under the African Charter and Initial Report under the Maputo Protocol (August 2015) paras 293-305; Lesotho Combined Second to Eighth Periodic Report under the African Charter and Initial Report under the Maputo Protocol, para 413; Gambia Combined Report (n 157) 164; Kenya Combined Report (n 157) paras 299 & 301.

165 African Commission, Concluding observations on the 6th and 7th Periodic Reports of the Republic of Angola on the implementation of the African Charter on Human and Peoples' Rights and the Initial Report on the Protocol to the African Charter on the Rights of Women in Africa (2011-2016) paras 18-19, p 27 (16 to 30 July 2019).

166 Namibia 7th Periodic Report on the African Charter (2015-2019) and the Second Report under the Maputo Protocol (2020) para 12; 11th 12th and 13th Combined Periodic Reports of the Republic of Rwanda on the Implementation of the African Charter and the Initial Report on the Implementation of the Maputo Protocol (2009-2016) paras 63-67.

167 Paragraphs 12.1 to 12.3.

168 Eswatini Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Periodic Report on the African Charter on Human and Peoples' Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa (2001-2019) para 472 and Cameroon Single Report (n 154) para 913.

169 Seychelles Initial Report on the Maputo Protocol (2019) para 11.1.

170 Periodic Report of Burkina Faso on the Implementation of the African Charter and Initial Report on the Implementation of the Maputo Protocol (January 2015) paras 363-364.

and tension, including during elections, thus applying IHL norms where they are not relevant.¹⁷¹ This lack of clarity indicates the low quality of reporting on article 11.

6.4 Awareness-raising efforts

As part of their treaty-based and customary law obligation to respect and ensure the respect of IHL,¹⁷² some states have engaged in awareness-raising on article 11.¹⁷³ Cameroon has trained its security officers on GBV in humanitarian contexts,¹⁷⁴ while the DRC has organised trainings on protecting women and children from sexual violence.¹⁷⁵ Importantly, Kenya organised training of its military, police and civilian officials involved in peacekeeping missions in Somalia on the prevention of GBV in conflict situations.¹⁷⁶ Within its security forces, it has also furthered gender-sensitive reporting, which can possibly extend to reporting human rights violations committed by troops involved in peacekeeping missions. None of the states that have reported on the Protocol has indicated the inclusion of issues related to article 11 in their military training/operations manuals or the adoption or revision of existing military training/operations manuals to consider women's rights protection during military operations.¹⁷⁷

6.5 Prosecution and the emerging jurisprudence

Emerging practices among countries affected by armed conflicts are showing some efforts to prosecute those involved in violations of IHRL and IHL. As an example, military and civilian officials involved in rape and other forms of sexual exploitation have been convicted of war crimes or crimes against humanity in the DRC both before and after the ratification of the Protocol.¹⁷⁸ While courts and tribunals have not referred to article 11 of the Protocol, some have applied domestic law incorporating and defining international crimes, as required by article 11. They sometimes rely on the Geneva Conventions and/or their additional protocols to define the nature of armed conflict, other modalities of protection, and other ICL (general) principles.¹⁷⁹ This is a progressive step in the fight against impunity for crimes indicated under article 11, and it shows that institutional judicial capacity and jurisprudence are in place to implement article 11.¹⁸⁰

In the DRC, a judicial cooperation agreement has strengthened the prosecution of crimes related to article 11. This agreement was signed in 2004 between the DRC and the ICC pursuant to article 54(3)(c) of the Rome Statute.¹⁸¹ The ICC's involvement in cases implicating gross violations of human

171 Kenya Combined Report (n 157) para 300.

172 Rule 142 of Customary IHL.

173 It is a constitutional obligation in the DRC and South Africa to raise awareness through education over matters concerning international human rights and humanitarian law, art 45; sec 199(5) of the Constitution of South Africa.

174 Cameroon Single Report (154) para 916.

175 DRC Combined Report (n 2) para 333.

176 Kenya Combined Report (n 157) para 303.

177 See the South African Law of Armed Conflict Manual for indication <https://ihl-databases.icrc.org/fr/customary-ihl/v2/rule142?country=za>.

178 See broadly JB Mbokani *La jurisprudence congolaise en matière de crimes de droit international: une analyse des décisions des juridictions militaires congolaises en application du Statut de Rome* (2016) vi-viii.

179 As above.

180 D Perissi & K Naimer 'Achieving justice for child survivors of conflict-related sexual violence in the Democratic Republic of the Congo: the *Kavumu* case' (2020) 18 *Journal of International Criminal Justice* 293-306.

181 SP Tunamsifu 'Twelve years of judicial cooperation between the Democratic Republic of the Congo and the International Criminal Court: have expectations been met?' (2019) 19 *African Human Rights Law Journal* 109.

rights committed in the DRC has led to landmark judgments on questions relevant to article 11, such as the recruitment and use of children in hostilities and rape.¹⁸²

7 Conclusion

Article 11 is a response to the gross violations that women have endured for generations on a continent plagued by conflicts. In particular it speaks to a context where rape and sexual violence is frequently used as a weapon of war. It is a significant normative step toward the realisation of women's rights during armed conflicts. It is, moreover, an important move towards ensuring accountability for mass atrocities committed against women and girls. Article 11, therefore, fills the gap left by CEDAW.

Article 11 protects women irrespective of their ethnic, political, social, cultural, or national status. This protects women against abuses by all parties to the conflict, and against the effects of hostilities, whether direct or indirect. While embedded in a human (women's) rights treaty, the link the Maputo Protocol makes with IHL and ICL, among others, widens the scope of protection accorded to women during armed conflict, both normatively and institutionally.

The normative and institutional complementarity deriving from the linkages between article 11 and other relevant treaties should be leveraged to enhance women's rights protection during armed conflicts and to avoid competing interpretations of article 11. The African Commission and the African Court, in their monitoring and/or interpretive mandates, should take cognisance of the humanitarian role which the ICRC exercises pursuant to the Geneva Conventions and the normative developments of IHL it has prompted.¹⁸³ The content of article 11 begs for institutional collaboration between the Commission and the ICRC when the latter develops soft law instruments related to IHL or is seized of human rights issues related to IHL where the ICRC's expertise can help clarify legal questions.¹⁸⁴ The jurisprudence of international criminal tribunals and courts should also be mobilised by the African Commission and the African Court when dealing with IHL matters, as the former are more acquainted with war crimes, crimes against humanity and genocide-related questions. The findings of African human rights bodies on article 11-related questions should be consistent with regional and global good practices.

In addition to the African Commission and the African Court, international institutions, the ICRC and the ICC in particular, and broadly the ICJ and the CEDAW Committee could rely on article 11 or use it as an interpretive source to humanise the conduct of hostilities in Africa. The provision also provides an opportunity to develop new jurisprudence by national and international (criminal) courts and foster judicial dialogue and complementarity among these courts. Constructive dialogue through state reporting should also be furthered so that various stakeholders, including the African Commission, are able to understand and evaluate the quality of measures instituted to comply with article 11. Finally, more training should arguably be provided to the military involved in armed conflicts, including those involved in peacekeeping forces.

182 See *Lubanga* (n 70) and *Ntaganda* (n 85).

183 See the various studies including those on customary international humanitarian law.

184 Based on Rule 104 of the Commission's Rules of Procedure, the Commission may invite the ICRC to intervene as an *amicus curiae*. The ICRC has also participated in the development of soft-law instruments such as the African Commission General Comment 5 (n 34). See R Adeola, F Viljoen & TM Makunya 'A commentary on the African Commission's General Comment on the Right to Freedom of Movement and Residence under art 12(1) of the African Charter on Human and Peoples' Rights' (2021) 65 *Journal of African Law* 140.