

**THE RESPONSIBILITY OF THE STATE ON THE
VIOLATION OF THE RIGHTS OF THE CHILD
DURING THE POST-ARMED CONFLICT: THE CASE
OF THE DEMOCRATIC REPUBLIC OF CONGO**

Mini-dissertation submitted in partial compliance of the LLM degree
(Multidisciplinary Human Rights)

By **Grace MUNDELA BILONDA**

Student number 10055721

Prepared at the Faculty of law, Centre for Human Rights, University of Pretoria,
under the supervision of Professor Michelo Hansungule

July 2012



DECLARATION

I, MUNDELA BILONDA GRACE, declare that the work presented in this dissertation is original. It has never been presented at any other university or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfillment of the requirements for the award of the LLM degree in Multidisciplinary Human Rights.

Signed

Grace Mundela

Date



EPIGRAPH

‘It is unforgivable that children are assaulted, violated, murdered and yet our conscience is not revolted nor our sense of dignity challenged.

This represents a fundamental crisis of our civilization.’

Graça Machel



DEDICATION

To my parents Joseph Mandela Mbombo and Jeanne Mbiya Kabongo

To my brother and sisters

Emmanuel, Kelly, Thesy, Dina, Jenny

And to all children victims of those gross and systematic violations of their
human rights in the world and specifically

in The Democratic Republic of Congo



ACKNOWLEDGEMENTS

I would like to thank the Almighty God, who granted me the grace to accomplish my academic purpose despite the difficulties I passed through during my studies.

My acknowledgement also goes to the incomparable contribution to this mini-dissertation of my Supervisor, Professor Michelo Hansungule, of University of Pretoria, for his patience in his theoretical advice, his guidance in the research, and his supervisory task to make this mini-dissertation be what it is.

A special thanks to my parents, my brother and sisters, my uncle Richards Kabeya and his wife Yvette Mbuyi who supported, encouraged and advised me. They have all been of tremendous financial assistance to me, without which I should not have been at this level.

I would like to thank as well Mme Margaret Mkhathswa, Oliver Musampa, Serge Kamga and Justin Wanki for their advice and their help which were helpful for my studies at University of Pretoria and the entire Oliver Tambo Law Library crew who assisted me very frequently with helpful material for my dissertation.

And finally, to all my friends Kelly Sadwane, Chevelie Mubiala, Elias Fangmbeng, Otomiewo Ufuoma, Gaele Tchouta, Mireille Kamga, Adewale Showers, Anita Twinomurinzi, Gerard Kamga, I would like to thank them for their support, their advice and their friendship.



Table of Contents

ABSTRACT.....	3
Chapter 1: Introduction.....	4
1. Background.....	4
2. Problem statement.....	6
3. Research questions.....	7
4. Significance of this study.....	7
5. Research methodology.....	7
6. Literature review.....	8
7. Limitation of this study.....	9
8. Outline of this study.....	9
Chapter 2: Violations of the rights of the child during armed conflict.....	11
2.1 An overview of the rights of the child.....	11
2.1.1 The best interests.....	12
2.1.2 The right to life, to survive and to develop.....	13
2.1.3 The non-discrimination.....	14
2.1.4 The right to participation.....	15
2.2 The grave violations on the rights of the child in DRC.....	16
2.2.1 Killing or maiming of children.....	17
2.2.2 The conscription or the use of child soldiers.....	17
2.2.3 Sexual abuse and abduction of children.....	18
2.2.4 Attacking schools or hospitals and denying humanitarian access to children.....	19
2.3 Conclusion.....	20
Chapter 3: International protection of the rights of the child in armed conflict.....	21
3.1 International Humanitarian Law.....	22
3.1.1 The Geneva Conventions 1949.....	23
3.1.1.1 Sexual abuse and abduction of children.....	24
3.1.2 Additional Protocol I and II to the Geneva Conventions.....	24
3.1.2.1 The conscription or the use of child soldiers.....	25
3.1.2.2 Sexual crimes against children.....	25
3.2 International Human Rights Law.....	25
3.2.1 The Convention on the Right of the Child.....	27
3.2.1.1 The conscription of children in armed conflict.....	28
3.2.2 Optional Protocol to the UNCRC on the Involvement of Children in Armed Conflict 2000.....	28
3.2.2.1 The conscription or the use of children in armed conflict.....	28



3.2.3 The Rome Statute of the International Criminal Court.....	29
3.2.3.1 Killing or maiming of children	30
3.2.3.2 The conscription of children in armed conflict.....	30
3.2.3.3 Sexual abuse and abduction of children.....	30
3.3 Conclusion	33
Chapter 4: State responsibility on the violation of the rights of the child.....	35
4.1 The responsibility of the DRC and individual actor on the violation of the rights of the child.....	35
4.1.1 The responsibility of the DRC	36
4.1.2 The individual responsibility	37
4.2 Reparation of these grave violations and the multidisciplinary approach	40
4.2.1 Reparation of these grave violations.....	41
4.2.2 Multidisciplinary approach	42
4.3 Conclusion	43
Chapter 5: Conclusion and general recommendations.....	45
5.1 Conclusion	45
5.2 General recommendations	46
Bibliography	48



ABSTRACT

The United Nations General Assembly adopted on the 20th of November 1989 the Convention on the Rights of the Child responding to the atrocities committed against the child, the deaths of children from armed conflict, and children suffering from diseases and hunger. Moreover, the UNGA adopted on May 25th, 2000 two Optional Protocols to the CRC relating to the involvement of children in armed conflict and to the sale of children, the use of the child for pornography and prostitution.

The CRC, almost ratified by all states, contains a comprehensive list of Human Rights relating to children which should be respected, promoted, protected and fulfilled. The CRC guarantees children's individual human rights strengthening the role of parents. The UNCRC defines in article 1 that a child is every human being below the age of 18 unless, in a particular state, the age of majority is achieved earlier and emphasizes on four general principles the best interest of the child, non-discrimination, the rights to life, survival and development and the right to participate.

Furthermore, especially for children in armed conflict, the CRC sets up measures which all states parties must implement in order to protect them and the African Charter on the Rights and Welfare of the Child (ACRWC) also sets up some measures to protect them in armed conflict according to International Humanitarian Law and International Human Rights Law.

Nevertheless, during armed conflict, it is almost impossible to respect all obligations set in IHL and IHRL. During the last twelve years, the Democratic Republic of Congo was a battlefield in which it has been estimated that 2 million children have been killed, more than 6 million have been injured during this armed conflict. For instance, they have suffered sexual violence, grave psychological trauma, malnutrition and diseases. All the six grave violations against children set by the UN Security Council in its resolution 1612 (killing or maiming of children, recruitment or use of child soldiers, rape and other forms of sexual violence against children, abduction of children, attacks against schools or hospitals, denial of humanitarian access to children) were committed during this period in the DRC.

Therefore, the DRC is responsible for the violation of children's rights set in the various legal instruments protecting children in period of armed conflict. Despite the responsibility of the state, armed groups or individuals are also recognized as criminally responsible of the violation of the rights of children within the Congolese jurisdiction only if the material elements are committed intentionally and with knowledge, according to article 30 of the International Criminal Court.

However, the reparation of these violations may foresee restitution, compensation for damage suffered in the past, assurance against future breach of international obligations and an approach that of remedial justice and prevention because children represent our societies and their protection represents a right and a human security issue.



Chapter 1: Introduction

1. Background

After a lengthy drafting process that started in 1978,¹ the United Nations General Assembly adopted on November 20th, 1989 the Convention on the Rights of the Child (CRC) responding to the horrors of child abuse, the deaths of children from war and conflict, and children suffering from disease and hunger.² On May 25th, 2000 the UN Assembly adopted two Optional Protocols to the Convention relating to the Involvement of Children in armed conflict³ and to the Sale of Children, Child Pornography and Child Prostitution.⁴

The CRC contains a comprehensive list of Human Rights relating to children which should be respected, promoted, protected and fulfilled even in a liberal democracy.⁵ The CRC also guarantees children's individual human rights while strengthening the role of parents and the family.⁶ For instance, it establishes that the basic principle of non-discrimination applies to children; this means that every boy and girl is equal.⁷

The issue of the definition of a child was crucial and debatable as part of the negotiations of the CRC.⁸ It defines a child in its article 1(1) as 'every Human Being below the age of 18 years old unless, under the law applicable to the child, majority is attained earlier'.⁹ However, subject to the provision that a domestic law which sets legal majority at an earlier age will not be compromised.¹⁰ The CRC also states in its article 3(1) that the best interest of the child should be the primary consideration in all actions concerning children.¹¹

Moreover, as human beings, children are entitled to the rights guaranteed by the Universal Declaration of Human Rights (UDHR) and the various treaties that have developed there from.¹² The CRC also contains a comprehensive set of economic, social and cultural rights as

¹ T Buck *International Child Law* (2005) 47.

² BB Woodhouse & KA Johnson 'The United Nations Conventions on the Rights of the Child: Empowering parents to protect their children's rights' in MA Fineman & K Worthington (eds) *What is right for children: the competitive paradigms of religion and Human Rights* (2009) 7.

³ The Optional Protocol to the Convention on the Right of the Child on the Involvement of Children in Armed Conflict adopted and opened for signature ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entry into force 12 February 2002.

⁴ The Optional Protocol to the Convention on the Right of the Child the Sale of Children, Child Prostitution and Child Pornography adopted and opened for signature ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002.

⁵ n 2 above 1.

⁶ n 2 above 7.

⁷ Article 2 of the Convention on the Right of the Child adopted and opened for signature ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990

⁸ n 1 above 57.

⁹ The Convention on the Right of the Child in accordance with article 49.

¹⁰ n 1 above 57.

¹¹ as above.

¹² Amnesty International 'The Human Rights of children: overview' 23 November 2006.



well as civil and political rights, which are considered to be indivisible and interdependent and consequently there should be no hierarchy in their implementation.¹³

However, four general principles are emphasized in the UNCRC: non-discrimination,¹⁴ the best interests of the child,¹⁵ the rights to life, survival and development¹⁶ and the right for children to have their views heard and given due weight to all decision affecting them.¹⁷ Especially for children in armed conflicts, the CRC sets up some measures which all state parties to the Covenant must respect and implement in order to protect them according to International Humanitarian Law (IHL).¹⁸

Moreover, the African Charter on the Rights and Welfare of the Child (ACRWC) also states in its article 22 some measures to protect children in armed conflict according to the IHL: ‘...States Parties to the present Charter shall take all necessary measures to ensure that no child shall take direct part in hostilities and should refrain in particular, from recruiting any child...’¹⁹

All the rights enshrined in the CRC fall into four categories: the first category is the subsistence rights. It includes the rights to foods, shelter and health care (to survive). The second category is the development rights. Those rights allow children to reach their fullest potentials, including education and freedom of thought, conscience and religion (to develop). The third category is the protection rights, such as the rights to life and to protection from abuses, neglect or exploitation (to be safe); and the fourth category is the participation rights. Those are rights which allow children to take active roles in community and political life (to belong).²⁰

Nevertheless, during the last 10 years, it is estimated that 2 million Congolese children have been killed in this armed conflict, more than 6 million have been injured; for instance, they have suffered sexual violence, grave psychological trauma, malnutrition, disease, etc.²¹ Moreover, over 20 million children have been displaced by war within and outside their countries.²²

Based on the above impacts of armed conflicts on children, it is evident that the rights of children have been violated during armed conflicts.

¹³R Harvey *Children and armed conflict: a guide to international humanitarian and Human rights laws* International Bureau of children rights (2003) 11.

¹⁴ Article 2.

¹⁵ Article 3.

¹⁶ Article 6.

¹⁷ Article 12.

¹⁸ Article 38.

¹⁹ Article 22.

²⁰ n 13 above 2.

²¹ n 13 above 6.

²² as above.



Children's rights are the building blocks for a solid human rights culture, the basis for securing human rights for the future generations;²³ therefore, the need for the fulfilment of these rights by the state must be established.

2. Problem statement

Article 1 of the CRC has defined a child as every human being below the age of 18 years and it considers a child as a subject of rights whose involvement in all capacities must be respected according to article 5 and 14 (2) of the CRC.²⁴

Children need special protection and care because they are the most vulnerable in society and they suffer many of the same human rights violations as adults.²⁵ Certainly in every armed conflict, children are affected in different ways; they are not less affected by events because of their supposed resilience or naivety.²⁶

Nevertheless, in the situation of armed conflicts, they face many violations of their rights including the right to health care, to education, adequate housing and to life. For instance during armed conflicts, children are seriously affected by what happens to adults in their lives: as teachers are targeted and killed, schools close down ; as health care workers are killed or flee, clinics also close their doors or offer only basic services.²⁷

Children suffered from many challenges such as death, involvement in armed conflict (the phenomena soldiers), and displacement. For instance, a recent resurgence of armed conflict in North Kivu in the eastern part of the DRC between the Congolese army and rebel forces led by General Laurent Nkunda, has caused a significant new wave of population displacement in a region.²⁸ Approximately 300,000 people have become displaced since October 27th, 2008 and half of the displaced are said to be children.²⁹ In the last seven years this armed conflict, including disease and hunger, have killed nearly 4 million people in the DRC and one in every five children dies before reaching their fifth birthday.³⁰

Although the war in the DRC officially ended in 2003, internal displacement and movement into neighbouring countries seems to be the order of the day as thousands of children have

²³ as above.

²⁴ R Hodgkin & P Newel *Implementation handbook for the Convention on the Rights of the Child* (2007) 1.

²⁵ S Singer *Protecting children during armed conflict situations* (May-June 1986).

²⁶ n 13 above 6.

²⁷ D Mazurana & K Carlson 'The girl child and armed conflict: Recognising and addressing grave violations of girls' human rights' Florence Italy 25-28 September 2006.

²⁸ Save the children 'Eastern DRC conflict' available at www.savethechildren.net/alliance/what_we_do/emergencies/eastern_drc/index.html (accessed 29 March 2011).

²⁹ as above.

³⁰ Save the children 'Gasigwa's story' available at www.savethechildren.net/alliance/media/voices/2008-11-21.html (accessed 29 March 2011).



been in active combat,³¹ twelve thousand five hundred girls have been forced to join the rebel forces for support and sexual roles.³²

Sometimes states do not realise their responsibility to protect, to promote, to respect and to fulfil the rights of children as human beings. Therefore, the responsibility of the state, a group or an individual part to the conflict must be established in order to obtain the reparation of those violations.

3. Research questions

- In what way could the state of DRC be held responsible for the violation of the rights of the child, post armed conflict?
- Are the rights of the child justiciable in the DRC?
- What should the government do to ensure the rights of the child in the DRC?
- What is the responsibility of non-state actors e.g. rebels, in relation to child involvement in armed conflict?
- Which obligations are imposed on the DRC by the CRC and the various legal instruments on the protection of the child?
- How can the African Charter on Human and People's Rights and the African Charter on the Rights and Welfare of the child together with the protocol on Women's Rights in Africa be of assistance to protect the child including the girl-child in post-armed conflict DRC?
- Which strategies need to be implemented to guarantee the rights of the child?

4. Significance of this study

Achieving a national security during or after armed conflict requires states to fulfil their responsibilities to protect their citizen especially children who are the future of our communities against any human rights violation. Therefore, this mini dissertation seeks to establish the responsibility of the DRC and the responsibility of the non-state actor of the violation of the rights of children during armed conflict by illustrating the impact of those conflicts on children and the obligations of the state which were supposed to be respected. This mini dissertation has a purpose to contribute to the protection, promotion, respect of the rights of the child in armed conflict and post armed-conflict.

5. Research methodology

In order to provide adequate answers to the relevant questions in this mini dissertation, the processing and the collection of data used in the drafting lead us to use desk research method and analytical method.

³¹ C Clifford 'Examples of the Use and Abuse of Girl Child Soldiers' (2011) available at <http://children.foreignpolicyblogs.com/?s=DRC> accessed 16 April 2011.

³²as above.



6. Literature review

There are several scholarly and other works which are relevant to the protection of children after the period of armed conflict and the responsibility of the state to ensure the rights of their citizens such as children. Therefore, the preliminary review is as follows:

Carlson Anyangwe (2004)³³ gives an overview of human rights and humanitarian law. How every human being is entitled to the rights drafted in the UDHR and those rights must be respected. The most important element which matches with our topic is when he explains the importance of the IHL in the period of armed conflict. For instance, the protection of victims in armed conflict such as children is guaranteed in IHL. In the same way, O Ben-Naftali (2011)³⁴ explains to us how IHL and International Human Rights Law (IHRL) lead state parties in armed conflict in order to avoid grave violations in those countries.

Based on the above books and more from Francois Bouchet-Saulier (2002),³⁵ this study will draw the legal standard and appropriate measures which must be applied in the DRC in armed conflict periods in order to establish if the DRC has not respected those rules and not implemented them in the objective to protect the victims especially children against those violations.

Moreover, this mini dissertation will draw some data from J Cilliers & M Malan³⁶ and Anneke Van Woudenberg & al. (2004)³⁷ about the violations of the rights of citizens during armed conflicts it will also look at the impacts of armed conflict on the DRC population during the period of 1998-2003.

After establishing the evaluation of grave violations of the rights of the child as a human being and the legal standard of IHL and IHRL which must be undertaken by state parties, this will also draw some information from some books, such as E. Van Sliedregt,³⁸ on individual responsibility on the violations of the legal standards of IHL and L Cotula & M Vidar,³⁹ for state responsibility on the breach of international law.

In order to remedy those violations and to allow the DRC to fulfil its responsibilities to protect its citizens during armed conflict periods, this will draw some data from Dinah Shelton (1999)⁴⁰ who deals with state responsibility of the violations of human rights. She also explains the issue of the reparation of individual rights' violation, the right to remedy in Human Rights instruments and United Nations drafts rules on reparation for the graves and systematic violations of individual rights. As human beings, children in the DRC face many

³³ C Anyangwe *Introduction to human rights and international humanitarian law* 2004.

³⁴ O Ben-Naftali *International Humanitarian Law and International Human Rights Law* (2011).

³⁵ F Bouchet-Saulier *The practical guide to humanitarian law* (2002).

³⁶ J Cilliers & M Malan *Peacekeeping in the DRC: Monuc and the road to peace* (2001).

³⁷ A Woudenberg 'Ethnically targeted violence in ituri' in M Malan & J Porto (eds) *Challenges of peace implementation: the UN Mission in the Democratic Republic of Congo* (2004).

³⁸ E. Van Sliedregt *The responsibility of individuals for violations of International Humanitarian Law* (2003).

³⁹ L Cotula & M Vidar *the right to adequate food in emergencies* (2002).

⁴⁰ D Shelton *Remedies in international Human Rights law* (1999).



issues of the reparation of their rights violated mostly in armed conflict. According to Shelton's book, the reparation by the state on the violation of the rights of the child in the DRC can be found in the remedies proposed in it and in D Shelton (second edition).⁴¹

Moreover, Michelo Hansungule (2009) in 'African courts on Human Rights and the African Commission'⁴² explains the existence of an individual complain mechanism which helps the individual to lay a complain on the violation of his personal rights before the African commission. According to Hansungule's chapter, we will be able to apply this mechanism in the DRC in order to learn how we can lay a complain for children and to have their rights redressed.

J Willems⁴³ explains the manner through which the DRC must protect rights of the child such as the right to education, the right to health care etc. In order to avoid more injured children in armed conflict, some strategies must be implemented in the DRC.

7. Limitation of this study

This mini dissertation will focus only on the rights of the child, which were violated in the DRC especially at the eastern part of the country during the last armed conflict from August 1998 to 2008. The responsibility of the state, the group or an individual of those violations must be established in order to protect children and to avoid such situation in the future. One limitation obviously would be that the study will be done here in Pretoria by desk research only. There will be no field visit to the country to get current situation and voices of victims.

8. Outline of this study

This study is divided into five chapters.

Chapter I deals with the general introduction

1. Gives an introduction
2. Deals with the structure of this

Chapter II deals with Violations of the rights of the child in the DRC

- 2.1 Gives an overview of the rights of the child
- 2.2 Illustrates the grave violations on the rights of the child

Chapter III elaborates legal international protection of the rights of the child during armed conflict

- 3.1 Covers international humanitarian law

⁴¹D Shelton *Remedies in international human rights law* (2005).

⁴² M Hansungule 'African courts on Human Rights and African Commission' in A Boel & J Diescho (eds) *Human Rights in Africa: legal perspectives on their protection and promotion* (2009).

⁴³J Willems *Children's rights and human development: a multidisciplinary reader* (2010).



3.2 Covers international human rights law

Chapter IV establishes the responsibility of the state on the violation of the rights of the child

4.1 Is about the establishment of the DRC's responsibility and individual actors on the violation of the rights of the child

4.2 Is about the reparation of these violations and a multidisciplinary approach

Chapter V outlines the general conclusion of the study



Chapter 2: Violations of the rights of the child during armed conflict

‘The idea of children’s rights, then, may be a beacon guiding the way to the future but it is also illuminating how many adults neglect their responsibilities towards children and how children are too often the victims of the ugliest and most shameful human activities.’ (Kofi Annan, *UN Secretary-General, September 2001*)⁴⁴

This chapter sets up an overview in section one of the rights of children in order to show that the knowledge and the respect of these rights can increase the wellbeing of children everywhere especially in the DRC. In the same way, this chapter illustrates in section two the grave violations on the rights of the child which occurred during armed conflict in the DRC, especially in the eastern part of the country.

2.1 An overview of the rights of the child

Human rights are those basic standards without which people cannot live in dignity. To violate someone’s rights is to treat that person as though he or she is not a human being. To advocate human rights is to demand that the human dignity of all people be respected.

All rights of the child are contained in the UNCRC which is the most widely ratified human rights treaty in history. It encompasses civil rights and freedoms, family environment, basic health and welfare, education, leisure, cultural activities, special protection measures for children. It also establishes a comprehensive set of goals for countries to achieve, guided by the best interests of the child.⁴⁵

The rights and the obligations of children which are guaranteed in the UNCRC are covered by articles 1 to 41.⁴⁶ The subdivision of these rights does not bring any distinction between them, neither does it establish a hierarchy, but the intention is to bring all these variety of rights together in one comprehensive instrument. Furthermore, they also want to show that the rights are all equally important and even interdependent.⁴⁷

The comprehensiveness of the CRC is underlined especially by the fact that the two generations of human rights (the first-generation and the second-generation) have been brought together in the Convention.⁴⁸ Based on the particularity of children, the UNCRC contains the protection of children against abuse and exploitation.⁴⁹

Furthermore, some organizations such as Save the Children describe the rights in the CRC in four categories: the right to survive; the right to be safe; the right to belong; the right to develop. Those rights are all considered to be equal, independent, and indivisible in importance and to reinforce.⁵⁰ Moreover, United Nations Children’s Fund (UNICEF) sets the

⁴⁴ P Alderson *Young children’s rights: exploring beliefs, principles and practice* (2008) 13.

⁴⁵ Amnesty International ‘a safe childhood is a human right’ 01 June 2011.

⁴⁶ E Verhellen *Convention on the Rights of the Child* (2006) 77.

⁴⁷ as above.

⁴⁸ n 46 above 78.

⁴⁹ as above.

⁵⁰ Save the children ‘Children’s rights: a teacher’s guide’ (2006) 4.



rights of the Convention in four principles: the best interests of the child, non-discrimination, or universality; the right to life, to survive and to develop and the respect for the views of the child (the right to participation).⁵¹

2.1.1 The best interests

The Committee on the rights of the child has highlighted article 3 of the CRC as one of the general principles of the Convention.⁵² It recognised that the best interests of the child must be the primary consideration in all actions concerning children.⁵³

The ‘best interests’ is an indeterminate concept, even the UNCRC does not define it. Of course, the conception of what is the ‘best interests’ for the child differs from different cultures, societies; however it can be reduced to a satisfaction for material needs.⁵⁴ John Eekelaar’s definition of the concept of the best interests is one of the best attempts. He said the best interests can be understood as follows:

‘Basic interests, for example to physical, emotional and intellectual care developmental interests, to enter adulthood as far as possible without disadvantage; autonomy interests, especially the freedom to choose a life style of their own.’⁵⁵

In other words, the term ‘best interests’ is described as ‘the well-being of the child’ including the physical, mental and social aspects of the child’s life.⁵⁶ This well-being is determined by a diversity of individual conditions of living such as the level of maturity of the child, the age, the presence and absence of the parents of the child, the environment and experiences of the children.⁵⁷

The purpose of what is in the best interests of the child requires a clear and comprehensive evaluation of the child’s identity, including his or her nationality, education, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.⁵⁸ The evaluation process should be accomplished in a good and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques.⁵⁹

The legal norm of the best interests of the child was changed by the CRC into a principal and required all state parties to automatically consider how children’s rights and interests might

⁵¹ P Jones ‘What Are Children’s Rights? Contemporary Developments and Debates’ (15 February 2011) 6.

⁵² M Freeman *Article 3 The best interests of the child* (2007) 1.

⁵³ n 24 above 35.

⁵⁴ n 52 above 27.

⁵⁵ as above.

⁵⁶ Office of the Special Representative of the Secretary-General for children and armed conflict: working paper no 2 ‘the Rights and guarantees of internally displaced children in armed conflict’ (2010) 20.

⁵⁷ United Nations High Commissioner Refugee guidelines on ‘Determining the best interests of the child’ May (2008) 14.

⁵⁸ General Comment No. 6

⁵⁹ as above.



be affected by their decisions and actions based on the best interests of the child.⁶⁰ The best interests of the child developed all over the world a system of the child welfare as children came to be seen as unique individuals with different needs and required a particular assistance from adults.⁶¹

Moreover, the ACRWC states in its article 4 that the best interests of the child shall be the fundamental consideration in all actions undertaken by the judicial or administrative authority concerning the children.⁶² This right implies that it is a principle which will usually take priority over other rights recognised for all children.⁶³

2.1.2 The right to life, to survive and to develop

Article 6 of the CRC is one of the general principles designed by the Committee on the rights the child and it is also a universal human rights principle in other instruments.⁶⁴

The right to life is the only right under the International Convention on Civil and Political Rights (ICCPR) described as inherent. This right is not awarded to individuals by society; every society is obliged to protect the child's right to life individually.⁶⁵ Although the right to life was already protected in other human rights conventions, it was included and listed during the drafting of the CRC as a priority before other rights of the child.⁶⁶ Even the Human Rights Committee (HRC) in a General Comment in 1982 notes that the right to life is considered to be the supreme right from which no derogation even in a period of emergency is permitted.⁶⁷

According to the CRC, children's natural right to life as set forth in article 6 obliges all state parties to ensure, to respect, to protect, and to fulfil the survival and the development of the child to the maximum extent possible for their economic, social and cultural rights contained in the same convention.⁶⁸ Based on article 38 of the CRC, all states must take special measures of care and protection for children affected by armed conflict which posed a danger to the right to life of many children.⁶⁹ Moreover, the CRC asserts that the right of the child to survival and to develop was linked to the right to life and the right to life and the right to survival were complementary rights.⁷⁰

The Committee on the Rights of the child evaluates development as a general concept which constitutes an objective to reach by the parents and the family and the obligation of the state

⁶⁰ n 56 above 21.

⁶¹ n 56 above 20.

⁶² n 56 above 21.

⁶³ Save the Children 'Advancing Children's Rights: a Guide for Civil Society Organisations on how to engage with the African Committee of Experts on the Rights and Welfare of the Child' (2009) 10.

⁶⁴ n 24 above 83.

⁶⁵ S. Detrick *A commentary on the United Nations Convention on the Rights of the Child* (1999) 126.

⁶⁶ n 65 above 127.

⁶⁷ n 24 above 90.

⁶⁸ A G Mower *The Convention on the Rights of the Child: International Law Support for Children* (1997) 31.

⁶⁹ n 24 above 89.

⁷⁰ n 65 above 130.



to support them.⁷¹ Furthermore, the protection from violence and exploitation is also fundamental for the maximum survival and development.⁷² The resulting rights from the right to survival and the right to develop are essential for its enjoyment; therefore, all children even those living with disability, refugee are entitled not only to the health care but also to certain programs, conditions and opportunities related to the qualitative aspect of survival.⁷³

These rights include rights to adequate food, shelter, clean water, formal education, primary health care, leisure and recreation, cultural activities, access to information about their rights, and freedom of expression, conscience and religion. The rights of survival and development require not only the existence of the means to fulfil the rights but also access to them.⁷⁴

For instance: state parties should provide health care which is important for all human rights.

The needs of children are based on the following characteristics:

- Availability: principal health care should include services sensitive to the needs of children;
- Accessibility: a health service should be known and easily accessible economically, physically and socially to all children in the way;
- Acceptability: all health services should respect cultural values, be gender sensitive, be respectful of medical ethics and be acceptable to both children and the communities in which they live;
- Quality: health services should be appropriate and require personnel trained to care for all children.⁷⁵

2.1.3 The non-discrimination

The HRC suggests that the concept discrimination should be understood as any exclusion which is based on any ground such as colour, sex, religion poverty, etc.⁷⁶ The principle of non-discrimination has also 3 functions: the first function is to protect human dignity when people are dispossessed of basic needs in their life because of their colour or their religion.⁷⁷

The second function, it is as an umbrella to politics in sectoral rights. For instance, a state can make any kind of distinctions in the implementation of the sectoral rights but according to the IHL in its principle of non-discrimination, the state is limited in its political decisions. It cannot use discrimination as the accomplishment of the political goal.⁷⁸ The third function is to help express and transmit the ethical norm of race, sex, religious etc.⁷⁹

⁷¹ n 24 above 83.

⁷² as above.

⁷³ n 68 above 31.

⁷⁴ UNICEF fact sheet 'Child rights' the interim national Constitution of the Republic of Sudan (2005).

⁷⁵ General Comment No. 4 of the Convention on the Rights of the Child.

⁷⁶ n 24 above 17

⁷⁷ B Abramson *Article 2 rights of non- discrimination* (2008) 32.

⁷⁸ n 77 above 34.

⁷⁹ n 77 above 39.



Moreover, the principle of non-discrimination of the CRC enunciated in its article 2 includes ‘property’ and ‘disability’ as criteria for discrimination.⁸⁰ All state parties to the CRC have the obligation to ensure the rights enunciated in the Convention.

This duty extends to all children within the state’s jurisdiction irrespective of race, colour, sex, language, political or other opinion. Ethnic or social origin, property, disability, birth or other status and health status (including HIV/AIDS and mental health) are also among the state’s responsibility.⁸¹

Therefore, it does not matter where the child comes from, what language he speaks, what his or her parents do, what their culture is, whether he or she has a disability, if he or she is rich or poor. No child should be treated unfairly on any basis and each child should be entitled to special attention and protection from any society where he or she belongs.⁸²

According to the ACRWC, the principle of non- discrimination contains ‘fortune’ as criteria for discrimination.⁸³ This right is strengthened by the provisions giving priority to the special needs of children living under apartheid but also under regimes practising racial, ethnic, religious or other forms of discrimination as well as in states subject to military destabilisation.⁸⁴

2.1.4 The right to participation

Article 12 of the CRC provides for all children who are capable of developing their own views, the right to express those views freely in all matters affecting them, the views of children being given due weight of the age and maturity of the children.⁸⁵ The Committee on the rights of the child highlighted that the child must be regarded as an active subject of rights and that an explanation purpose of the Convention is emphasized that the human rights extend to children.⁸⁶

Therefore, children have the rights to express their opinions and to have a word in matters affecting their social, economic, religious, cultural and political life.⁸⁷ These rights also include the right to be heard, the right to information and freedom of association and these rights as they mature help children bring about the realization of all their rights and prepare them for an active role in society.⁸⁸

⁸⁰ n 63 above 10.

⁸¹ n 75 above.

⁸² UNICEF fact sheet: ‘A summary of the rights under the Convention on the Rights of the Child’ available at http://www.unicef.org/crc/files/rights_overview.pdf (accessed 29 March 2011).

⁸³ n 63 above 10.

⁸⁴ as above.

⁸⁵ n 65 above 214.

⁸⁶ n 24 above 149.

⁸⁷ n 74 above.

⁸⁸ as above.



These four general principles as rights of children included in the UNCRC, also recognised in all human rights instruments protecting the child, constitute the fundamental rights for all children in the entire world. The parents and the family have the obligation to respect, to protect and to fulfil. The state has the obligation to support the parents, the family in their obligation for the child's enjoyment of his or her rights.

Nevertheless in armed conflict, these general principles are not respected, protected and fulfilled. Children are deprived of their rights. This is what the second section illustrates by giving the grave violation of the rights faced by the child during armed conflict especially the case of the DRC.

2.2 The grave violations on the rights of the child in DRC

The DRC, which lies at the heart of Africa, is the third largest country on the continent with a wealth of mineral resources.⁸⁹ For more than ten years, the DRC has been a victim of a chain of new and variable coalitions because of the lack of Congolese state control over its territory has allowed others to engage inside the country and interstate conflicts across its borders.⁹⁰

The pillage of these natural resources such as bauxite, diamonds, zinc, uranium, zinc is also immediately connected to the beginning and perpetuation of armed conflict.⁹¹ In 1998, the DRC government was involved in armed conflict supported by Angola, Zimbabwe and Namibia against several rebel movements backed by Uganda, Rwanda and Burundi.⁹²

Violence and conflicts have always been part of human incidents in one form or another and their destructive effects can be detected all over the world.⁹³ During armed conflict, IHL and IHRL must be respected with special regard to children who often have no means to defend themselves against abuses and the full variety of children's rights. The rights consist of economic, social and cultural rights as well as political and civil rights should be respected, protected and promoted;⁹⁴ for instance, the case of Thomas Lubanga was a particular case pertaining to the DRC on the violation of the rights of children related to conscription and enlistment of children in armed forces.

In order to protect children's rights in armed conflict, the United Nations Security Council (UNSC) elaborated its resolution of 1612 in 2005 for an end to grave violations against children in conflict and the formation of a Working Group on Children in Armed Conflict. The working group was created in order to develop mechanisms for the monitoring and

⁸⁹ n 36 above 15.

⁹⁰ as above.

⁹¹ Watch list on children and armed: Struggling to survive children in armed conflict in the Democratic Republic of Congo (2006)8.

⁹² A Woudenberg & al. 'Ituri: covered in blood ethnically targeted violence in North-eastern DR Congo (2003) 5 Human Rights Watch vol. 15 No.11.

⁹³ H C Rohne & al 'Challenging retroactive justice-state-based conflict, mass victimisation and the changing nature of warfare' in I Aertsen & al (eds) *Restoring justice after large-scale violent conflicts* (2008) 3.

⁹⁴ Office of the Special Representative of the Secretary-General for children and armed conflicts working paper No1: the six grave violations against children during armed conflict: the legal foundation (2009) 3.



reporting of six specific grave violations against children during armed conflict due to their egregious nature and severe impact on a child's wellbeing which forms the basis of the Council's architecture in protecting children during war.⁹⁵

Moreover, each of the six grave violations against children during times of conflict constitute a grave violation of the Geneva Conventions (GC) and the laws of war, a violation of customary norms of international law, a contravention of the CRC and other international and regional human rights treaties, a war crimes and crimes against humanity.⁹⁶

These six grave violations against children selected due to their ability to be monitored and quantified. Their flagrant nature and the severity of their consequences on the lives of children during armed conflict are: killing or maiming of children, conscription or use of child soldiers, rape and other forms of sexual violence against children, abduction of children, attacks against schools or hospitals, denial of humanitarian access to children.⁹⁷

2.2.1 Killing or maiming of children

'The right not to be arbitrarily deprived of life and the prohibitions against murdering or maiming civilians including children are principles enshrined in humanitarian law, human rights treaties and international legal judgments'.⁹⁸

Killing and maiming children means any actions that results in the death or serious injury such as disfigurement, scarring, mutilation of children; from international conflict, maiming includes wounds caused by bullets in cross fire or detonation of anti-personnel landmine widespread deliberate targeting of children such as in the DRC.⁹⁹

2.2.2 The conscription or the use of child soldiers

Children become soldiers in different ways such as kidnapping or others join armed forces or armed groups because they are convinced that it is a good way to protect their families.¹⁰⁰ The kind of children, who join voluntary armed forces or armed group, respond more often to variety of pressure for instance economic, political, social and cultural.¹⁰¹

Over the last ten years, Lord Resistance Army (LRA) has abducted children in their militia group to continue hostilities especially in Goma (Kivu) and Haut Uele territory north eastern

⁹⁵ n 94 above 2.

⁹⁶Office of the Special Representative of the Secretary-General for children and armed conflict booklet: protecting children during armed conflict: international legal foundations of the six grave violations against children during armed conflict (2009) 2.

⁹⁷ as above.

⁹⁸ n 94 above5.

⁹⁹ UNICEF *Machel study 10 years of strategic review: children and conflict in a changing world* (2009) 21.

¹⁰⁰ G. Machel *The impact of war on children* (2001) 8.

¹⁰¹ n 99 above 11.



of the DRC.¹⁰² They can also be used as porters to carry loads that include anything from ammunition to wounded soldiers.¹⁰³

Enlisting or using children under the age of 15 as soldiers is incontrovertibly prohibited under the CRC and the Additional Protocols to the GC, treaty and custom. Furthermore, human rights law declares 18 years as the minimum legal age for recruitment and use of children in hostilities.¹⁰⁴

Nevertheless, the enlistment of children from wealthier and better education at background is less than others because their parents can pay for their freedom or challenge their recruitment through legal means or political influence.¹⁰⁵

2.2.3 Sexual abuse and abduction of children

Rape and other forms of sexual violence against boys and girls are most serious human rights violations.¹⁰⁶ They pose a particular risk to girls in conflicts when it is used as a war tactic.¹⁰⁷ The attention to those grave violations against the rights of children as weapon of war began during the conflicts of the Balkans and Africa's Great lakes region in the early 1990s.¹⁰⁸

Moreover, in the DRC the climate of impunity has resulted in extensive sexual violence from October 2006 to July 2007 more than 10.000 survivors of sexual violence 34 per cent of them were children.¹⁰⁹ There are many cases of sexually abused children such as the following one:

'In Massamba in November 2002, a young girl, aged 14, was raped by four soldiers of the MLC. She was a virgin. They pinned her to bed. They forced her brother to watch and said that if he left, they would kill her... After they raped her, she cried. They slapped her on her face and leg and told her to stop crying. They said: we can do what we want as long as we don't kill people.'¹¹⁰

'In October 2002, two miles of Massamba, a daughter of a man name Ndalo, was raped in front of her father and kidnapped in the bush by several soldiers. She was about 12 years old. He never saw a daughter girl again.'¹¹¹

Abduction of boys and girls by the use of force or by seizing them against their will or the will of their adult guardians either temporarily or permanently can also be classified for the purpose of recruitment by armed forces or armed groups. This classification makes no difference from participation in hostilities to sexual abuses, force labour, taking information

¹⁰² n 93 above 21.

¹⁰³ n 99 above 12.

¹⁰⁴ n96 above 7.

¹⁰⁵ n 99 above 8.

¹⁰⁶ n 96 above 9.

¹⁰⁷ n 99 above 23.

¹⁰⁸ as above.

¹⁰⁹ as above.

¹¹⁰ n 92 above 44.

¹¹¹ n 92 above 45.



and indoctrination.¹¹² The cases of abduction were cited in the Secretary-General's report on children between 2003 and 2006 in the DRC.¹¹³

2.2.4 Attacking schools or hospitals and denying humanitarian access to children

Schools and hospitals are civilian institutions that often provide shelter and tend to the needs of children during conflict.¹¹⁴ Attacking schools or hospitals includes targeting of educational or medical facilities resulting in their total or partial destruction and they may also involve the occupation or deliberate targeting of personnel, students, or patients.¹¹⁵

Schools or hospitals are often made inaccessible to the population during armed conflict because of military occupation or they use them as camps for internal displaced persons.¹¹⁶ This grave violation against the rights of children does not allow children to enjoy their right to education or their right to the enjoyment of the highest attainable standard of physical and mental health.

Denial of humanitarian access means the blockage of the free passage or timely delivery or humanitarian assistance to persons in need, including children.¹¹⁷ Humanitarian access may be denied for either security or political purposes.¹¹⁸

Since states are bound to provide access to civilians in need under IHL, a state's obligation to allow humanitarian access is a pressing issue of the conflict.¹¹⁹ For instance in Ituri, armed groups began to intimidate humanitarian workers and to block the delivery of assistance to rival areas in late 1999,¹²⁰ in April 2001 the armed groups killed six members of the International Committee of the Red Cross.¹²¹

Since violent conflict started in the DRC in 1998, more than 5 million of the population have died and most of them as result of lack of access to food and health care.¹²² Even after a peace accord to end conflict in North Kivu province, eastern of DRC, armed group and government forces sustain to kill, to rape, to abduct and to torture the population.¹²³

¹¹² n 99 above 23.

¹¹³ as above.

¹¹⁴ n 96 above 13.

¹¹⁵ n 99 above 22.

¹¹⁶ as above.

¹¹⁷ n 99 above 24.

¹¹⁸ as above.

¹¹⁹ as above.

¹²⁰ n 92 above 39.

¹²¹ n 37 above 190.

¹²² Oxfam 'Conflicts in DRC' available at <http://www.oxfamamerica.org/emergencies/conflict-in-drc> (accessed on 17 June 2011).

¹²³ Amnesty International 'No end to war on women and children: North Kivu Democratic Republic of Congo' (17 June 2011) 1 available at <http://www.amnesty.org/en/library/info/AFR62/005/2008/en> accessed 17 June 2011.



Those members of armed groups and government security forces still rape and commit sexual abuses against women and girls, and in a smaller number of cases, men and boys as well as infant children and older women are among the victims. These crimes are committed in public and in front of family members, including children.¹²⁴

In many cases, sexual abuse and rape appear to be ethnically motivated and/or aimed at terrorizing and demoralizing communities suspected of supporting enemy groups and some women have been abducted and held as sexual slaves.¹²⁵

Since the beginning of 2009, more than 1 million people have abandoned their homes; almost half a million Congolese are now refugees in neighbouring countries.¹²⁶ The Oxfam Studies reveal that an estimated 5.4 million have lost their lives since 1998, most of them from preventable diseases; one in three children are not able to go to school and malnutrition is extensive.¹²⁷

2.3 Conclusion

According to the variety rights of the child subdivided in four principles: the best interests, non-discrimination, right to life, to survive and to develop and the right to participate included in the CRC, all children must have the satisfaction of materials basic needs: physical, emotional, environmental, social aspect of the children. They do have the right to live, to have access to appropriate services in education, health care for their enjoyment.

The illustration of the grave violations against the rights of the child elaborated by the UNSC in its resolution 1612 in 200, such as killing of many children especially at the eastern part of the country, sexual abuse sustained by both boys and girls in the rural area, denied of humanitarian access to children by the rebels in conflict areas occurred during armed conflict, has demonstrated that the rights of Congolese children as recognised by all legal documents protecting the rights of children during armed conflict were not respected, protected and fulfilled. They were violated by all parties to this conflict.

In fact, the responsibility in these violations must be proved in order to make reparation of these violations. Hence, the following chapter helps us to recognise that the DRC has violated different international norms of IHL and IHRL by committing the six grave violations against children.

¹²⁴ n 122 above 6.

¹²⁵ as above.

¹²⁶Oxfam 'Conflicts in DRC: background' available at <http://www.oxfamamerica.org/emergencies/conflict-in-drc/background> (accessed on 17 June 2011).

¹²⁷ as above.



Chapter 3: International protection of the rights of the child in armed conflict

“We want our rights to be respected. Wars are no excuse for violating our rights. We all have rights [...] and we ask you to raise awareness of these rights and to promote them. We want to learn more about our rights so that we can demand them. We want our parents, teachers and people from communities, development organisations and government offices to be trained on children’s rights so that they can respect and protect them” (Will you listen? Young Voices From Conflict Zones)¹²⁸

Human rights are those rights inherent to humankind and without them humankind cannot live as human beings; for that reason, human rights constitute for them the foundation of human existence and co-existence.¹²⁹ Human rights permit to human beings to completely develop and use their skills, their conscience and to satisfy their spiritual and physical needs such as expression of opinions.¹³⁰

Therefore, human rights constitute the most cherished rights in its rights to be a human, which implies the fact that those rights should be respected and protected for the inherent dignity of human beings.¹³¹ Owing to the UNCRC, ratified by almost all countries of the world, children’s rights have been recognised, even in period of armed conflict and consequently they must be promoted, protected, respected and fulfilled by all state parties to the UNCRC.

Those rights are protected by a broad variety of international and regional instruments on human rights, humanitarian law. In general, the legal protection of the rights of children is contained in two bodies of the International Law which is the body of rules governing inter-state relations: International Humanitarian Law and International Human Rights Law.¹³² Those two bodies IHL and IHRL share the same fundamental objectives, aiming to protect human beings despite this, both came to the forefront of discussions after the devastating consequences of the Second World War.¹³³

At the beginning, IHL and IHRL were dealt with as two distinct bodies of law and they were applied in distinct situations; IHL was applied in times of war while IHRL was applied in times of peace.¹³⁴ Actually, IHRL is also applied during armed conflict because some rights such as the right to life must be respected despite it not being fully achieved in that situation.¹³⁵ Moreover, the International Court of Justice (ICJ) concluded that there are three different aspects of their interrelation: some rights may be exclusively a matter of IHL, some exclusively of IHRL and some others may be regulated by those two bodies of International

¹²⁸ n 56 above 13.

¹²⁹ n 33 above xi.

¹³⁰ as above.

¹³¹ as above.

¹³² n 13 above 6.

¹³³ I Siatitsa & M Titberidze ‘Human Rights in armed conflict from the perspective of the contemporary State practice in the United Nations: factual answers to certain hypothetical challenges’ available at www.adh-geneva.ch/RULAC/pdf/HRL-in/AC.pdf (accessed 13 September 2010) 2.

¹³⁴ as above.

¹³⁵ as above.



Law.¹³⁶ However, it does not specify which rights must be a matter of each of the respective categories or how those rules must be applied simultaneously.¹³⁷

Nevertheless, it is important to examine whether the content of IHL and IHRL framework according to the protection of the rights of children in armed conflict because of their particular vulnerabilities and their importance in society.

This chapter is subdivided into two sections: section 1 gives us the most important legal instruments IHL on the protection of children during armed conflict. In the same way, the second section illustrates IHRL with its most important legal instruments.

3.1 International Humanitarian Law

International humanitarian law (IHL) is a branch of public International Law comprising customary and treaty law of war, applicable in period of armed conflict, in matter of an international or non-international character.¹³⁸ It seeks to regulate the methods and means of warfare, and the treatment of persons in period of armed conflicts, who are not, or who are no longer participating in the hostilities.¹³⁹ It is also a limit to the amount of violence permissible to the amount necessary to weaken the military potential of the enemy.¹⁴⁰ In fact, it used to be called ‘the laws and customs of war’ or ‘the law of armed conflict’ and with the same purpose to limit the use and effects of international violence.¹⁴¹

IHL or ‘Geneva law’ is also one of the principal subdivisions of the modern *jus in bellum* and can be maintained to be genuinely distinct from ‘Hague law’ in its focus upon the victims of armed conflict deriving from humanitarian initiative undertaken by Henry Dunant for the wounded on the battlefield of Solferino.¹⁴² IHL safeguards a subset of human rights from which states cannot derogate even in the extreme case of armed conflict.

Since the practice of violence by states in inter-state relations has not yet been eliminated, the naturalistic purpose of IHL is the humanisation of the conduct of warfare by subjecting war to legal regulation and limiting as far as possible the suffering and destruction caused by armed conflict.¹⁴³ Some scholars generally agree that the origin of modern IHL was in 1864 with the adoption of the first Geneva Convention.¹⁴⁴

It is also clear that the rules contained in that Convention was derived from other existing international customary laws; for instance the prohibition against poisoning well reaffirming

¹³⁶ n 133 above 12.

¹³⁷ as above.

¹³⁸ n 33 above 66.

¹³⁹ n 13 above 6.

¹⁴⁰ n 34 above 34.

¹⁴¹ n 33 above 66.

¹⁴² H Mc Coubrey *International law of armed conflict* (1992) 257.

¹⁴³ n 33 above 66.

¹⁴⁴ Peace Operations Training Institute ‘International Humanitarian Law’ available at www.peaceopstraining.org/get_course_sample_pages/16 (accessed 16 August 2011) 3.



in the 1899 in the Hague, the first reasons for the prohibition against killing prisoners reaffirmed in the third Geneva Convention.¹⁴⁵

Between 1850 and 1950 some rules limiting the way and methods of warfare were codified in international instruments such as the Declaration of Paris 1856, the Geneva Convention of 1864, the Declaration of St Petersburg 1868, the Hague Convention 1899, the four Geneva Red Cross Conventions 1949.¹⁴⁶ Nonetheless, the most significant humanitarian law treaties applicable to warfare are the Geneva Conventions 1949, drafted in the outcome of the World War II, and the two Additional Protocols to these Conventions added in 1977.¹⁴⁷

3.1.1 The Geneva Conventions 1949

The most important purpose of the four Geneva Conventions is the protections of civilians of international conflicts.¹⁴⁸

- Geneva Convention I focuses on the treatment and the protection of members of armed forces who are wounded and sick in the field;
- Geneva Convention II regulates the way that state must treat and protect members of armed forces who are survivors, exiled or wounded and sick at the sea;
- Geneva Convention III relates to the treatment and the protection of prisoners of armed conflict;
- Geneva Convention IV is the first treaty which seeks to regulate the way that each state should treat and protect all civilians in period of armed conflict, occupation or internment.¹⁴⁹

The GC IV, in its general provisions on the protection measures of persons, includes limited number of obligations on the parties to armed conflict to provide protection for children.¹⁵⁰ For instance in article 23, the GC IV allow the free passage of basic needs such food, clothes, medicine for children, the assistance for children who are separated or orphaned.¹⁵¹

However, the majority of children in the provisions of the GC IV do not afford protection for children under the age of 18 because all persons under that age are children and simultaneously entitled to a special protection did not exist when the GC were elaborated but it has been accepted recently by the international community.¹⁵²

The GC IV's provisions are applicable to every international conflict because, not only are 190 state parties to the 1949 GC, but those Conventions are also now considered to be customary international law although the GC IV provides limited protection for children in

¹⁴⁵ as above.

¹⁴⁶ n 33 above 67.

¹⁴⁷ n 13 above 7.

¹⁴⁸ as above.

¹⁴⁹ as above.

¹⁵⁰ n 13 above 8.

¹⁵¹ as above.

¹⁵² n 13 above 8.



armed conflict.¹⁵³ Therefore, for non-state parties to the GC, the provisions of the GC must be applicable in their territories because they are bound and have to uphold the obligations contained therein.¹⁵⁴

The overarching aim of the four GC is the protection of victims of international conflicts but its weakness, in terms of modern day conflicts, is that they are not applied in non-international conflict such as internal conflict.¹⁵⁵ However, there is an exception. It is the common article 3.¹⁵⁶

The common article 3 is contained in all four GC and requires all parties to an internal conflict to provide a very limited set of fundamental guarantees for those who are no longer taking part in hostilities due to injury, sickness or for any other reasons but it is also considered insufficient and inadequate to address and regulate the growing number and the nature of internal conflicts.¹⁵⁷

The GC IV has elaborated some rules in order to protect all civilians including children especially for the six grave violations against them committed in the DRC.

3.1.1.1 Sexual abuse and abduction of children

In time of international and non-international conflicts, children are protected from rape, sexual violence and outrages on the personal dignity by the general provisions protecting civilian population.¹⁵⁸ The GC IV provides in article 27 that 'protected persons are entitled, in all circumstances, respect for their persons, their honour, their family rights... Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'.¹⁵⁹

3.1.2 Additional Protocol I and II to the Geneva Conventions

The international community adopted in 1977 the Additional Protocols (API and II) to the Geneva Conventions.¹⁶⁰ The API widens the protection for those caught in international conflict, especially by up-dating rules applicable to the conduct of hostilities and it also amplifies the protection afforded to children in international conflicts, stating that they shall be protected from any form of indecent assault, shall be object of special respect and special care and aid from States parties.¹⁶¹

The APII was the first binding international document to solely address the conduct of parties in non-international conflicts, developing the fundamental guarantees enshrined in common

¹⁵³ as above.

¹⁵⁴ as above.

¹⁵⁵ as above.

¹⁵⁶ as above.

¹⁵⁷ as above.

¹⁵⁸ n 13 above 47.

¹⁵⁹ Geneva Convention IV 1949 relating to the protection of civilian persons in time of war article 27(1) (2).

¹⁶⁰ n 13 above 9.

¹⁶¹ Article 77 (1) of the Additional Protocol I to the Geneva Conventions of 12 August 1949 relating to the protection of victims of international armed conflicts (1977).



article 3.¹⁶² The APII contains a similar version of the protection of children provision contained in the API.¹⁶³ Under the APII, children are entitled to be provided with care and aid that are required for them; importantly, children need education set up in article 4(3)(a), to be reunited with their family set in article 4(3)(b) and to be removed from conflict zones to safer places in the country set in article 4(3)(a).¹⁶⁴

Concerning the violations against children that occurred in the DRC, the AP I and II have also elaborated some rules.

3.1.2.1 The conscription or the use of child soldiers

The Additional Protocol I set in article 77(2) the minimum age for recruitment of children by armed forces and for the immediate participation of them; it constitutes the first international binding document responding to the issue of child soldiers.¹⁶⁵ However, the age of 15 and not 18 was set in article 77(2)&(3) of the API as the minimum age for the participation in hostilities and for the enlistment.¹⁶⁶ Significantly, the APII recognised in article 4(3)(c) that all children need protection from being enlisted by the government and armed opposition groups, but in the same order with the API, the minimum age for the enlistment and the participation in conflicts was set at 15 years old.¹⁶⁷

3.1.2.2 Sexual crimes against children

The API provides in its article 75(2)(b) the fundamental guarantees for the protection of children of these crimes: 'the following acts are and shall remain prohibited at any time and any place whatsoever, whether committed by civilians or military agents: (b) outrages upon personal dignity, in particular humiliating and degrading treatment enforced prostitution and any form of indecent assault.'¹⁶⁸ In its article 77(1) for the protection of children, the API states that 'children shall be the object of special respect and shall be protected against any form of indecent assault'.¹⁶⁹

In case of internal conflicts, the APII sets in its article 4(2)(e) that '... the following acts... shall remain prohibited at any time and in any place whatsoever: (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'.¹⁷⁰

3.2 International Human Rights Law

International Human Rights Law seeks to regulate the way that all states act towards people in their jurisdiction; even though it is not designed to protected people in period of armed

¹⁶² n 13 above 10.

¹⁶³ as above.

¹⁶⁴ as above.

¹⁶⁵ n 13 above 9.

¹⁶⁶ as above.

¹⁶⁷ n 13 above 11.

¹⁶⁸ n 13 above 49.

¹⁶⁹ as above.

¹⁷⁰ as above.



conflict, many of its provisions remain applicable.¹⁷¹ According to Patrick Marcklem, IHRL refers to the most important objective to protect universal features of all human being from the exercise of the sovereign power; and it emerged as a distinct field of International law only in the consequence of the World War II.¹⁷²

IHRL, which provides to every human being subjective of rights mostly against the state, is used in or outside of armed conflict.¹⁷³ Its rules were elaborated in regard to problems individuals face in period of peace.¹⁷⁴ In spite of this, there is no limitation on their materiel field application and the application of their rules during armed conflicts has been re-affirmed time and time again by the SC, the UNGA, the now-defunct UNHRC and its special rapporteurs, as well as by the International Court of Justice (ICJ) which affirm that ‘the protection offered by human rights conventions does not cease in case of armed conflict, save for the effect of provision for derogations...’¹⁷⁵

There is a number of plural countries as Iraq, Sudan with specific resolutions adopted by the Security Council (SC), General Assembly (GA), Human Rights Council (HRC) and the Commission on Human Rights that, taken separately as well as in their entirety, point to the general understanding that HRL is applied in times of armed conflict.¹⁷⁶

Some titles of special resolutions adopted in the context of armed conflict obviously illustrate the fact that IHRL is applied. For instance, the title of the resolution A/HRC/RES/12/5 of the HRC, being ‘Protection of the human rights of civilians in armed conflict’, speaks for itself.¹⁷⁷

The SC, GA, HRC and CHR have also all adopted various resolutions that unequivocally condemn the violation of both IHL and IHRL in certain armed conflicts. For example the SC, in one of its resolutions relating to the situation in the DRC in 2001, expressed ‘its grave concerns at the repeated human rights violations throughout the DRC in particular in the territories under the control of the rebel groups’.¹⁷⁸ It is the resolution GA, A/RES/57/233 (2002) which illustrates the application of the IHRL in the DRC. This resolution is the respond to all violations of human rights and IHL in the territory of the DRC in particularly the eastern part of the country by all parties to the conflict.¹⁷⁹

In fact, IHRL has a number of treaties protecting all children during armed conflict such as the International Covenant on civil and political rights (General Assembly resolution 2200 A

¹⁷¹ n 13 above 7.

¹⁷² A R Chouwbhury & J H Bhuiyan *An introduction to International humanitarian law and International human rights law* (2010) 1.

¹⁷³ n 34 above 34.

¹⁷⁴ n 34 above 50.

¹⁷⁵ as above.

¹⁷⁶ n 133 above 4.

¹⁷⁷ as above.

¹⁷⁸ n 133 above 5.

¹⁷⁹ Addendum to human rights in armed conflict from the perspective of the contemporary State practice in the United Nations: Factual answers to certain hypothetical challenges 18 January 2011 www.adh-geneva.ch/.../Addendum%2018%20January%202011_%20final.pdf (accessed 1 October 2011) 9.



XXI) including the right to life, the right to freedom from slavery, torture, arbitrary arrest; the International Covenant of Socio Economic and Cultural Rights (General Assembly resolution 2200 A XXI) covers some rights e.g. the right to food, clothing, health, education; the Convention on the Elimination of all forms of Discrimination against Women (General Assembly resolution 34/180).¹⁸⁰

Besides, there are some treaties dealing with particular themes or group of people such as the issues of genocide, torture, refugees and racial discrimination. In all situations (armed conflict or period of peace), the Convention of the Right of the Child is the most specialised.¹⁸¹

3.2.1 The Convention on the Right of the Child

The UNCRC, ratified by the DRC as decree no. 87-027 of 20th July 1987,¹⁸² is the very first document at the international level to adopt legal standards relating to the rights of the child traced back to the League of Nations and a special committee was also established to deal with questions relating to the protection of children.¹⁸³ The Convention on the Rights of the Child defines children as all human being under the age of 18 years with a comprehensive set of economic, social and cultural rights as well as civil and political rights considered to be indivisible and interdependent and these should be no hierarchy in their implementation.¹⁸⁴

It recognised that the UNCRC provides the most comprehensive and specific protection for children in peace period and in armed conflict.¹⁸⁵ As emphasized by the Committee on the Rights on the Child (A/49/41) these include protection of the family environment, essential care and assistance, access to health, food and education; the prohibition of the torture, abuse or neglect, the prohibition of the death.¹⁸⁶

Article 38 of the UNCRC specifically addresses the issue of the protection of children in times of armed conflicts; however, this provision does not impose an absolute duty on states parties to ensure the care and the protection of children during this period.¹⁸⁷ Moreover, relating to post armed conflict, article 39 of the UNCRC provides that all states parties are obliged to assist the physical and psychological recovery and the social reintegration of children who have been victims of armed conflict.¹⁸⁸

¹⁸⁰ Report of the expert of the Secretary General, G Machel 'Promotion and protection of the rights of children: impact of armed conflict on children' A/51/306 26 August 1996 http://www.unicef.org/graca/a51-306_en.pdf (accessed 17 August 2011) 50.

¹⁸¹ as above.

¹⁸² Democratic Republic of Congo Ministry of Human Rights 'Eight, Ninth and tenth periodic reports to the African Commission on Human and Peoples Rights; implementation of the Africa Charter on Human and People's Rights (Period – From July 2003 to July 2007) June 2007 2

¹⁸³ n 65 above 13.

¹⁸⁴ n 13 above 11.

¹⁸⁵ n 178 above 51.

¹⁸⁶ as above.

¹⁸⁷ n 13 above 11.

¹⁸⁸ n 13 above 12.



Despite the specific protection of children during armed conflict being limited, it is arguable that all provisions of the UNCRC are applicable to children during international conflict and non-international conflict, as there is no provision which can be derogated by states in an emergency situation.¹⁸⁹

3.2.1.1 The conscription of children in armed conflict

The standard age of children to be enlisted was reaffirmed by article 38 of the UNCRC which states that all state parties should respect obligations of IHL applicable to them in armed conflicts which are relevant to the child and all states should also take measures to protect all children who did not attained the age of 15 years not to take a direct part in armed conflicts.¹⁹⁰

However, in the case of the enlisting of children who have attained the age of 15 years but who have not attained the age of 18 years, state parties shall make an effort to give priority to those who are oldest.¹⁹¹ The limitation of this article is the fact that it does not extend the protection for children and does not address the issue of recruitment by non-state forces.¹⁹²

3.2.2 Optional Protocol to the UNCRC on the Involvement of Children in Armed Conflict 2000

In May 2000, after many years of discussion, the GA adopted the Optional Protocol to the UNCRC on the Involvement of children in armed conflict which came into force on 12 February 2002.¹⁹³ The aim of the Optional Protocol was to address the widespread recruitment and the use of children by government armed and armed forces of the opposition.¹⁹⁴

3.2.2.1 The conscription or the use of children in armed conflict

The Optional Protocol on the involvement of children in armed conflict also raises the minimum age of children for the compulsory and voluntary enlistment and deployment for both government forces and non-government forces.¹⁹⁵ The direct participation of children in armed conflict is set in article 1 of the Optional Protocol which states that ‘state parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.’¹⁹⁶

The Optional Protocol provides in article 2 that ‘state parties shall ensure that all persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces’.¹⁹⁷ However, it also states that ‘state parties shall raise the minimum age for the

¹⁸⁹ as above.

¹⁹⁰ Article 38 (1) & (2) of the Convention on the Rights of the Child.

¹⁹¹ Article 38(3) of the Convention on the Rights of the Child.

¹⁹² n 13 above 27.

¹⁹³ n 13 above 28.

¹⁹⁴ n 13 above 13.

¹⁹⁵ as above.

¹⁹⁶ Article 1 n 3 above.

¹⁹⁷ Article 2 n 3 above.



voluntary enlistment of persons into their national armed forces under the age of 18...'¹⁹⁸ and in the case of the enlistment under that age 18, it also provides that 'the minimum shall maintain safeguards to ensure, as a minimum, that:

- (a) Such recruitment is genuinely voluntary;
- (b) Such recruitment is done with the informed consent of the person's parents or legal guardians;
- (c) Such persons are fully informed of the duties involved in such military service;
- (d) Such persons provide reliable proof of age prior to acceptance into national military service'.¹⁹⁹

Despite the enlistment by government forces, the OP also includes the enlistment and use of children by non- state armed forces. Article 4(1) state that 'armed groups that are distinct from the armed forces of a state should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years'.²⁰⁰ All state parties to the OP are also obliged to criminalize such activities.²⁰¹

3.2.3 The Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court hereinafter ICC came into force on 1 July 2002, after receiving the requisite 60 state ratifications.²⁰² It was signed by the DRC on 8 September 2000 and the 'Legislative Decree no. 003/2002 authorising the ratification of the Rome Statute of the International Criminal Court'.²⁰³ It has provided a vital conduit to address the impunity of those who commit atrocities against civilians and children during armed conflict.²⁰⁴

The Rome Statute began working on setting up the International Criminal Court (ICC), which has jurisdiction over the most serious crimes of concern to international law: genocide, crimes against humanity, war crimes and the crime of aggression but it is limited in bringing prosecutions for these crimes.²⁰⁵ For instance, the ICC has only jurisdiction for: crimes committed after the Statute came into force,²⁰⁶ also where the individual is a national of a

¹⁹⁸ Article 3 n 3 above.

¹⁹⁹ as above.

²⁰⁰ Article 4(1) n 3 above.

²⁰¹ Article 4(2) 'States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices' n 3 above.

²⁰² n 13 above 71.

²⁰³ Avocats Sans Frontieres 'Case Study the application of the Rome statute of the international criminal court by the courts of the Democratic Republic of Congo'10 available at http://www.asf.be/publications/ASF_CaseStudy_RomeStatute_Lights_PagePerPage.pdf (accessed 29 March 2012).

²⁰⁴ International Bureau for children *Children and armed conflict: a guide to International Humanitarian and Human Rights Law* (2010) 283.

²⁰⁵ n 13 above 71.

²⁰⁶ Article 11(1) of the Rome Statute of the International Criminal Court.



state party,²⁰⁷ where the crime is committed on a state party's territory²⁰⁸ and where a non-state party agrees to the jurisdiction of the ICC to prosecute a specific individual.²⁰⁹

The ICC has the jurisdiction to prosecute only if a state is unable or unwilling to investigate and prosecute that person for one of the crimes recognised in the Rome Statute or has investigated the crime and decided not to prosecute.²¹⁰

In defining these crimes, specific references to children are made according to the Rome Statute.

3.2.3.1 Killing or maiming of children

The importance of the right to life is repeated and reaffirmed in many rules and it is mentioned in the context of indiscriminate attacks against civilians by emphasizing the relevant value of the right to life and calling all parties to fulfil their obligations.²¹¹

Therefore, the Rome Statute has provided in article 7(1)(a) : 'For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder...'²¹² and article 8(2)(a)(i) : 'For the purpose of this Statute, "war crimes" means: Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant GC: Wilful killing...'²¹³ Those regulations were established in order to protect civilians including children against crimes against humanity and war crimes.

3.2.3.2 The conscription of children in armed conflict

The age of 15 used at the beginning for enlistment and deployment of children is reaffirmed in the Rome Statute of the ICC in article 8(2)(b)(xxvi) which lists the conscription of children under that age to participate directly in international conflicts, in non-international armed conflict.²¹⁴

3.2.3.3 Sexual abuse and abduction of children

Concerning the sexual abuse of children, the Rome Statute states in article 7(1)(g) that 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisations, or any form of sexual violence of comparable gravity' amount to crimes against humanity as part of systematic attack directed at the civilian population including children.²¹⁵

²⁰⁷ Article 12(2)(b) of the Rome Statute of the ICC.

²⁰⁸ Article 12(3) of the Rome Statute of the ICC.

²⁰⁹ Article 12(3) of the Rome Statute of the ICC.

²¹⁰ n 13 above 72.

²¹¹ n 133 above 22.

²¹² Article 7(1)(a) of the Rome Statute of the ICC.

²¹³ Article 8(2)(a)(i) of the Rome Statute of the ICC.

²¹⁴ n 13 above 27.

²¹⁵ n 13 above 48.



Moreover, the Rome Statute expressly includes the trafficking of children in the definition of enslavement in its article 7(2)(c) which ‘mean the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children’.²¹⁶ Similar rules concerning the sexual violence can also be found in article 8(2)(b)(xxii) and article 8(2)(e)(vi) of the Rome Statute.²¹⁷

3.2.4 National legislation

In all states, following the incorporation approach, the Covenants themselves become part of the national legislation once the ratification and the accession have been satisfied.²¹⁸ The UN Committee on the Convention of the Rights of the Child requires all state parties to the Convention to indicate in their reports the status of the CRC in domestic law with respect to recognition in the Constitution or other national legislation of the rights forwarded in the Conventions,²¹⁹ although the CRC does not indicate any consequence or sanction for non-submission of reports.²²⁰

In the case of conflict between the CRC and the national legislation, the central obligation of the DRC is to respect and to ensure the rights recognised therein as mentioned in article 2 of the CRC which states that ‘state parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national ethnic or social origin, property, disability, birth, or other status’.²²¹

The Constitution of the DRC itself has set in its article 215 that: ‘lawfully concluded treaties and agreements have, when published, an authority superior to that of the law, subject for each treaty and agreement to the application by the other party’.²²²

Nevertheless, successive governments have committed themselves to implement the CRC and the measures taken involved in the establishment, organisation and reorganisation of bodies whose work contributes to the implementation of the Convention.²²³ The DRC ratified the Convention in 1993, thereby committed itself to the implementation of all its provisions

²¹⁶ as above.

²¹⁷ article 8(2)(b) (xxii) of the Rome Statute of the ICC: Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions & article 8(2)(e)(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.

²¹⁸ n 65 above 28.

²¹⁹ n 65 above 27.

²²⁰ n 1 above 50.

²²¹ as above.

²²² Constitution of the Democratic Republic of Congo 18 February 2006.

²²³ Unpublished: J Fritzen ‘Accountability of child soldiers in conflict situation in sub-Saharan Africa’ unpublished Master dissertation, Nelson Mandela Metropolitan University, 2010 33.



but it has not yet ratified the African Charter on the Rights and Welfare of the Child (ACRWC).²²⁴

The protection of children in the territory of Congo is guaranteed through the protection of human being's rights, which include the rights of children.²²⁵ Therefore, all treaties that the DRC has signed and ratified are applicable for the protection of children.²²⁶

At the regional level, The DRC has ratified the African Charter on Human and Peoples' Rights on 20th July 1987 in accordance with its relevant provisions and by virtue of those stipulated in the ratification decree no. 87-027 of 20th July 1987.²²⁷ The ACHPR provides in article 23(1) 'all people shall have the right to national and international peace and security...'; concerning the right to education, the ACHPR in article 17(1) stipulates that 'every individual shall have the rights to education'.²²⁸

ACHPR in its article 5 states that 'every individual shall have the rights to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'.²²⁹

Specifically, the ACHPR sets in article 4: 'human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this rights'. Under the domestic law, a child is defined as a human being who has not yet reached the age 18 years is a minor'.²³⁰

The DRC has further under its national law the Protocol on the ACHPR on the rights of women in Africa which, according to article 66 of the ACHPR, states that the Protocol or agreements may add supplementary provisions if necessary to the Charter.²³¹

Article 11 of the Protocol protects all women from all forms of violence such as rape, sexual exploitation during armed conflicts by requiring state parties to respect and to ensure the respect of the rules of IHL and IHRL applicable in this case. Especially for young girls under the age of 18 years, the Protocol requires all state parties to undertake special measures not to allow them to participate directly in hostilities and not as child soldier.²³²

The Constitution of the DRC has also set a comprehensive list of economic, social and cultural rights as well as civil and political rights of civilians including children which must be respected, protected, promoted, fulfilled and considered to be indivisible and interdependent. Specifically in event of an armed conflict, the DRC's Constitution also

²²⁴ as above.

²²⁵ n 223 above 34.

²²⁶ as above.

²²⁷ n 182 above 2.

²²⁸ Article 23 of the African Charter on Human and People's Rights.

²²⁹ Article 5 of the African Charter on Human and People's Rights.

²³⁰ *LOI 87-010 portant Code de la famille. (Journal Officiel .Zairois, No spécial, 1er août 1987 Code Larcier of the DRC (2003) article 219.*

²³¹ The Protocol on the ACHPR on the Rights of Women in Africa adopted on 27 June 1981.

²³² Article 11(1)(3)&(4) n 231 above.



recognises, in its regulation, the protection of these rights such as the rights to education,²³³ the rights to life and it condemns all worse treatment of individual in this situation.²³⁴

Under the national, the DRC has elaborated the law No. 09/001 on the protection of the child adopted on 10 January 2009, and published in the Official Journal on 12 January 2009.²³⁵ Among its provisions, the law No 09/001 also provides ‘exceptional protection’, by which it prohibits the enlisting or using of children in the armed forces or armed groups and it requires the DRC to assure that children enlisted or used by forces or armed groups are reintegrated into their family or community.²³⁶ The DRC should also guarantee the protection and education of children affected by armed conflict, as well as their re-adaptation.²³⁷

In terms of penal repression, the military penal code (MPC) criminalized crimes against humanity in its article 165 to 172 and war crimes in its article 173 to 175.²³⁸ Similarly, article 187(2) specifies that the enlistment or use of children below 18 years of age in the armed forces or armed groups shall be punishable by imprisonment for 10–20 years.²³⁹

Despite those above legal protections of the child during armed conflict which were supposed to be respected by the DRC, some resolutions also clearly certify that rebel groups have to respect human rights.²⁴⁰ For instance, the SC, in its resolution 1906 (2009) regarding the DRC, ‘demands that all armed groups, in particular the *Force Démocratiques de Liberation du Rwanda* (FDRL) and the Lord’s Resistance Army (LRA), *immediately cease all forms of violence and human rights abuse* against the civilian population in the Democratic Republic of Congo, in particular gender-based violence, including rape and other forms of sexual abuse’.²⁴¹

3.3 Conclusion

The legal protection of the rights of children during armed conflict is contained in two bodies of international law: IHL and IHRL. Both of them are applied in time of armed conflict and in time of peace. According to those two bodies of international law, the principles and

²³³ Article 43(1) n 222 above.

²³⁴ Article 61 (1)(2) &(3) of the Constitution of the DRC which states: ‘In no case, not even when the state of siege or the state of emergency has been proclaimed in accordance with Articles 87 and 88 of this Constitution, is a derogation admissible from the following rights and fundamental principles:

- The right to life;
- The prohibition of torture and of cruel, inhumane or degrading punishment or treatment;
- The prohibition of slavery and servitude’.

²³⁵ International Review of the Red Cross ‘National implementation of international humanitarian law: Biannual update on national legislation and case law January–July 2009’ vol. 91 No 875 (September 2009) 628 available at <http://www.icrc.org/eng/assets/files/other/irrc-875-national-imp-jan-july-ihl.pdf> (accessed 12 April 2012).

²³⁶ Article 71 of the Law No. 09/001, 10 January 2009, on the protection of the child.

²³⁷ Article 72 of the Law No. 09/001.

²³⁸ Centre for Human Rights & al. ‘Expert workshop: giving effect to the law on war crimes, crimes against humanity and genocide in Southern Africa’ (13-14 June 2011) 22.

²³⁹ Article 187 (2) of the Law No. 09/001.

²⁴⁰ n 133 above 31.

²⁴¹ as above.



provisions to protect children in armed conflict are laid out in the GC (1949), mostly the GC IV articles 3, 23, 27 which treats the protection of civilians who are or who are no longer member of the hostilities; the four GC are applied in international armed conflict and their Additional Protocols (1977), for example: article 77 of API article 4(3) of APII, are addendum to the GC in its applicability in non-international armed conflict. All these legal documents are contained in IHL.

IHRL contains the CRC (1989) which is the first legal document with a comprehensive list of rights recognised for all children. The CRC recognises in its article 38 the protection of children in armed conflict and its Optional Protocol on the involvement of children in armed conflict (2000) which reaffirms in article 1 and article 3 the conscription or the use of children in military service at the standard age 15 years. The IHRL also contains the Rome Statute of the ICC (1998) which criminalises in article 7 and article 8 all crimes against humanity and war crimes. Those treaties are the most legal instruments to protect children in time of armed conflict and in time of peace. Those rules must not be derogated by any state parties.

Under the domestic law of the DRC, all those above legal instruments including the ACHPR and its Protocol on the Right of Women in Africa at the regional level for the protection of children and the justiciability of their rights are implemented in the Constitution following their ratification. Except the ACWRC which is not yet ratified by the DRC.

Besides, the DRC provides the Law No. 09/001, 10 January 2009, on the protection of the child and the MPC for the penal repression in case of crimes against humanity and war crimes committed in the country. The Security Council's resolution 1906 responding to the violations of IHL and IHRL committed by the rebel groups elaborated in 2009 is also under national law.

In the previous chapter, this study has illustrated the six grave violations against children which occurred in the DRC during armed conflict such as killing, sexual abuse, recruitment or use of the children as child soldier. Based on these above regulations, the DRC has failed to respect the rules set for the protection of children in armed conflict and has failed to protect its children during that period although there is no derogation to these legal protections of the rights of children in armed conflict.

Therefore, the responsibility of the DRC and the rebel groups on the violation of the regulations set for the protection of children during armed conflict must be established in order to obtain the reparation of these violations and to have the best environment in time of peace for civilians especially for children, which will be the aim of the next chapter.



Chapter 4: State responsibility on the violation of the rights of the child

According to IHL and IHRL, all states have the obligation to respect, protect and fulfil the human rights of all persons (adults and children) without discrimination of any kind, including on the bases of the age, gender, ethnic origin, birth or status.²⁴² Children rights are also considered to be human rights and must be respected, protected, promoted and fulfilled as adult's rights.

In IHL and IHRL, all state parties must distinguish military forces and civilians or those persons who are not taking part any more in a conflict; they must not deliberately attack civilians or their properties and they have to protect them during armed conflict. However, individuals who commit serious violations of the law are responsible for those violations, including those who participate in or order war crimes, or are culpable as a matter of command responsibility.

The objective of this chapter is to establish the responsibility of the DRC as a state on the violation of the rights of the child during the period of conflict. Furthermore, the responsibility on the violation of children's rights is not only a matter of state parties but also non-state actors such as rebels; for instance, Germain Katanga, Mathieu Ngudjolo Chui.

This chapter also illustrates the fact that children's victims can bring their complaints particularly in Africa's system against their offenders in order to obtain reparation of the grave violations and it also gives a multidisciplinary approach regarding the remedies of those violations.

4.1 The responsibility of the DRC and individual actor on the violation of the rights of the child

The state often plays an important role in the commission of crimes against humanity and war crimes, given the systematic and massive nature of such crimes. In addition, individuals prosecuted for crimes against humanity or war crimes are often agents, state officials or persons acting on its behalf.²⁴³

The violation of IHL implies 'system-criminality' or 'collective wrongdoing'.²⁴⁴ Almost by nature genocide, crimes against humanity and crimes due in armed conflict happen on a mass-scale or in the context of grave violence such as the six grave violations affecting children established by the UN Security Council in its resolution 1612 of 2005.²⁴⁵ By this fact, the case of the violation of the rights of the DRC's children implies in the same way: 'system-criminal'. This system invariably means a plurality of offenders, particularly in carrying out the crimes.²⁴⁶

²⁴² n 56 above 13.

²⁴³ n 203 above 84.

²⁴⁴ n 38 above 4.

²⁴⁵ as above.

²⁴⁶ n 38 above 5.



4.1.1 The responsibility of the DRC

States and armed groups are the duty-bearers under IHRL and they are bound by the norms of IHL which create obligation for them and require for each state the primary responsibility to take care of the victims of natural or man-made emergencies in its territory.²⁴⁷ It is important to emphasize that the responsibility of the state does not have a penal character even where its agents are responsible for criminal acts.²⁴⁸

All human rights require state obligations to respect, to protect and to fulfil them for the interest of its citizen. The fundamental principle set in international law on state responsibility provides that any state which violates its international obligations must be held accountable of its acts; in order words, any state which does not respect international obligations is responsible and must directly stop its actions and make reparations to the injured.²⁴⁹ In case of violation, the state has the responsibility to ensure full reparation for the injury caused, including both material and moral damages.²⁵⁰

Article 1 of all the GC, which constitutes the basic keys in the responsibilities of the state under international law, provides that states are responsible to respect and ensure respect of the Conventions in all circumstances.²⁵¹

According to the rights of children, the obligation of the state to respect implies that state must not needlessly interfere in the private life of expecting parents, infants, young children and their guardians according to article 5 and 6 of the CRC.²⁵²

The obligation to respect requires state not to take any measures that would result in preventing children from having access to food, even in armed conflict, it is reinforce by IHL norms that the use of starvation of civilians as method of warfare is prohibited.²⁵³

However, the responsibility to protect requires the state to intervene in the private life and family life expecting parents, young children when their security are at the serious risk for instance in time of armed conflict base on article 19 of the CRC.²⁵⁴

The responsibility to fulfil includes an obligation to facilitate which requires, for instance for the right to food, the state to adopt measures planned for improving rights-holders' access to and utilisation of resources and means to ensure their livelihood and in period of war.²⁵⁵ The state has the obligation to allow free passage to humanitarian relief and to facilitate the work of humanitarian agencies and the distributions of food aid (set in article 23& 59(3) of the

²⁴⁷ n 39 above 24.

²⁴⁸ n 203 above 84.

²⁴⁹ Diakonia 'what are the responsibilities of a state under international law?' available at www.diakonia.se/sa/node.asp?node=1857 (accessed 31 October 2011).

²⁵⁰ as above.

²⁵¹ Diakonia 'IHL: state responsibility' available at www.diakonia.se/sa/node.asp?node=1858 (accessed 31 October 2011).

²⁵² n 43 above 4.

²⁵³ n 39 above 27.

²⁵⁴ n 43 above 4.

²⁵⁵ n 39 above 33.



fourth GC, article 70(2) of the API and article 18 of the APII) and an obligation to provide which demand the state, in case of the right to food, to provide food whenever an individual or group is unable to do it for the enjoyment of their right.²⁵⁶

The obligation to provide and to facilitate education for the development of children at primary and secondary level (article 28 and 29 of the CRC) provide supports services including therapy (counselling and psychotherapy) especially for those who are victims of the violations of their rights such exploitation, sexual abuses, child recruited into the armed forces based on article 18(2) and 19(2) of the CRC.²⁵⁷

The UN body has expressed grave concern in its concluding observations on the state of children's rights in Congo released on the 30th January 2009 that the Congolese government, through its military forces assume the direct responsibility for those violations and that the government has failed to protect children from rights violations by other non-state armed forces or rebel groups.²⁵⁸

Despite the responsibility of the DRC during post armed conflict, there is also the individual criminal responsibility.

4.1.2 The individual responsibility

The principle of the criminal individual responsibility was established for the first time in Nuremberg and Tokyo. It was affirmed later in national proceedings and it has been approved in the criminal law system of the *ad hoc* Tribunals and the ICC.²⁵⁹ However, it was only in article 6 of the charter of the Nuremberg Tribunal and the judgement itself that set the development of the principle of individual criminal responsibility off in international law.²⁶⁰

The mainly recent provision on the individual criminal responsibility in international law is in article 25(3) of the ICC which indicates the conclusion of a process of differentiation in criminal participation mode since Nuremberg codified in law.²⁶¹

The concept of individual criminal responsibility and the crimes as set in the ICC Statute are not defined in its constitutive elements.²⁶² The only provision set up in the ICC structure defines the concept of individual criminal responsibilities in article 30 on the mental element which provides that a person can be criminally responsible and at the same time legally responsible for a crime within a jurisdiction only if the material elements are committed

²⁵⁶ as above .

²⁵⁷ n 43 above 5.

²⁵⁸ J Kippenberg 'DR Congo: rights panel condemns abuses against children' available at www.hrw.org/news/2009/02/04/dr-congo-rights-panels-condemns-abuses-against-children (accessed 31 October 2011).

²⁵⁹ n 38 above 3.

²⁶⁰ n38 above 31.

²⁶¹ n 38 above 36.

²⁶² n 38 above 8.



intentionally and with knowledge.²⁶³ However, it is a challenge to find recourse in others instruments which shape the concept of individual criminal responsibility outside the ICC Statute.²⁶⁴ Therefore, the existence of individual responsibility depends on culpability and requires proof of *personal* guilt connected to one's *own* conduct.²⁶⁵ These elements 'personal and own' allow the establishing of the difference between individual responsibility and plurality of responsibility.²⁶⁶ Moreover, the principle of criminal responsibility is extended to all persons who contribute to the commission of crimes.²⁶⁷

The provision on individual criminal responsibility laid in article 25(3) of the ICC Statute requires some conditions to consider a person as criminally responsible and liable for punishment for a crime within the jurisdiction of the Court. For example, when a person perpetrates a crime recognised by the Statute, whether as an individual or jointly with another or through another person, regardless whether that other person is criminally responsible; orders, solicits or induces the commission of such a crime which in fact occurs or is attempted.²⁶⁸

The grave violations of the Geneva law are described as 'war crimes' which generate individual criminal responsibility.²⁶⁹ The grave breaches system require every state party to '(...) enact any legislation necessary to provide effective penal sanction for persons *committing or ordering to be committed* any of the grave breaches and the search for those persons in order to either bring them before its own courts or hand them over for trial to another state party.²⁷⁰

Therefore, this provision provides firstly while relying on national jurisdiction, the GC and the API implemented a system of individual criminal responsibility for international crimes and secondly, Geneva law is not restricted to those who perpetrate war crimes but is also for those who ordered them.²⁷¹

International crimes are almost committed not only by a person but also by a group of persons, a band and a clique.²⁷² In the DRC especially in Ituri, armed groups have committed

²⁶³Article 30 of the Rome Statute of the ICC: '1. unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.'

²⁶⁴ n 38 above 9.

²⁶⁵ n 38 above 363.

²⁶⁶ as above.

²⁶⁷ n 38 above 34.

²⁶⁸ Article 25(3) of the Rome Statute.

²⁶⁹ n 38 above 33.

²⁷⁰ as above.

²⁷¹ as above.

²⁷² n 38 above 15.



war crimes, crimes against humanity and other violations of obligations set in IHL and IHRL.²⁷³

All those armed groups have committed grave violations of the rights of children such as the conscription of children, even younger than seven years old, in military services and exposing them to the risks and strictness of military operations.²⁷⁴ Germain Katanga and Mathieu Ngudjolo Chui who are Congolese militia leaders on trial at the ICC for seven counts of war crimes and three counts of crimes against humanity allegedly committed these crimes in a joint attack in Congo from January to March 2003.²⁷⁵

Germain Katanga reportedly is the leader of the FRPI (*Force de résistance patriotique en Ituri*), Ngudjolo allegedly became the leader of the ethnic Lendu FNI (FNI (*Front des nationalistes et intégrationnistes*)), which joined with Katanga's FPRI against the ethnic Hema whose Thomas Lubanga is a member and leader of the Union of Congolese Patriots (UPC).²⁷⁶

In the case of the *Prosecutor v. Germain Katanga and Mathieu Chui*,²⁷⁷ the Prosecution alleges Katanga and Ngudjolo to be responsible for having committed (jointly with others) or ordered crimes against humanity. Those crimes are the killings according to article 7(1)(a) of the Rome Statute with guns and machetes with the intent to kill civilians including children at least 200 in Bogoro village in Ituri during and in the aftermath of the February 24, 2003 attack.²⁷⁸

Based on article 7(1)(g) of the Rome Statute, the prosecution alleges that they are responsible for sexual slavery, rape of girls and women that they abducted from villages or areas surrounding the camps for the purpose of using them as their "wives"; forced and threatened women and/or girls to engage in sexual intercourse with combatants and to serve as sexual slaves for combatants and commanders alike and captured and imprisoned women and/or girls to work in a military camp servicing the soldiers before, during and after the February 2003 in Bogoro.²⁷⁹

They are also responsible for the recruitment and the use of children under the age of 15 to take part in the hostilities within their militias according to article 8(2)(b)(xxvi) of the Rome Statute.²⁸⁰

In the case of the *Prosecutor v. Thomas Lubanga Dyilo*,²⁸¹ the ICC, in its first judgment on the 14th of March 2012, has found Thomas Lubanga the president of the militia group known

²⁷³ n 121 above 189.

²⁷⁴ n 121 above 190.

²⁷⁵ Open Society Justice Initiative 'The trial of Germain Katanga & Mathieu Ngudjolo Chui: trial background who are Germain Katanga & Mathieu Ngudjolo Chui? available at www.katangatrial.org/trial-background/who-are-katanga-and-ngudjolo-chui/ (accessed 10 October 2011).

²⁷⁶ as above.

²⁷⁷ The *Prosecutor v. Germain Katanga and Mathieu Chui* available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (accessed 17 April 2012).

²⁷⁸ n 275 above.

²⁷⁹ as above.

²⁸⁰ as above.



as the UPC/FPLC responsible for conscripting, enlisting and using children in armed conflict according to the violation of the Rome Statute article 8(2)(b)(xxvi).²⁸²

The state of DRC has failed to respect the rights of children and to protect them against these violations committed by the leaders of militia in the country especially in the east during the period of armed conflict. Significantly, the reparations of the violations of the rights of the victims must be established in order to avoid this kind of crimes or to prevent the realisation of these violations in the future.

4.2 Reparation of these grave violations and the multidisciplinary approach

The term reparation refers sometimes to money damages. However, it refers generally to the variety of remedies available for non-respect of an international obligation.²⁸³ The reparation of violation of international obligations may foresee restitution, for instance the re-establishment of the violated right; compensation for damages suffered in the past, example in armed conflict and assurance against future breach of international obligation, an approach of a remedial justice and deterrence.²⁸⁴

Reparation, inter alia, refer to the various means by which a state may repair the breach of international law for which it is responsible; that reparation may include individual physical and psychological injury from human rights violations.²⁸⁵

However in human rights instruments, the term reparation refers the state providing successful remedies for the violation of these rights.²⁸⁶ Therefore, these remedies can be procedural by the fact that they are the process by which all claims of human rights violations are heard and decided by courts, administrative authorities or other competent bodies and substantive by the fact that they constitute the result of the proceedings.²⁸⁷

The necessity of improving the law about the protection and the promotion of human rights is the result of the atrocities which occurred during the Second World War.²⁸⁸ Those promotion and protection are woven throughout the United Nations Charter which the preamble notices that all member states to the charter 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'.²⁸⁹

²⁸¹ The *Prosecutor v. Thomas Lubanga Dyilo* available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (accessed 17 April 2012).

²⁸² A Cole 'Thomas Lubanga: Landmark decision for international justice' 15 March 2012 available at <http://www.osisa.org/law/blog/landmark-decision-international-justice> (accessed 19 March 2012).

²⁸³ n 40 above 93.

²⁸⁴ as above.

²⁸⁵ n 41 above 7.

²⁸⁶ n 41 above 8.

²⁸⁷ n 41 above 7.

²⁸⁸ n 40 above 7.

²⁸⁹ as above.



In fact, one of the fundamental objectives of the UN is the achievement of international co-operation in promoting and encouraging respect of human rights and fundamental freedoms; and for the achievement of these purposes, the UN imposes obligations to the Organisations and all member states which must be respected.²⁹⁰

However, in cases of grave violations recognised internationally, the law of state responsibility is applicable because such an act implies that the state has failed to respect an international obligation.²⁹¹ Therefore, the law of state responsibility demand a state to make reparations when it has failed to achieve its obligations regarding the rights of its citizens through an act or an omission.²⁹²

According to the Rome Statute, its provisions governing reparations to victims do not specifically mention if a state may be ordered to compensate for injuries caused by its agents, which may be a question to be settled by the court in the future.²⁹³

IHRL has elaborated procedures which allow all victims of human rights violations without discrimination to bring complaints immediately against the offending state.²⁹⁴

4.2.1 Reparation of these grave violations

The English Magna Carta states: '*Nulli vendemus, nulli negabimus, aut differemus, rectum aut justicam*' (no one will be sold, no one will be refused or deferred, rights or justice) and Coke also states that 'every Subject... for injury done to him in *bonis, terris, vel persona...* may take his remedy by the course of the law, and have justice and the right for the injury done to him freely without sale, fully without any denial, and speedily without delay.'²⁹⁵

The reparation must not only be for adults but also for children as human beings and victims of the violations of their rights committed by individuals such as German Katanga, Thomas Lubanga during the hostilities which occurred in the DRC and they must immediately obtain reparation of these violations as subject of human rights.

Therefore, the ACHPR has established an African Commission on Human and Peoples' Rights whose functions are to promote and to ensure the protection of human and peoples, rights in Africa article 30 of the ACHPR.²⁹⁶ Article 45(1) spells mandate of the African Commission which is to promote human and peoples' rights through different activities such as conference, seminars and motivating national and local institutions regarding human rights.²⁹⁷

²⁹⁰ as above.

²⁹¹ n 40 above 93.

²⁹² as above.

²⁹³ n 203 above 84.

²⁹⁴ n 40 above 93.

²⁹⁵ n 41 above 27.

²⁹⁶ n 42 above 248.

²⁹⁷ n 42 above 250.



The best known case brought before the African Commission is *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*.²⁹⁸ The communication alleges the violations of the socio-economic rights consequences of environmental degradation in Ogoniland (in Niger Delta of Nigeria) provided in article 2, 4, 14, 16, 18(1), 21 and 24 of the ACHPR.²⁹⁹

There has also been an inter-state complaint lodged to the African Commission by the DRC against the Rwanda for the grave and serious violations of human rights caused its territory during the coalition of the Rwanda, the Burundi and the Uganda armies. In the case of *the DRC v Burundi, Rwanda and Uganda*, the respondent states were found guilty, violating article 12(1), 14, 16, 17, 18(1)(3), 19, 20, 21, 22 and 23 of the ACHPR.³⁰⁰

Most importantly, it is its mandate to protect human and peoples' rights through decisions and recommendations in the course processing mostly individual communications³⁰¹ set up in article 45(2)(3) of the ACHPR.³⁰²

According to this mandate, everyone within the territory of the DRC party to the ACHPR may bring a communication to the attention of the African Commission in accordance with article 56 of the ACHPR where /she may claim the violation of his or her rights set out in the ACHPR; s/he can do it by his or her own or an NGO can do it on his or her behalf with an express consent of the victim and they need not to be a citizen or be registered in the DRC.³⁰³

4.2.2 Multidisciplinary approach

Children may obtain justice remedy of the injuries suffered during armed conflict. However, the state also has to deal with other impacts of these hostilities on children such as psychological and emotional traumas caused by the grave violations perpetrated on them during these periods. This reparation cannot only be successfully fulfilled with the implementation of the legal proceedings for their protection but also with the implementation of other disciplines such as education, psychology, sociology.

Therefore, the CRC, as a unique treaty because it has been ratified by almost all states except the United States of America and the Somali and it is an interdisciplinary document, must be studied not only from a legal perspective but it must be combined with various disciplines related to human rights and to the field of psychology.³⁰⁴

²⁹⁸ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

²⁹⁹ C Heyns and M Killander *Compendium of key human rights documents of the African Union* (2007) 252.

³⁰⁰ n 299 above 190.

³⁰¹ A communication is one of the mechanisms employed by the Commission to ensure compliance of the states with the human rights set in the Charter. The Commission may receive complaint from states against another one or by individuals or NGOs against one or more states on alleged the violation of HR in accordance with its mandate under article 48, 49 and 55. (Centre for Human Rights and African Commission on Human and Peoples' Rights *Celebrating the African Charter at 30: a guide to the African Human Rights system* (2011) 24).

³⁰² n 42 above 251.

³⁰³ n 42 above 261.

³⁰⁴ n 43 above 7.



As we illustrated above, during armed conflict children's rights are violated and the survival and development of children jeopardised; for instance the right to life, the rights to education, and the right to be with his or her family the right to health, the interventions in such areas are very important for the interest of children affected by the war occurred in the DRC.

During armed conflict, educational facilities (staff and infrastructures) are targeted and it disrupts children's education which implies all primary school-aged children who are not in school have to struggle to find a way to attend the limited schooling options available during a crisis or to return to school at an appropriate level when it reopens.³⁰⁵

More importantly, schools often offer a sense of normality, a pattern of safety to children, where they can return to handle with the psychosocial stress inflicted on them by an emergency and ensuring that children return to school or creating an educational and play corner as soon as possible after a crisis, greatly contributes to their psychosocial well-being and development.³⁰⁶

During this period, children are witnesses, victims or perpetrators of the violations of their rights such as sexual abuses, conscription and enlisting in armed conflict and they can be emotionally, physically and verbally affected; children may develop psychological problems as a result of the hostilities. The justice remedy cannot fully help them. The need of psychology, which is the science of human mind and mental processes, especially in relation to behaviour,³⁰⁷ is very important to help those children for their development and their reintegration in their community.

4.3 Conclusion

IHL and IHRL provide various norms for the interest of civilians including children and oblige the DRC to respect, to protect and fulfil them in any circumstances. According to international law, the state has the duty to protect civilians; if the state fails in its obligations, then it is supposed to take appropriate measures to ensure that reparation is made.

During the official civil war 1998-2003, the DRC failed to achieve its obligations to its civilians especially children who were raped, killed, conscripted in armed conflict, denied humanitarian access. The state has been recognized responsible for being in violations of the rights of children.

However, non-state actors such as individuals or a group of persons have also committed grave violations against children. For instance, the prosecutor of the ICC alleges that Germain Katanga and Mathieu Ngudjolo Chui are criminally responsible for grave violations in the eastern part of the DRC.

³⁰⁵ n 204 above 51.

³⁰⁶ as above .

³⁰⁷ Psychology definition available at [http:// dictionary.reference.com/browse/psychology](http://dictionary.reference.com/browse/psychology) (accessed 31 October 2011).



International law has established mechanisms which allow victims to have reparation of their violated rights. In African system, the victims can bring their complaints to the African Commission if they complete all requirements set in article 56 of the ACHPR. However, the reparation must not only be obtained by justice procedures but some disciplines must interfere as well, such as education, psychology for their reintegration and development in their communities.



Chapter 5: Conclusion and general recommendations

Children represent hopes and future of their societies. For this reason, while children are emotionally and physically affected, so are their societies. The protection of children is not only about rights, it is also a human security issue. Human rights are about the dignity and the worth of the individual, including children and not only adult and constitute a common language of humanity.

5.1 Conclusion

The principal aim of this study is to establish the responsibility of the DRC on the violation of the rights of children because of their vulnerable nature during the post armed conflict according to international law.

The most important legal instruments for the protection of children during these periods recognized in IHL and IHRL are all the GC of 1949 and its AP I and II of 1977; the CRC and its OP on the involvement of children in the armed conflict of 2000 and the Rome Statute.

However, during the civil war which occurred in the DRC especially in the eastern part of the country, grave violations such as killings, conscription or use of children in armed conflict, abduction, sexual abuse, the destruction of hospitals and schools and the denial of humanitarian aids recognised by the resolution 1612 of the UNSC were committed against children.

The grave violations perpetrated against children demonstrated that the rights of children are classified in 4 categories (the best interests of the child, the right to life, to survive and to develop; the right to non-discrimination and the right to participation) were not respected, protected and, fulfilled by the DRC.

Consequently, the DRC is responsible for breach of international law and has the responsibility to stop these crimes and to make reparation of these violations. Furthermore, the criminal responsibility does not apply to the state only, but equally to individuals such as Thomas Lubanga.

Thomas Lubanga has been criminally responsible for crimes against humanity, enlisting and conscripting of children under the age of 15 years into the *Forces patriotiques pour la liberation du Congo* (FPLC) and using them to participate actively in hostilities. Those crimes were committed in the context of international and non- international armed conflict under article 8(2)(b)(xxvi) and (e)(vii) of the Rome Statute.

However, IHRL has established some mechanisms which serve to allow victims to obtain reparation of the violation of their rights. These justice procedures must interfere with other disciplines such as education (to help children to learn about their rights etc.), psychology (to assist those children affected by armed conflict as victims, witnesses and perpetrators) in order to guaranty their reintegration and development in their communities.



Nonetheless, the responsibility of human rights violations is an important element to break the cycle of impunity and it is indispensable for the process of reparation of these violations committed in the DRC. It is also the foundation for post –conflict reconstruction based on the rule of law and the respect for human rights. Therefore, the lack of justice and the lack of responsibility allow a climate of impunity, which undermines the rule law.

5.2 General recommendations

The fight against impunity requires an active engagement on the part of the DRC at the national level and international justice, as conceived under the Rome Statute. In October 2010, the UN published its Mapping Report on serious human rights violations committed in the DRC between 1993 to 2003. This report noted that the Congolese judicial system does not have an adequate capacity or sufficient guarantees of independence to ensure justice for these crimes. Therefore, it suggested the creation of a mixed judicial mechanism.³⁰⁸

This mixed court would involve both international and national staff, and would be responsible of the serious crimes not currently prosecuted by the ICC. Nevertheless, this suggestion was rejected by the Senate on August 2011. The international community need to support the DRC by encouraging it to adopt, immediately, the implementation legislation, transfer the jurisdiction over international crimes to civilian courts, allocate adequate resources to the judiciary and provide judges with the necessary training and the creation of the mixed court.

The guarantee of a long term of peace, security and development of a country has been undertaken that children, having played a significant role in armed conflict as victims, witnesses and perpetrators of violence and war crimes, must not be ignored or marginalised in the peace process.³⁰⁹

It has also been recognised that children have the rights as well as needs during and after conflict, which are not guaranteed when the rights and needs of their community are addressed, to be part of the peace process not just the beneficiaries of it.³¹⁰

Generally, if a society recognises that the rights of children need care and protection, then it ought to be possible to construct rights upon the DRC's foundation. The point is, the rights of children must not be ignored during armed conflict or post-armed conflict. Children are also human beings and they are entitled to the most protection because they represent the future generation of the DRC's society.

Hence, general recommendations require to be implemented in the DRC in order to protect, to respect, to promote and to fulfill the rights of children. It has been set in IHL and IHRL that all states and parties such as armed groups (rebels) to armed conflict have the obligation to protect the rights of children without discrimination.³¹¹

³⁰⁸ n 238 above 23.

³⁰⁹ n 13 above 65.

³¹⁰ as above.

³¹¹ n 56 above 16.



The DRC should assess and ensure that its laws, programmes and policies do not explicitly or implicitly discriminate against or otherwise limit the rights of children. Congolese authorities should strengthen national and local capacities for redressing such issues, including the designation of a specific institutional focus point on it and the designation of a special officer who is charged to redress the situation.

The implementation of the CRC requires that the DRC should make some legislative reforms, work with independent persons who investigate complaints concerning children, elaborate a permanent national coordinating mechanism.³¹² The monitoring and evaluation system for the implementation of the Convention needs to be set up, collection of disaggregated data on all aspects of children's rights should be evaluated.³¹³ The implementation of treaties implies also a comprehensive list of plans or programmes for all children in the countries without discrimination, the promotion of trainers who can help the society on the rights of children and the importance of children's participation in all aspects of children's rights.³¹⁴

Furthermore, the Congolese authorities have to arrest leaders who perpetrated crimes against humanity even if they are running as a candidate for the National Assembly elections programmed for November 2008, including mass rape such as Ntabo Ntaberi Sheka (Mai Mai militia leader)³¹⁵ otherwise a climate of impunity will continue in the country and undermine the rule of law.

Despite the legal aspect of redressing the violated rights of children, the need of other disciplines for the reintegration and development of children is a significant element which must not be neglected in the process of the protection of children.

³¹² n 204 above 43.

³¹³ as above.

³¹⁴ as above.

³¹⁵ A Wounderger 'DRC: arrest candidate wanted for mass rape Mai Mai Leader Sheka campaigning while arrest warrant goes unenforced' (02 November 2011) available at www.hrw.org/news/2011/11/02/dr-congo-arrest-candidate-wanted-mass-rape (accessed 02 November 2011).



Bibliography

Books and Chapter in Books

Abramson, B (2008) *Article 2 rights of non- discrimination* Leiden: Martinus Nijhoff publisher

Alderson, P (2008) *Young children's rights: exploring beliefs, principles and practice* Philadelphia: Jessica Kingsley publishers

Anyangwe, C (2004) *Introduction to human rights and international humanitarian law* Lusaka: the University of Zambia and the Author

Ben-Naftali, O (2011) *International Humanitarian Law and International Human Rights Law: pas de deux* New York: Oxford University Press

Bouchet-Saulier, F (2002) *The practical guide to humanitarian law* Oxford: Rawnman & Littlefield publishers

Buck, T (2005) *International Child Law* New-York: Cavendish publisher

Centre for Human Rights, Faculty of Law (University of Pretoria) and African Commission on Human and Peoples' Rights (2011) *Celebrating the African Charter at 30: a guide to the African Human Rights system* Pretoria: Pretoria University Law Press (PULP)

Chouwbhury, A R & Bhuiyan, JH (2010) *An introduction to International humanitarian law and International human rights law* Leiden: Brill Academic Publishers

Cilliers, J & Malan, M (2001) *Peacekeeping in the DRC: Monuc and the road to peace* Pretoria: Institute for Security Studies

Cotula, L & Vidar, M (2002) *The right to adequate food in emergencies* Rome: Food and Agriculture Organisation of the United Nations

Detrick, S (1999) *A commentary on the United Nations Convention on the Rights of the Child* Leiden: Martinus Nijhoff publisher

Fineman, M A 'Introduction what is right for children?' rights' in Fineman MA & Worthington K (eds) (2009) *What is right for children: the competitive paradigms of religion and Human Rights* Farnham: Ashgate

Freeman, M (2007) *Article 3 the best interests of the child* Leiden: Martinus Nijhoff Publisher

Hansungule, M 'African courts on Human Rights and African Commission' in Boel A & Diescho J (eds) (2009) *Human Rights in Africa: legal perspectives on their protection and promotion* Windhoek: Konard Adenauer Stiftung



Heyns C and Killander M (2007) *Compendium of key human rights documents of the African Union* Pretoria: Pretoria University Press Law

Hodgkin, R & Newel, P (2007) *Implementation handbook for the Convention on the Rights of the Child* New York: United Nations Children Fund

Kamenov, T 'The origin of States and entity responsibility for the violations of international humanitarian law in armed conflict' in Kalshoven F and Sandoz Y (eds) (1989) *Implementation of International Humanitarian Law/ Mise en oeuvre du Droit International Humanitaire* Dordrecht: Martinus Nijhoff publishers

Machel, G (2001) *The impact of war on children* London: A. Hurts & CO. publishers

McCoubrey, H (1992) *International Law of armed conflict* Aldershot: Dartmouth

Mower, AG (1997) *The Convention on the Rights of the Child: International Law Support for Children* Westport: Greenwood publisher

Mugiraneza, C & Levy, K (2003) *the case of the Eastern Democratic Republic of Congo* London: ALNAP

Raeymaekers, T (2004) 'The political economic of Beni-Lubero' in T Raeymaekers and K Vlassnroot (eds) *Conflict and social transformation in Eastern DR Congo* Academia Press Scientific Publishers

Rohne, H C & al (2008) 'Challenging retroactive justice-state-based conflict, mass victimisation and the changing nature of warfare' in I Aertsen & al (eds) *Restoring justice after large-scale violent conflicts* William Publishing

Shelton, D (1999) *Remedies in international Human Rights law* Oxford: Oxford University

Shelton, D (2005) *Remedies in international human rights law* Oxford: Oxford University

Singer, S (May-June 1986) *Protecting children during armed conflict situations* Switzerland: International Review of the Red Cross

Sliedregt, E (2003) *The criminal responsibility of individuals for violations of International Humanitarian Law* Hague: T.M.C. Asser press

Verhellen, E (2006) *The Convention on the Rights of the Child* Apeldoorn: Eugen Verhellen & Garant publishers

Willems, J (2010) *Children's rights and human development: a multidisciplinary reader*

Wolfrum, R 'Enforcement of international humanitarian law' in Dieter F (eds)(1995) *the handbook of humanitarian law in armed conflicts* New York: Oxford University press



Woundenberg, A 'Ethnically targeted violence in Ituri' in M Malan & J Porto (eds) *Challenges of peace implementation: the UN Mission in the Democratic Republic of Congo* (2004)

Woodhouse, BB & Johnson KA 'The United Nations Conventions on the Rights of the Child: Empowering parents to protect their children's rights' in MA Fineman & K Worthington (eds) (2009) *What is right for children: the competitive paradigms of religion and Human Rights* Farnham: Ashgate

UNICEF (2009) *Machel study 10 years strategic review: children and conflict in a changing world* New York: UNICEF

Reports

Centre for Human Rights & al. 'Expert workshop: giving effect to the law on war crimes, crimes against humanity and genocide in Southern Africa' (13-14 June 2011) Pretoria: University of Pretoria

Committee on the CRC thirty-ninth session General Comment No. 6 (1 September 2005) 'Treatment of unaccompanied and separated children outside their country of origin' UNCRC

Democratic Republic of Congo Ministry of Human Rights 'Eight, Ninth and tenth periodic reports to the African Commission on Human and Peoples Rights; implementation of the Africa Charter on Human and People's Rights (Period – From July 2003 to July 2007) June 2007 Kinshasa

Office of the Special Representative of the Secretary-General for children and armed conflict: working paper No 2 (2010) 'The Rights and guarantees of internally displaced children in armed conflict' New York: United Nations

Office of the Special Representative of the Secretary-General for children and armed conflicts working paper No1 (2009) 'The six grave violations against children during armed conflict: the legal foundation' New York: United Nations

Office of the Special Representative of the Secretary-General for children and armed conflict booklet (2009) 'Protecting children during armed conflict: international legal foundations of the six grave violations against children during armed conflict' New York: United Nations

Dissertation

Fritzen, J 'Accountability of child soldiers in conflict situation in sub-Saharan Africa' unpublished Master dissertation, Nelson Mandela Metropolitan University, 2010

Articles

Amnesty international 'the human rights of children: overview' (2006) Canada



Morris, MH 'Babies and bathwater: seeking an appropriate standard of review for the asylum applications of formers' (2008) Harvard *Human Rights Journal* vol 21 281

Sassoli, M 'State responsibility on the violations of the international humanitarian law' (June 2002) Geneva: IRRC Vol. 84 No 846.

Woudenberg, A & al. *Itury*: 'covered in blood' ethnically targeted violence in the north eastern DR Congo' (2003) New York: *Human Right Watch* vol 15 No. 11

Legal and Official Documents

Additional Protocol I to the Geneva Conventions of 12 August 1949 relating to the protection of victims of international armed conflicts (1977)

African Charter on Human and Peoples' Rights (1981)

Convention of the Right of the Child adopted by General Assembly resolution 44/25 (1989)

Convention on the Rights of the Child General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child Adopted at the Thirty-third Session of the Committee on the Rights of the Child CRC/GC/2003/4 (2003)

Geneva Convention IV 1949 relating to the protection of civilian persons in time of war

Loi 87-010 portant Code de la famille. (Journal Officiel .Zairois, no spécial, 1er août 1987 Code Larcier de la RDC (2003)

Law No. 09/001, 10 January 2009, on the protection of the child

The Constitution of the DRC (2006)

The Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women (2009)

The Optional Protocol to the Convention on the Right of the Child on the Involvement of Children in Armed Conflict by General Assembly resolution A/RES/54/263 (2000)

The Optional Protocol to the Convention on the Right of the Child the Sale of Children, Child Prostitution and Child Pornography by General Assembly resolution A/RES/54/263 (2000)

Cases

Democratic Republic of Congo v Burundi, Rwanda and Uganda (2004) African Human Rights Law Report (AHRLR) 19 African Charter on Human and People's Rights (ACHPR 2003)

Prosecutor v. Thomas Lubanga Dyilo (10 February 2006) ICC-01/04-01/06 Trial

Prosecutor v. Germain Katanga and Mathieu Chui (02 July 2007) ICC-01/04-01/07 Trial



Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) African Human Rights Law Report (AHRLR) 60 African Charter on Human and People's Rights (ACHPR 2001)

Internet Sources

Addendum to human rights in armed conflict from the perspective of the contemporary State practice in the United Nations: Factual answers to certain hypothetical challenges 18 January 2011 available at www.adh-geneva.ch/.../Addendum%2018%20January%202011%20final.pdf accessed 1 October 2011

Amnesty International 'The human rights of children: overview available at http://www.amnesty.ca/themes/children_overview.php accessed 02 March 2011

Amnesty International 'No end to war on women and children: North Kivu Democratic Republic of Congo' available at <http://www.amnesty.org/en/library/info/AFR62/005/2008/en> accessed 17 June 2011

Avocats Sans Frontieres 'Case Study the application of the Rome statute of the international criminal court by the courts of the Democratic Republic of Congo'10 available at http://www.asf.be/publications/ASF_CaseStudy_RomeStatute_Lights_PagePerPage.pdf accessed 29 March 2012

Clifford, C 'Examples of the Use and Abuse of Girl Child Soldiers' New York: Foreign Policy Association available at <http://children.foreignpolicyblogs.com/?s=DRC> accessed 16 April 2011

Cole, A 'Thomas Lubanga: Landmark decision for international justice' 15 March 2012 available at <http://www.osisa.org/law/blog/landmark-decision-international-justice> (accessed 19 March 2012)

Diakonia 'what are the responsibilities of a state under international law?' available at www.diakonia.se/sa/node.asp?node=1857 accessed 31 October 2011

Diakonia 'IHL: state responsibility' available at www.diakonia.se/sa/node.asp?node=1858 accessed 31 October 2011

Harvey, R (2003) *Children and armed conflict: a guide to international humanitarian and human rights law* International Bureau of children rights www.essex.ac.uk/armedcon/story_id/000044.pdf accessed 21 March 2011

Jones, P (15 February 2011) 'What Are Children's Rights? Contemporary Developments and Debates' www.sagepub.com/.../39891_9781849203807.pdf accessed 20 March 2011

International Bureau for children (2010) *Children and armed conflict: a guide to International Humanitarian and Human Rights Law* available at www.ibcr.org/editor/assets/Conflict_Eng.pdf accessed 21 March 2011



International Review of the Red Cross 'National implementation of international humanitarian law: Biannual update on national legislation and case law January–July 2009' vol. 91 No 875 (September 2009) available at <http://www.icrc.org/eng/assets/files/other/irrc-875-national-imp-jan-july-ihl.pdf> (accessed 12 April 2012).

Kippenberg, J 'DR Congo: rights panel condemns abuses against children' available at www.hrw.org/news/2009/02/04/dr-congo-rights-panels-condemns-abuses-against-children accessed 31 October 2011.

Mazura D & Carlson K 'The girl child and armed conflict: Recognising and addressing grave violations of girls human rights' (25-28 September 2006) Florence available at http://www.fasngo.org/assets/files/resources/UN_girl_soldiers.pdf accessed 29 March 2011

Open Society Justice Initiative 'The trial of Germain Katanga & Mathieu Ngudjolo Chui: trial background who are Germain Katanga & Mathieu Ngudjolo Chui?' available at www.katangatrial.org/trial-background/who-are-katanga-and-ngudjolo-chui/ accessed 10 October 2011

Peace Operations Training Institute 'International Humanitarian Law' available at www.peaceopstraining.org/get_course_sample_pages/16 accessed 16 August 2011

Psychology definition available at [http:// dictionary.reference.com/browse/psychology](http://dictionary.reference.com/browse/psychology) accessed 31 October 2011

Oxfam 'Conflicts in DRC' available at <http://www.oxfamamerica.org/emergencies/conflict-in-drc> accessed on 17 June 2011

Oxfam 'Conflicts in DRC: background' available at <http://www.oxfamamerica.org/emergencies/conflict-in-drc/background> accessed on 17 June 2011

Report of the expert of the Secretary General, G Machel 'Promotion and protection of the rights of children: impact of armed conflict on children' A/51/306 26 August 1996 available at http://www.unicef.org/graca/a51-306_en.pdf accessed 17 August 2011

Save the children 'Advancing Children's Rights: a Guide for Civil Society Organisations on how to engage with the African Committee of Experts on the Rights and Welfare of the Child' (2009) available at [http://www.cрни.org/docs/Advancing CSOGuide.pdf](http://www.cрни.org/docs/Advancing_CSOGuide.pdf) accessed 02 March 2011

Save the children 'Children's rights: a teacher's guide' (2006) London: Save the children Fund http://www.savethechildren.org.uk/en/docs/childrensrights_teachersguide.pdf accessed 02 March 2011

Save the children 'Eastern DRC conflict' available at www.savethechildren.net/alliance/what_we_do/emergencies/eastern_drc/index.html accessed 29 March 2011



Save the children ‘Gasigwa’s story’ available at www.savethechildren.net/alliance/media/voices/2008-11-21.html accessed 29 March 2011

Siatitsa, I & Titberidze, M ‘Human Rights in armed conflict from the perspective of the contemporary state practice in the United Nations: factual answers to certain hypothetical challenges’ available at www.adh-geneva.ch/RULAC/pdf/HRL-in/AC.pdf accessed 13 September 2010

The *Prosecutor v. Thomas Lubanga Dyilo* available at <http://www.iccpi.int/Menus/ICC/Situations+and+Cases/> (accessed 17 April 2012)

The *Prosecutor v. Germain Katanga and Mathieu Chui* available at <http://www.iccpi.int/Menus/ICC/Situations+and+Cases/> (accessed 17 April 2012)

UNICEF fact sheet ‘Child rights’ the interim national Constitution of the Republic of Sudan (2005) available at <http://unmmis.unmissions.org/Portals/UNMIS/Constitution-making%20symposium/UNICEF%20fact%20sheet.pdf> accessed 29 March 2011

UNICEF fact sheet: ‘A summary of the rights under the Convention on the Rights of the Child’ available at http://www.unicef.org/crc/files/rights_overview.pdf accessed 29 March 2011

United Nations High Commissioner Refugee guidelines on ‘Determining the best interests of the child’ (May 2008) available www.unhcr.org/4566b16b2.pdf accessed 17 June 2011

Watch list on children and armed: Struggling to survive children in armed conflict in the Democratic Republic of Congo (2006) http://watchlist.org/reports/pdf/dr_congo.report.20060426.pdf accessed 17 June 2011

Wounderger, A ‘DRC: arrest candidate wanted for mass rape Mai Mai Leader Sheka campaigning while arrest warrant goes unenforced’ 2 November 2011 available at www.hrw.org/news/2011/11/02/dr-congo-arrest-candidate-wanted-mass-rape accessed 02 November 2011