

# Silencing the guns to end gender-based violence in Africa: an analysis of article 10(3) of the Maputo Protocol

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**ABSTRACT:** One of the objectives of the African Union's (AU) 2020 theme 'Silencing the guns: creating conducive conditions for Africa's development' is to end gender-based violence. Since the campaign is to create a conflict-free Africa, it is estimated that the types of gender-based violence referred to here are those that occur during conflict situations. Existing documents for the practical implementation of the theme mention article 10(3) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) which obligates states parties to 'take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular'. Article 10(3) therefore has specific instructions for states to reduce their military expenditure and to re-invest the resources in social development, including elimination of gender-based violence. This article presents article 10(3) of the Maputo Protocol as a legally binding provision to assist the implementation of the AU 2020 theme, and analyses the challenges in its implementation. It also highlights the role of the judicial and human rights institutions of the AU in ensuring that article 10(3) becomes a means to implement the AU 2020 theme. The crux of the findings is that although there are challenges in the implementation of article 10(3) of the Maputo Protocol, this provision can be a legal tool in the hands of the AU in ensuring that African countries implement the AU 2020 theme of silencing the guns to eradicate gender-based violence.

## TITRE ET RÉSUMÉ EN FRANCAIS:

**Faire taire les armes pour mettre fin aux violences basées sur le genre en Afrique: évaluation de l'article 10(3) du Protocole de Maputo**

**RÉSUMÉ:** L'un des objectifs du thème que l'Union africaine (UA) a retenu pour l'année 2020 «Faire taire les armes: créer des conditions propices au développement de l'Afrique» est de mettre fin aux violences basées sur le genre. Comme la campagne rêve d'une Afrique sans conflit, on estime que les types de violences basées sur le genre dont il est fait référence sont celles qui ont lieu durant les situations de conflit. Les textes disponibles relatifs à la mise en œuvre pratique du thème de l'année ne mentionnent pas l'article 10(3) du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits de la femme en Afrique (Protocole de Maputo) qui oblige les États parties à «prendre les mesures nécessaires pour réduire

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This article is adapted from the author's unpublished doctoral thesis submitted to the University of Pretoria: A Budoo 'The role of gender budgeting in implementing the obligation to provide resources to realise women's human rights in Africa' (2016).

de manière significative les dépenses militaires en faveur de dépenses pour le développement social en général, et la promotion des femmes en particulier». L'article 10(3) contient donc des directives spécifiques pour que les États réduisent leurs dépenses militaires et réinvestissent les ressources dans le développement social, y compris l'élimination de violences basées sur le genre. La présente contribution présente l'article 10(3) du Protocole de Maputo comme une disposition juridiquement contraignante pour renforcer la mise en œuvre du thème que l'UA a retenu pour l'année 2020, et analyse les défis de sa mise en œuvre. Il met en relief le rôle que les institutions judiciaires et des droits de l'homme de l'UA peuvent jouer pour concrétiser le pouvoir normatif de l'article 10(3) dans la mise en œuvre du thème de l'année. Cette contribution note que, bien que la mise en œuvre de l'article 10(3) du Protocole de Maputo est parsemée d'embûches, la disposition constitue un levier juridique à la disposition de l'UA pour s'assurer que les pays africains mettent en œuvre le thème qu'elle a retenu pour l'année 2020, à savoir faire taire les armes pour mettre fin aux violences basées sur le genre.

**KEY WORDS:** gender-based violence, Maputo Protocol, military expenditure, conflict, national security, African Commission on Human and Peoples' Rights, African Court on Human and Peoples' Rights

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## 1 BACKGROUND

In 2019, 83 countries from sub-Saharan Africa were in a conflict situation with 14 having disputes, 9 facing non-violent crises, 45 being subject to violent crises, 10 having limited wars and 5 being in war.<sup>1</sup> Such conflicts are the results of 'crime, jihadism, insurgency and communal violence' that are fuelled by several factors such as '[p]olitical exclusion, institutional and governance weakness, poverty, and a lack of access to resources, job opportunities and land'.<sup>2</sup>

Given the high incidence of conflict in the continent, it is of no surprise that the African Union's (AU) 2020 theme is 'Silencing the guns: Creating conducive conditions for Africa's development'. The AU 2020 theme includes ending gender-based violence as one of its objectives.<sup>3</sup> Since the campaign is to create a conflict-free Africa,<sup>4</sup> it is estimated that the types of gender-based violence referred to are those

1 Website of Statista available at <https://www.statista.com/statistics/262938/conflicts-in-sub-saharan-africa-by-intensity/> (accessed 18 August 2020).

2 The International Institute for Strategic Studies 'Armed Conflict Survey 2019: Sub-Saharan Africa' available at <https://www.iiss.org/publications/armed-conflict-survey/2019/armed-conflict-survey-2019/subsaharan-africa> (accessed 18 August 2020).

3 Website of the AU available at <https://au.int/en/flagships/silencing-guns-2020> (accessed 1 April 2020).

that occur during conflict situations. This is emphasised by the Platform of United Nations (UN) and regional independent expert mechanisms on the elimination of discrimination and violence against women (Platform on EDVAW) which met in Addis Ababa in February 2020 and adopted a Joint statement on the 'Elimination of discrimination and violence against women and girls, including its root causes, must be integrated in all efforts to silence the guns before, during and after conflict' (EDVAW Statement).<sup>5</sup> The EDVAW Statement makes reference to the UN Security Council Resolution 1325 on women, peace and security<sup>6</sup> and requires states to adopt a holistic approach to violence against women during conflict and consider it as a discrimination against women, the root causes of which have to be addressed during and after conflict.

The AU has adopted several documents<sup>7</sup> for the implementation of the AU 2020 theme but none of them mentions article 10(3) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) despite the African Peace and Security Architecture Roadmap making gender a cross-cutting issue and referring to gender-sensitive budgeting.<sup>8</sup> Similarly, no AU document adopted prior to the AU 2020 theme mentions article 10(3) of the Maputo Protocol even if they focus on women and peace, and generally mention the Maputo Protocol.<sup>9</sup> Article 10(3) of the Maputo Protocol obligates state parties to 'take the necessary measures to

4 50th Anniversary Solemn Declaration by the Heads of State and Government of the African Union (26 May 2013).

5 Platform on EDVAW 'Elimination of discrimination and violence against women and girls, including its root causes, must be integrated in all efforts to silence the guns before, during and after conflict' adopted on 4 February 2020, available at [https://reliefweb.int/sites/reliefweb.int/files/resources/Statement\\_conflict\\_prevention\\_EDVAW\\_platform.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Statement_conflict_prevention_EDVAW_platform.pdf) (accessed 18 August 2020).

6 UN Security Council 'Resolution 1325 (2000)' adopted on 31 October 2000 S/RES/1325 (2000).

7 For instance: Windhoek Declaration at the 6th Annual Retreat of Special Envoys and Mediators on the Promotion of Peace and Security in Africa (22 October 2015); Newsletter 'Silencing the Guns by 2020: Practical Steps to Disarmament Demobilization Reintegration Interventions' (3 March 2017); Report on the proceedings of the Fifth African Union High-Level Retreat on the Promotion of Peace, Security and Stability in Africa 'Silencing the guns, owning the future: Realising a conflict-free Africa' held from 21 to 23 October 2014 in Arusha, Tanzania; African Peace and Security Architecture Roadmap 2016-2020; Report of the Peace and Security Council on its Activities and the State of Peace and Security in Africa, for the Period February 2019 - February 2020; Fifth Report of the Peace and Security Council of the African Union on the implementation of the AU Master Roadmap of Practical Steps to Silence the Guns in Africa by the year 2020, for the period (February 2019 – February 2020); Summit Orientation Concept Note on the AU Theme of the Year 2020 – Silencing the Guns: creating conducive conditions for Africa's Development (2020); Decision on the second report of the Peace and Security Council of the African Union on the implementation of the African Union Master Roadmap of Practical Steps to silencing the guns in Africa (Niamey, Niger, 4-5 July 2019); and AU Master Road Map of Practical Steps to Silencing the Guns in Africa (2016).

8 African Peace and Security Architecture Roadmap 2016-2020 64.

9 For example, AU Commission 'Implementation of the women, peace and security agenda in Africa' (2016); AU Agenda 2063; and AU Peace and Security Council 'Continental results framework on Women, Peace, Security in Africa' (2018).

reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular'. Article 10(3) of the Maputo Protocol is unique in the sense that it directly imposes an obligation on states concerning their budgetary policies.

Article 10(3) of the Maputo Protocol, read together with its other articles,<sup>10</sup> can legally equip the AU to require African states that have ratified the document<sup>11</sup> to reduce their military expenditure, thereby silencing the guns, in favour of social development and the promotion of women. Using desktop research to review primary sources such as the Maputo Protocol and other legal documents, and secondary sources in the form of academic publications and reports, I analyse the role of the Maputo Protocol, particularly its article 10(3) in realising the AU 2020 theme's objective of silencing the guns to end gender-based violence.

To this end, I first lay the background to the study, which is the current section. Second, I elaborate on the types of gender-based violence that women endure during conflicts in Africa. Third, I study the provisions of the Maputo Protocol to assess the extent to which it requires states to eliminate gender-based violence during conflict situations. Fourth, I unpack article 10(3) of the Maputo Protocol with the view of demonstrating that it extends beyond budgetary allocation for the elimination of gender-based violence. While so doing, I analyse the role of the judicial and human rights institutions of the AU in ensuring the implementation of article 10(3). Fifth, I provide a conclusion.

## **2 TYPES OF GENDER-BASED VIOLENCE IN AFRICA DURING CONFLICTS**

The term used in the AU 2020 theme is 'gender-based violence', similar to Agenda 2063 which aspires an Africa free from gender-based violence, amongst others.<sup>12</sup> The 2020 AU theme was derived from Agenda 2063 which envisaged silencing the guns by 2020 'through enhanced dialogue-centred conflict prevention and resolution, to make peace a reality for all people'.<sup>13</sup> The first 10-year implementation plan of Agenda 2063 links silencing the guns with ending gender-based

10 Arts 4(2)(i) and 26(2) of the Maputo Protocol.

11 42 out of 55 African countries have ratified the Maputo Protocol as at 20 August 2020: African Union 'List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 16 October 2019 available at <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed 18 August 2020).

12 Para 37 and 51 of Agenda 2063 of the AU.

13 Para 72(j) of Agenda 2063 of the AU.

violence,<sup>14</sup> thus explaining the inclusion of the latter as one of the objectives of the AU 2020 theme.

However, the use of the term gender-based violence in these documents can be problematic since it encompasses both violence against men and women and does not take into account the entrenched vulnerabilities of women during conflicts. The UN Committee on the Elimination of All forms of Discrimination Against Women raised a similar concern relating to the use of the term gender-based violence when it emphasised the use of the term 'gender-based violence against women' as a more 'precise' phrase.<sup>15</sup>

To avoid such confusion at the regional level, the Maputo Protocol uses the term 'violence against women' and it is unclear why, despite the presence of a legal framework using a clearer term, Agenda 2063 and the AU 2020 theme uses the term gender-based violence. For the purposes of this article, I assume that gender-based violence under Agenda 2063 and the AU 2020 theme refers to gender-based violence against women or violence against women and use the terms interchangeably.

The Maputo Protocol defines violence against women as

all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.<sup>16</sup>

This definition is very broad and encompasses violence against women during situations of armed conflicts or of war.

Nevertheless, women throughout Africa are subjected to violence due to armed conflicts. Such violence occur when:<sup>17</sup> women's lives are at risk due to conflicts; clashing forces use violence against women such as abduction and trafficking as a strategy to attack the enemy; women displaced due to conflict are subjected to physical or sexual violence; and girls are forced to be married because of conflict driven poverty or as rewards for combatants.

One of the common forms of violence that women face during armed conflicts is sexual violence, which has been recognised as a crime against humanity.<sup>18</sup> It includes 'rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity'.<sup>19</sup> Such sexual violence are used as weapons of armed conflicts,

14 AU Commission 'Agenda 2063: First ten year implementation plan' (2015) 5.

15 CEDAW Committee 'General Recommendation No 35 on gender-based violence against women, updating General Recommendation No 19' adopted on 26 July 2017 CEDAW/C/GC/35 para 9.

16 Art 1(j) of the Maputo Protocol.

17 UN 'Report of the Secretary-General on conflict-related sexual violence' (2018) S/2018/250.

18 Art 7 of the Rome Statute of the International Criminal Court, adopted in 1998 and entered into force in 2002.

19 UN (n 17) 3.

where it expresses itself brutally.<sup>20</sup> For instance, in the Democratic Republic of Congo, in 2019 there were 1409 conflict-related rapes reported<sup>21</sup> while a study in 2011 revealed that about 1.7 to 1.8 women reported having been raped in their lifetime in the country.<sup>22</sup> South Sudan has been considered as having one of the highest rates of physical/sexual violence against women during conflict in the world, with 65% of women reporting having subjected to the same during their lifetime.<sup>23</sup>

### 3 THE MAPUTO PROTOCOL AND ELIMINATION OF GENDER-BASED VIOLENCE DURING CONFLICT

The Maputo Protocol contains several provisions that protect women, that is 'persons of female gender, including girls',<sup>24</sup> from violence during conflicts. To begin with, article 2 of the Maputo Protocol requires states to 'combat all forms of discrimination against women through appropriate legislative, institutional and other measures'.<sup>25</sup> While so doing, states have to 'modify social and cultural patterns' with the objective of eliminating discriminatory acts against women by virtue of their sex. In the context of violence against women during conflict, states therefore have to embark on initiatives to ensure that women are not subjected to violence as a result of discrimination. This was also reflected in the EDVAW Statement that considers violence against women during conflict as a manifestation of discrimination against women.<sup>26</sup>

The Maputo Protocol protects the inherent right to dignity of every woman and imposes an obligation on states to adopt measures to ensure that women are not exploited or degraded.<sup>27</sup> Such measures must ensure 'the protection of women from all forms of violence, particularly sexual and verbal violence'.<sup>28</sup> This article has relevance for violence against women during conflicts since a proper application of

20 IA Daudu & LS Shulika 'Armed conflict in Africa: examining sexual violence as an instrument of war' (2019) 8 *Journal of African Union Studies* 1 at 51-52.

21 UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict available at <https://www.un.org/sexualviolenceinconflict/countries/democratic-republic-of-the-congo/#:~:text=In%202019%2C%20the%20United%20Nations,to%20non%2Dstate%20armed%20groups.> (accessed 18 August 2020).

22 A Peterman, T Palermo & C Bredekamp 'Estimates and determinants of sexual violence against women in the Democratic Republic of Congo' (2011) 101 *American Journal of Public Health* 6.

23 What Works to Prevent Violence Against Women and Girls in Conflict and Humanitarian Crises and Others 'No safe place: A lifetime of violence for conflict-affected women and girls in South Sudan' (2017) 12.

24 Art 1(k) of the Maputo Protocol.

25 Art 2(1) of the Maputo Protocol.

26 EDVAW Statement (n 5).

27 Art 3 of the Maputo Protocol.

28 Art 3(4) of the Maputo Protocol.

its provisions will contribute to the elimination of violence against women.

One of the most important articles relating to elimination of violence against women during conflict is article 4 of the Maputo Protocol that provides for the rights to life, integrity and security of the person. Even though it does not specifically mention armed conflict, article 4 is applicable at all the times since the article does not mention that governments are exonerated from their obligations in cases of armed conflicts. Article 4(1) protects the rights to life and security of the African women and prohibits '[a]ll forms of exploitation, cruel, inhuman or degrading punishment and treatment'. States have to take several steps to ensure the protection of the rights mentioned in article 4(1).<sup>29</sup> Many of these steps, if adopted, will ensure that women are protected from violence, or the elimination of violence, during conflicts. For instance, states have to not only enact and enforce laws to prohibit all forms of violence, including sexual violence against women but they have to ensure that perpetrators of violence against women are punished. Conflict-ridden countries therefore have to ensure that they implement their laws on violence against women by arresting and prosecuting those who use violence against women as a weapon of conflict.

In addition to the legal measures to criminalise violence against women, states have to adopt 'such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women'.<sup>30</sup> States also have the obligation to '[i]dentify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence'.<sup>31</sup> These articles thus

29 Art 4(2) of the Maputo Protocol: a) Enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public; b) Adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women; c) Identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence; d) Actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women; e) Punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims; f) Establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women; g) Prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk; h) Prohibit all medical or scientific experiments on women without their informed consent; i) Provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women; j) Ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women; k) Ensure that women and men enjoy equal rights in terms of access to refugee status determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents.

30 Art 4(2)(b) of the Maputo Protocol.

31 Art 4(2)(c) of the Maputo Protocol.

encompass initiatives by governments to silence the guns to ensure a conflict free Africa since conflicts exacerbate violence against women.

Specific to a conflict-free Africa, article 10 of the Maputo Protocol protects the right to peace of women. It provides that '[w]omen have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace'.<sup>32</sup> Article 11 of the Maputo Protocol expressly provides for the protection of women in armed conflicts. It requires states to respect the rule of international humanitarian law applicable in armed conflicts, particularly those that are applicable to women.<sup>33</sup> Article 11(3) of the Maputo Protocol provides that states 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.

The question that arises is whether states have no obligation towards women who do not fall within the ambit of the above article. Dyani has argued that article 11(2) of the Maputo Protocol that requires states to 'protect all civilians, including women, irrespective of the population to which they belong' clarifies this confusion and includes the protection of all women, and not only those mentioned in article 11(3).<sup>34</sup>

States also have the obligation to ensure that elderly women<sup>35</sup> and women with disabilities<sup>36</sup> are protected from violence, including during armed conflicts.

The Maputo Protocol contains several provisions that firstly require states to eliminate violence against women during conflict and secondly, impose an obligation on them to end such conflicts since they expose women to violence. Therefore, if implemented, these articles will ensure that the objective of the AU 2020's theme to eliminate violence against women is attained. However, despite these articles, as demonstrated in the background to the study, many African countries are in conflict situation, where women are subjected to all forms of violence. This implies that there is a gap in the implementation of these articles and several factors might influence such implementation. For the purposes of this study, I present the budgetary allocation provisions of the Maputo Protocol, especially article 10(3) of the Maputo Protocol as one of the measures that states must strictly adopt to ensure that the objective of eradicating violence against women by silencing the guns is achieved.

32 Art 10(1) of the Maputo Protocol.

33 Art 11(1) of the Maputo Protocol.

34 N Dyani 'Protocol on the Rights of Women in Africa: protection of women from sexual violence during armed conflict' (2006) 6 *African Human Rights Law Journal* 166 at 181.

35 Art 22 of the Maputo Protocol.

36 Art 23 of the Maputo Protocol.



## 4 ARTICLE 10(3) OF THE MAPUTO PROTOCOL

### 4.1 Unpacking article 10(3) of the Maputo Protocol

Article 10(3) of the Maputo Protocol imposes an obligation on states to 'take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular'. It is unique since it prioritises one budgetary item over another.<sup>37</sup> It puts a hierarchy in terms of expenditure and requires states to consider expenditure on social development and the promotion of women over military expenditure.<sup>38</sup> Article 10(3) has been considered as a radical provision that departs from the usual human rights norms.<sup>39</sup> Rightly so because no other binding human rights instrument directs states to reduce expenditure on one budgetary item for the purposes of allocating it to human rights items. Yeshanew has advanced that article 10(3) is a 'policy prescription' for states.<sup>40</sup>

Military expenditure is targeted in article 10(3) because they account for a substantial proportion of the gross domestic product (GDP) and national budget.<sup>41</sup> In 2017, African countries' military expenditure in terms of its GDP were among the highest in the world, with North Africa being second worldwide with a military expenditure of 3.6 per cent per GDP, followed by sub-Saharan Africa with 1.7 per cent of its GDP.<sup>42</sup> Hence, there is a need for African governments to reduce their military expenditure and to reallocate it to other budgetary items.

Article 10(3) mentions social development and the promotion of women. Expenditure for the promotion of women is clear within the Maputo Protocol. However, the inclusion of social development generally might take away the focus from women since social development encompasses different components. Despite the fact that the Copenhagen Declaration of 1995 concentrates on social development, it does not define the term.

In 2008, the AU adopted the Social Policy Framework for Africa<sup>43</sup> that elaborated on 19 key thematic social issues that need attention in

37 A Budoo 'Gender budgeting as a means to implement the Maputo Protocol's obligations to provide budgetary resources to realise women's rights in Africa' (2016) 9 *African Journal of Legal Studies* 199-219 at 206.

38 G Giacca *Economic, social and cultural rights in armed conflict* (2014) 50.

39 As above.

40 SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system* (2013) 291.

41 N Tian and others 'Military expenditure and transparency in sub-Saharan Africa' (2018) Stockholm International Peace Research Institute Policy Paper 4.

42 As above.

43 First Session of the African Union Conference of Ministers in charge of Social Development 'Social Policy Framework for Africa' (27-21 October 2008) CAMSD/EXP/4(I).

the context of social development. One of them is gender equality and women's empowerment that raises concern about the high level of violence against women on the continent.<sup>44</sup> One of the recommended actions takes into consideration 'women affected by armed conflict and other forms of violence and discrimination'.<sup>45</sup> The Social Policy Framework thus includes eliminating the vulnerabilities that women face, including violence during conflicts. Therefore, by mentioning social development, article 10(3) extends to ending violence against women during armed conflict, and to further end conflict since they expose women to vulnerabilities.

Another aspect of article 10(3) is that it requires states to take 'necessary measures' to reduce military expenditure. The term can have a two-fold interpretation. First, states must ensure that they reduce their military expenditure through the budgeting process. Second, states are mandated to take other necessary steps to ensure that their military expenditure is reduced. One such step is engaging in strategies to end conflicts within the country. Ending conflicts within the country will automatically lead to a reduced expenditure on military since states will no longer have to engage in combats. Therefore, the obligation of the state does not only end with a reduction of military expenditure in the budget but extends to other necessary measures that states can take that will ensure a conflict free state, thereby freeing resources to be allocated to social development and the promotion of women.

A state usually should be free in deciding about how to allocate its resources and this allocation of resources is considered as 'authoritative'.<sup>46</sup> However, article 10(3) has specific instructions for states to take necessary steps to reduce their military expenditure and to re-invest the resources in social development, including elimination of gender-based violence. Article 10(3) and the other budgetary provisions of the Maputo Protocol are relevant to the AU 2020 theme because they firstly impose an obligation on states to reduce military expenditure, including engaging in strategies to end conflict, and secondly, they require states to ensure the elimination of gender-based violence through the adoption of several steps. Nevertheless, as indicated, article 10(3) is nowhere mentioned in the strategies to implement the AU 2020 theme.

## **4.2 Challenges in implementing article 10(3) of the Maputo Protocol**

### **4.2.1 Military expenditure and national security**

The implementation of article 10(3) of the Maputo Protocol can be problematic since military expenditure matters concern the security of

44 Para 2.2.13 of the Social Policy Framework for Africa.

45 Para 2.2.13(g) of the Social Policy Framework for Africa.

46 S Pollack 'The politics of taxation' in RT Meyers (ed) *Handbook of government budgeting* (1999) 332.

states and a reduction of that expenditure jeopardises same. Although not being the only composition of national security, military expenditure is a central element of national security.<sup>47</sup> Interchangeably used with the term defence, national security is the 'safeguarding of a people, territory, and way of life'.<sup>48</sup> The issue is whether states risk the safety and the right to peace of its 'people, territory, and way of life' by reducing their military expenditure. States can easily justify the non-application of article 10(3) of the Maputo Protocol by stating that it was more important to protect the national security.

Hence, despite the ratification of the Maputo Protocol, many African countries have not been able to take the 'necessary measures' to redirect their military expenditure into social development and the promotion of women's rights. This gives rise to the question as to whether African countries understood the implications of all the provisions of the Maputo Protocol and whether they really understood what an implementation of article 10(3) of the Maputo Protocol would entail.

#### 4.2.2 Interpretation of the term 'necessary measures'

Additionally, the interpretation of the term 'necessary measures' can be very subjective. While reviewing the budget of a country, the African Commission on Human and Peoples' Rights (African Commission) might not consider necessary the measures taken by the state and can find that the state has not respected the provisions of the Maputo Protocol while the state can argue that the steps it has taken are necessary for the interest of the state. Yeshanew has noted that this term can represent a challenge for a 'monitoring organ' which is trying to decide what would amount to 'necessary measures'.<sup>49</sup> However, the African Commission is the body responsible for the interpretation of the Maputo Protocol and states must accept the interpretation of the African Commission as to whether states have taken the 'necessary measures' to give effect to the provisions of article 10(3) of the Maputo Protocol.

Thus, African countries which have ratified the Maputo Protocol are expected to take 'necessary measures to reduce military expenditure significantly in favour of social development and the promotion of women'. They are not expected to rely on escape routes such as the part concerning 'necessary measures' to justify non-implementation of the provisions of the article as this will be non-respect of the principle of *pacta sunt servanda* under article 26 of the Vienna Convention on the Law of Treaties 1969 (Vienna Convention).

Additionally, article 31 of the Vienna Convention provides that states should interpret treaties in 'good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The object and purpose of the

47 JJ Romm *Defining national security: the nonmilitary aspects* (1993) 1.

48 AA Jordan and others *American national security* (2009) 1.

49 Yeshanew (n 40) 293.

Maputo Protocol is the protection of women's human rights. As such, an interpretation of 'necessary measures' under article 10(3) of the Maputo Protocol will be in favour of the realisation of women's human rights to the detriment of military expenditure, which includes silencing the guns.

#### **4.2.3 Relationship between military expenditure and violence against women**

Article 10(3) of the Maputo Protocol relies on the assumption that a decrease in military expenditure budget will increase social development, and the promotion of the rights of women, including a reduction in violence against women. The first question which arises is why military expenditure has been identified as an element to be reduced in the national budget. As rightly put forward by Dumas:<sup>50</sup>

Whatever else can be said for it, military activity does not grow food, it does not produce clothing, it does not build housing, and it does not keep people amused. Nor does it create the kind of machinery, equipment, and facilities that can be used to grow food, produce clothing, build housing, and the like. Military activity may have other kinds of value, but it has no economic value because it does not directly contribute to material well-being, to the material standard of living.

Military expenditure can be therefore considered as an additional cost burden which does not generate any revenue or development for the country.

The second question that arises is whether a reduction in military expenditure will indeed silence the guns and lead to a reduction in violence against women. Although there is no research on this link, existing research demonstrates that when a country is in a conflict situation, violence against women is increased, either by them being victims of the hostilities, or them taking part in hostilities.<sup>51</sup> Hence, article 10(3) of the Maputo Protocol assumes that the reduction in military expenditure will lead to silencing the guns, hence reducing violence against women.

### **4.3 The judicial and human rights institutions of the African Union and article 10(3) of the Maputo Protocol**

The judicial and human rights institutions of the AU comprise of the African Commission, the African Court on Human and Peoples' Rights (African Court) and the African Committee of Experts on the Rights and

50 LJ Dumas 'The role of demilitarization in promoting democracy and prosperity in Africa' in J Brauer & JP Dunne (eds) *Arming the South: the economics of military expenditure, arms production and arms trade in developing countries* (2002) 16-17.

51 See generally S Ngono & FPT Duri 'Problematizing victimhood and agency: Women and terrorism in 21st Century' in M Mawere & N Marongwe (eds) *Violence, politics and conflict management in Africa: envisioning transformation, peace and unity in the twenty-first century* (2016) 327-357.

Welfare of the Child (African Children's Committee).<sup>52</sup> For the purposes of this article, focus is on the African Commission and the African Court. Since the Maputo Protocol did not create 'new mechanisms or procedures to improve implementation',<sup>53</sup> the existing judicial and human rights institutions, namely the African Commission and the African Court have the responsibility to oversee the implementation of the rights therein.

The provisions of the Maputo Protocol fall within the scope of the African Commission because the former was adopted as a supplement to the African Charter in terms of article 66 of the African Charter.<sup>54</sup> As such, the African Commission is mandated to ensure the protection of the rights provided by the Maputo Protocol, including the implementation of article 10(3).

The African Court has jurisdiction in cases and disputes to interpret and apply the African Charter, the African Court Protocol and 'any other [h]uman [r]ights instrument ratified by the states concerned'.<sup>55</sup> The Maputo Protocol falls within the jurisdiction of the African Court by virtue of article 3 of the African Court Protocol.

Both the African Commission and the African Court have to ensure that the rights in the Maputo Protocol are protected. The following sub-sections investigate whether the African Commission and the African Court have used their mandates to ensure the implementation of article 10(3) of the Maputo Protocol.

#### 4.3.1 Litigation

The African Commission and the African Court are mandated to receive cases that relate to violations of the provisions of the African Charter<sup>56</sup> and, by extension, those of the Maputo Protocol as explained in the previous paragraphs. The African Court has, till now decided only one case on its merits under the Maputo Protocol<sup>57</sup> and it had no aspect of military expenditure or budgetary allocation of resources. Contrary to the African Court, in the case of *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*,<sup>58</sup> the African Commission recommended Sudan to provide sufficient resources to various provinces to address the long-term sources of conflicts. This decision of the African Commission demonstrates that

52 AU 'Judicial and human rights institutions' available at <http://www.au.int/en/organs/cj> (accessed 20 August 2020).

53 F Viljoen *International human rights law in Africa* (2012) 257.

54 Art 66 of the African Charter 'Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.'

55 Art 3 of the African Court Protocol.

56 Arts 47 to 59 of the African Charter: In the event a state has violated the provisions of the African Charter, another state or individuals or organisations can submit a communication to the African Charter alleging such violations.

57 *Association Pour le Progrès et la Défense des Droits des Femme Maliennes and the Institute for Human Rights and Development in Africa v Mali* African Court on Human and Peoples' Rights (11 May 2018).

58 279/03-296/05 para 229(6).

conflicts have impacts on the realisation of human rights and states need to take necessary measures to address them. Hence, even if article 10(3) of the Maputo Protocol has not yet been the subject of litigation before the African Court and the African Commission, this case demonstrates the African Commission's position concerning the link between conflict and the realisation of human rights. The African Commission and the African Court are recommended give a boost to the realisation of the AU 2020 theme by mainstreaming elimination of conflict and eradication of violence against women while deciding cases against states that have ratified the Maputo Protocol. In cases of countries with high military expenditure, they can also recommend or order the state to reduce the same in favour of eradication of violence against women.

#### **4.3.2 Reporting on implementation**

Article 62 of the African Charter imposes an obligation on states to submit a report to the African Commission every two years on the 'legislative or other measures' adopted to realise the rights therein. Article 26 of the Maputo Protocol requires states to submit a report under article 62 of the African Charter. The state reporting procedure is a 'forum for constructive dialogue' where the African Commission can 'monitor implementation' of the African Charter and 'identify challenges' which arise in the implementation of the provisions of the African Charter.<sup>59</sup> The African Commission formulates concluding observations after considering the state reports<sup>60</sup> which are 'recommendations to guide improvements' of a state's performance.<sup>61</sup> The African Commission adopted guidelines on state reporting under the Maputo Protocol and requires states to elaborate on the administrative measures they have taken, including budgetary allocations, to implement specific provisions of the Maputo Protocol.

Although many concluding observations of the African Commission make reference to violence against women,<sup>62</sup> they do not specifically mention article 10(3) of the Maputo Protocol. Even when the African Commission makes reference to military expenditure, it does so at the exclusion of article 10(3). One such instance is the recommendation to Nigeria where reference was made to violence by military without referring to article 10(3) of the Maputo Protocol.<sup>63</sup>

59 Website of the African Commission 'State reporting' available at <http://www.achpr.org/states/> (accessed 16 August 2020).

60 Rule 82 of the Rules of Procedure of the African Commission 2020.

61 Viljoen (n 53) 365.

62 African Commission 'Concluding observations on the 3rd periodic report of Cameroon' adopted during its 15th extra-ordinary session (7-14 March 2014); 'Concluding observations and recommendations on the 5th and 6th periodic report of the Federal Republic Democratic of Ethiopia' adopted during its 56th ordinary session (21 April to 7 May 2015).

63 African Commission 'Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights (2011-2014)' adopted during its 57th ordinary session (4 to 18 November 2015).

Similarly, states do not generally report on article 10(3) of the Maputo Protocol. As it is, they face challenges in presenting reports under the state reporting guidelines.

The African Commission can use the state reporting procedure to raise more awareness about the AU 2020 theme of silencing the guns and to eradicate violence against in its concluding observations. The Special Rapporteur on the Rights of Women in Africa (SRRWA), who is the focal point for women's human rights in Africa, has to ensure that the concluding observations include the reduction of military expenditure in favour of social development and the promotion of women. The African Commission must also do regular follow-ups of the concluding observations to ensure that states implement the recommendations concerning eradicating conflict and gender-based violence.

State parties also have the responsibility to ensure that they provide information on the implementation of article 10(3) of the Maputo Protocol in the state reporting procedure. The report presented by states need to have information about several aspects of implementation. In the first instance, states that have not yet ratified the Maputo Protocol are urged to ratify the same to ensure that they provide women victims of violence access to remedies. Secondly, the state report needs to elaborate on plans of actions, if any, that the state has adopted to engage in strategies to implement the AU 2020 theme at the local level. Third, conscious of their legal obligations, states have to report on the legislative and other measures, including budgetary to ensure that they give effect to the provisions of the Maputo Protocol, more particularly article 10(3) with the objective of eradicating violence against women by silencing the guns. This includes strengthening efforts to fight terrorism or insurgencies and engaging with leaders of rebel groups to understand their needs and come to a compromise to ensure that conflicts come to an end. Fourth, countries need to have a report on budgetary allocation to implement article 10(3) of the Maputo Protocol. This implies that the state needs to adopt a transparent budgeting process that indicates their allocation to military, even if such amount is only a gross one. Despite the fact that countries such as the Central African Republic, the Democratic Republic of Congo and Somalia now have disaggregated verified military expenditure in their budget,<sup>64</sup> many African countries still provide little to no information about military expenditure that is available to the public. This might be due to national security since a state would not want its enemies to know the exact amount it is spending on arms to fight against them.<sup>65</sup> African states further treat military expenditure as a secret because they do not want their citizens to know the huge amount of money they are spending on military when poverty is rampant in the country.<sup>66</sup> However, to ensure transparency in the manner in which they are

64 Tian and others (n 41).

65 W Omitoogun 'Military expenditure and conflict in Africa' (2001) unpagued available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1078.1034&rep=rep1&type=pdf> (accessed 19 August 2020).

66 As above.

spending the tax collected from the population, African states need to indicate their military expenditure, even if it is a gross amount.

To assist the African Commission in monitoring the implementation of the Maputo Protocol, African states therefore need to, in the first instance, ensure a timely submission of their state reports under the Maputo Protocol. In the second instance, they need to provide comprehensive data on the implementation of article 10(3) of the Maputo Protocol.

In addition to state parties, civil society organisations (CSOs) have an important role in the state reporting process. In the first instance, CSOs that are within a country that has not yet ratified the Maputo Protocol can lobby for the ratification of the document with their government. This ratification will allow the African Commission, during the state reporting procedure, to question the state about the implementation of article 10(3) of the Maputo Protocol. Further, CSOs can engage in sensitisation campaigns with their governments to implement the provisions of the Maputo Protocol with the view of making Africa conflict free so that women are not exposed to conflict related violence. CSOs can also train government officials on the state reporting procedure and focus on measures to eliminate violence against women during conflicts.

CSOs can further submit shadow reports to the African Commission<sup>67</sup> on the implementation of article 10(3) of the Maputo Protocol.<sup>68</sup> Such shadow reports can assess the budget of a country from a gender lens to analyse whether they are allocating sufficient financial resources to the eradication of violence against women, including in conflict situations. Although many shadow reports mention the protection of women from violence, especially during conflicts,<sup>69</sup> they do not make specific reference to article 10(3) of the Maputo Protocol. Hence, CSOs need to engage more with article 10(3) of the Maputo Protocol to ensure a conflict-free Africa where women are not subjected to violence.

### 4.3.3 Investigations, studies and research

Article 45(1)(a) of the African Charter provides that the African Commission has the following function:

67 Rule 74(2) of the 2020 Rules of Procedure of the African Commission.

68 See Draft Guidelines on Shadow Reporting under the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (October 2019) available at [https://www.chr.up.ac.za/images/centrenews/2020/centre\\_webinars/Finalized\\_guidelines\\_2019.pdf](https://www.chr.up.ac.za/images/centrenews/2020/centre_webinars/Finalized_guidelines_2019.pdf) (accessed 10 November 2020).

69 See for example, Human Rights Watch 'Shadow report to the African Commission on Human and Peoples' Rights in response to the 6<sup>th</sup> periodic report of Cameroon' (2020); National Human Rights Commission of Côte d'Ivoire 'Rapport alternatif sur la situation des droits de l'homme en Côte d'Ivoire' (2016); Zimbabwe Civic Organisations' shadow report to the African Commission (2019); Amnesty International 'Nigeria: Shadow report to the African Commission on Human and Peoples' Rights (2018); and Amnesty International 'Angola: Submission to the African Commission on Human and Peoples' Rights (2012).



To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.

As such, the African Commission has to undertake studies and research in the area of human rights. This article can be applied for studies and research on women's rights. However, till now, there has been no research on the implementation of article 10(3) of the Maputo Protocol. The African Commission can therefore act under this article to undertake studies and research in relation to violence against women during conflicts. These studies and research will be based on the articles of the Maputo Protocol which provide for the protection of women from violence during conflicts.

#### **4.3.4 Resolutions, general comments and guidelines**

Article 45(1)(b) of the African Charter mandates the African Commission to 'formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations'. The African Commission has executed this mandate by adopting guidelines, resolutions and general comments on different human rights issues, including women's human rights. Nevertheless, none of them make reference to article 10(3) of the Maputo Protocol as a means to eradicate violence against women. The closest document to article 10(3) of the Maputo Protocol is Resolution 283 adopted in 2014, which focuses on the situation on women and children in armed conflict. Despite focusing on violence against women during conflict, the Resolution omits reference to article 10(3) of the Maputo Protocol. Hence, the African Commission still needs to expressly include article 10(3) while adopting documents.

In the first instance, it is recommended that the African Commission make reference to the entrenched vulnerabilities of women during conflicts in resolutions concerning women's rights. Secondly, the African Commission can adopt a resolution on the use of the Maputo Protocol, specifically article 10(3) as a means to realise the AU 2020 theme to silence the guns with the objective of eradicating violence against women.

Thirdly, the African Commission can adopt general comments under the articles of Maputo Protocol that concern eradication of gender-based violence during conflicts, and resolving conflicts to expand upon the nature and scope of these articles. This will assist African states in understanding their obligations under those articles. This general comment can elaborate on the specific steps that states are required to take to ensure that they eradicate conflict and gender-based violence in line with the AU 2020 theme.

#### 4.3.5 The Special Rapporteur on the Rights of Women in Africa

The African Commission established the special mechanism of the SRRWA in 1999 to ensure that women's rights receive sufficient attention while it is exercising its functions under article 45(1)(a) of the African Charter.<sup>70</sup> The SRRWA has to 'assist African governments in the development and implementation of their policies of promotion and protection of the rights of women in Africa, particularly in line with the domestication' of the Maputo Protocol and 'the general harmonization of national legislation to the rights guaranteed' therein.<sup>71</sup> The SRRWA must further 'undertake promotional and fact finding missions' in African countries<sup>72</sup> to 'disseminate' the provisions of the Maputo Protocol and to 'investigate on the situation of women's rights'.<sup>73</sup> The SRRWA has, through the platform on EDVAW, expressed the importance of eradicating gender-based violence as part of the AU 2020 theme. However, this is not enough. The SRRWA must ensure that she mainstreams the exposure of women to violence during conflicts in implementing its mandates. While doing so, she needs to lay emphasis on article 10(3) of the Maputo Protocol as the legal basis.

## 5 CONCLUSION

In a nutshell, the AU 2020 theme of silencing the guns with the objectives of, among others, eradicating violence against women, does not mention the Maputo Protocol as a legal foundation. Till now, the progress to implement the theme has been minimal. In the context of eradicating violence against women by silencing the guns, the Maputo Protocol provides the legal basis for, firstly, the protection of women from violence and, secondly, the elimination of conflicts that expose women to exacerbated violence. Article 10(3) of the Maputo Protocol goes a step further and requires states to take 'necessary steps' to reduce military expenditure. These 'necessary steps' can either be in the form of reducing existing military expenditure, and investing in social development and the promotion of women, or to take steps such as engaging in dialogue with leaders of the opposing sides of the conflict to ensure that conflicts are resolved, thus automatically ensuring that the state will no longer need to spend excessively on military expenditure to defend itself. Article 10(3) thus is an avenue to hold states accountable in the event they have not engaged in strategies to

70 African Commission 'Resolution on the Designation of the Special Rapporteur on the Rights of Women in Africa' ACHPR/res.38 (XXV) 99 (1999) para 4: 'Referring to the provisions of article 45(1)(a) of the African Charter on Human and Peoples' Rights'.

71 Website of the African Commission available at <http://www.achpr.org/mechanisms/rights-of-women/about/> (accessed 19 August 2020).

72 See the activity reports of the Special Rapporteur for information about the missions undertaken, available at <http://www.achpr.org/mechanisms/rights-of-women/> (accessed 19 August 2020).

73 As above.

reduce military expenditure, including strategies to resolve conflicts. Hence, it is a powerful tool in the implementation of the AU 2020 theme, especially in the context of silencing the guns for the eradication of violence against women.