

**Internally displaced children and HIV in situations of armed conflict in the DRC:
A study of the obligations of the government and selected non-state actors**

by

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‘Internal displacement is the great tragedy of our time. Internally displaced persons are the most vulnerable of the human family.’

Kofi Annan

Foreword, Guiding Principles (2004) OCHA

DEDICATION

To Martha Magayane, my beloved wife

To Ndamiyehe and Magayane

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ABSTRACT

The mini-dissertation analyses the international law obligations of the government and non-state actors regarding the protection of internally displaced children living with HIV in the Democratic Republic of the Congo.

The war and armed conflicts in the Eastern DRC have exacerbated the vulnerability of children, causing them to be separated from their families, to experience sexual violence and forced conscription into armed groups, to experience the violent deaths of a parent or friend, resulting in insufficient adult care. They further are subject to a lack of safe drinking water and food, insufficient access to health care services, discrimination and stigmatisation, and so on. These factors increase their risk of contracting HIV and, if they are already living with HIV, they adversely affect their welfare.

The mini-dissertation illustrates that international, regional and domestic human rights instruments protecting children can be applied in situations of armed conflicts to supplement humanitarian law instruments. It demonstrates that the government of the DRC has not implemented and fulfilled its international obligations to ensure these children adequate access to health services and to humanitarian assistance for displaced persons living with HIV; security and protection within displaced persons camps; and that children are protected from abuse and human rights violations.

The dissertation recommends the prosecution of perpetrators of crimes tied to the conflicts which have targeted children, as well as the ratification by the DRC of regional instruments such as the African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa, and the African Charter on the Rights and the Welfare of the Child, as this may enhance the legal protection of displaced children in the DRC.

ACRONYMES

ACRWC	: African Charter on the Rights and the Welfare of the Child
ARV	: Antiretroviral
CESCR	: International Covenant on Economic, Social and Cultural Rights
ICC	: International Criminal Court
ICCPR	: International Covenant on Civil and Politic Rights
ICGLR	: International Conference on the Great Lakes Region
ICJ	: International Court of Justice
ICRC	: International Committee of the Red Cross
IDMC	: International Displacement Monitoring Centre
IDPs	: Internally Displaced Persons
IEDA	: International Emergency and Development Aid
M23	: Movement of 23 March
NCDP	: National Congress for the Defence of the People
NRC	: Norwegian Refugee Council
PEP	: Post-Exposure Prophylaxis
PLHIV	: People Living with HIV

CHAPTER 1

INTRODUCTION

1. Background to the study

Internal displacement is a common occurrence in many countries in Africa. The Democratic Republic of the Congo (DRC) has been cited as having the largest internally-displaced populations in Africa after the Sudan.¹ The cartography of countries with displaced populations drawn by the International Displacement Monitoring Centre (IDMC) and the Norwegian Refugee Council (NRC) shows the DRC with 1.710.000 displaced persons at the end of 2011.² This large number of internally displaced persons is explained by the number of wars and armed conflicts, generalised violence and human rights violations which happened in the DRC since 1990. Wars and armed conflicts in the east of the DRC increased the number of internally displaced persons (IDPs), including children who are the most affected. There is evidence that these conflicts resulted in the greater vulnerability of girls and women to contracting HIV.³

1.1. Wars and armed conflicts that have affected children's human rights

The destabilisation in the east of the DRC started with the Rwandan Genocide in 1994 which resulted in a large number of Rwandese refugees in Eastern DRC, , among them those who were suspected of having killed several of their fellow citizens. In 1996, the Rwandan Patriotic Army entered Zaïre⁴ to pursue them, and this operation caused the dismantling of refugee camps, the displacement of mixed Rwandese and Congolese populations, and led to massive human rights violations, killings and the rapes of women and young girls.⁵

The second Congo war that started on 2 August 1998 has been described as 'Africa's first world war'⁶ because of the involvement of eight African countries⁷ and many rebel

¹ IDMC & NRC *Internal displacement in Africa* (2011) 1.

² IDMC & NRC (n 1 above) 2.

³ NT Maluleke 'HIV transmission in a conflict setting: An assessment of the vulnerability of women to HIV transmission through sexual violence' *Africa Institute for South Africa* 7
<http://www.pambazuka.org/images/articles/486/HIVpolicybrief.pdf> (accessed 7 November 2013).

⁴ As the DRC was then called.

⁵ P Apuuli Kasaija 'The United Nations' Mapping Exercise Report and Uganda's involvement in the Democratic Republic of Congo from 1996 to 2003' (2011) 11 *African Human Rights Law Journal* 667.

⁶ Kasaija (n5 above) 663.

⁷ Those countries were on the side of the Kabila government: Angola, Chad, Namibia, and Zimbabwe; and on the side of the rebels: Burundi, Rwanda and Uganda. See C Williams 'Explaining the great war in Africa: How

movements.⁸ It was considered by several as a war for ‘the natural resources of the Congo.’⁹ The 1998 war has been followed by armed conflicts which opposed and are still opposing the government of the DRC to many armed groups. Between 2003 and 2009, populations were displaced several times in large numbers, and some crossed to neighbouring countries,¹⁰ when the DRC army was fighting against an armed group named the National Congress for the Defence of the People (NCDP), created by General Laurent Nkunda.¹¹

The United Nations (UN) and Non-Government Organisations (NGOs) have denounced sexual violence against displaced women and girls by both government army and armed groups.¹² The human rights situation has worsened since April 2012 after the creation of the M23 armed group by former members of NCDP who were already integrated into the national army. They claimed that the DRC government did not respect the peace agreement of 23 March 2009¹³ signed with the NCDP.

Armed conflicts and displacement create negative conditions for children. The International Court of Justice (ICJ) has recognised that children were recruited by the rebels,¹⁴ and mentioned the significant number of HIV infections in the DRC, in the year prior to the outbreak of the conflict in 1998.¹⁵ In the case *The Prosecutor v Thomas Lubanga Dylo*, before the International Criminal Court (ICC), it has been testified and concluded beyond reasonable doubt that child soldiers under 15 were subjected to sexual violence.¹⁶ The Court considered sexual violence under Rule 145(1)(c) as part of the harm suffered by the victims during the

conflicts in the Congo became a continental crisis’ (2013) 90 <http://www.fletcherforum.org/wp-content/uploads/2013/05/Williams-37-2.pdf> (accessed 7 November 2013).

⁸ B M Lututala ‘The role of governance and research’ (2010) 36 *Forced Migration Revue* 9.

⁹ Kasaija (n 5 above) 663.

¹⁰ J K Stearns ‘Laurent Nkunda and the National Congress for the Defence of the People’ <http://www.ua.ac.be/objs/00210767.pdf> (accessed 16 May 2013).

¹¹ Rebel General Laurent Nkunda is a Congolese Tutsi who fought for Tutsi rebels in Rwanda and DR Congo. He is accused of war crimes in DR Congo, <http://news.bbc.co.uk/2/hi/africa/3786883.stm> (accessed 18 June 2013).

¹² Amnesty International ‘Seize jours d’actions contre les violences liées sur le genre (Sixteen days of action against gender-related violence)’ <http://www.amnesty.org/fr/womens-rights/16-days> (accessed 16 May 2013).

¹³ ‘Peace agreement between the government and the NCDP’, <http://www.iccwomen.org/publications>, (accessed 6 December 2012).

¹⁴ Kasaija (n 5 above) 663.

¹⁵ Watchlist ‘The impact of armed conflict on children in the Democratic Republic of Congo’ <http://www.watchlis.org> (accessed 6 December 2012).

¹⁶ ICC-01/04-01/06 *The Prosecutor v. Thomas Lubanga Dylo* Decision on Sentence pursuant to Article 76 of the Statute of 10 July 2012 para 69.

conflicts.¹⁷ The written submission of the expert witness to the ICC, Ms Schauer, explains well how children are affected by conflicts:

‘among a number of at risk populations, children of war and child soldiers are a particularly vulnerable group and often suffer from devastating long-term consequences of experienced or witnessed acts of violence. Child war survivors have to cope with repeated traumatic life events, exposure to combat, shelling and other life threatening events, acts of abuse such as torture or rape, violent death of a parent or friend, witnessing loved ones being tortured or injured, separation from family, being abducted or held in detention, insufficient adult care, lack of safe drinking water and food, inadequate shelter, explosive devices and dangerous building ruins in proximity, marching or being transported in crowded vehicles over long distances and spending months in transit camps. These experiences can hamper children's healthy development and their ability to function fully even once the violence has ceased.’¹⁸

The consequences that confront children in armed conflict are horrific and multiple. ‘While child soldiers have become a high-profile human rights cause in recent years, less visible are the millions of children and youth displaced and separated from families, exploited and denied basic rights.’¹⁹ In the context of armed conflicts such as the one in the DRC, children are not only vulnerable to militarisation, but the situation they face generally suggests that they are frequently and deliberately targeted.²⁰ They have experienced violence that ‘has become systematic, pervasive and has reached epidemic and horrific levels.’²¹

It is stated that sexual violence against women and girls in the DRC is ‘one of history’s greatest silences’²² and used by all armed groups involved in the conflict as a ‘weapon of war’.²³ Human Rights Watch calls this situation a ‘war within a war’.²⁴ It is reported that members of both the government army and rebel groups were involved in these human rights

¹⁷ ICC-01/04-01/06 (n 16 above) para 67.

¹⁸ ICC-01/04-01/06 (n 16 above) para 38.

¹⁹ V Kent & A McIntyre ‘From protection to empowerments: Civilians as Stakeholders in the DRC’ (2004) *Institute for Security Studies* 8.

²⁰ Office of the High Commissioner for Human Rights ‘Democratic Republic of Congo 1993-2003 UN Mapping Report: Acts of violence committed against children’ 2 http://www.ohchr.org/Documents/Countries/ZR/FS-4_Children_FINAL.pdf (accessed 7 November 2013).

²¹ Kent & McIntyre (n 19 above) 4.

²² Human Rights Watch ‘The war within the war, sexual violence against women and girls in Eastern Congo’ June 2002 cited by Kent & McIntyre (n 19 above) 8.

²³ Kent & McIntyre (n 19 above) 8.

²⁴ Kent & McIntyre (n 19 above) 8.

violations and abuses, including killings, sexual exploitations, abductions, and the forced conscription of children.²⁵

Sexual violence increases the risk of contracting HIV for displaced children. Researches show that the majority of national government combatants in the DRC are HIV positive. 'In the DRC it has been estimated that 60 per cent of all combatants are infected with HIV.'²⁶ Unfortunately, it is reported that they are having sexual intercourse with minors and this expose them to HIV.²⁷

According to the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and United Nations High Commissariat for Refugees (UNHCR), displacement breaks down the community and family structures, and exposes children to malnutrition, illness and disturbs their physical, psychological wellbeing and development.²⁸ Furthermore, in situations of displacement, internally displaced children may spend their entire childhood in camps or temporary shelters. They are unable to attend schools, and those girls who do attend school are likely to drop out of school. Poverty and a lack of sufficient protection can expose them to human trafficking and make them vulnerable to HIV.²⁹

Since armed conflicts and displacement exacerbate the vulnerability of children, the government must urgently respond to their specific needs, considering their best interests. In instances where there are no health care facilities and no voluntary testing campaign within displaced persons camps, children are exposed to HIV because of the violence they face.

2. Problem statement

This dissertation analyses international human rights and humanitarian law instruments which set out the obligations and responsibilities of state and non-states actors for the protection and assistance of internally displaced children living with HIV in the Eastern DRC. In the absence of specific instruments protecting IDPs at the international level,³⁰ it is necessary to

²⁵ Human Rights Council (HRC) *Second joint report of seven United Nations Experts on the situation in the Democratic Republic of the Congo* A/HRC/13/63 8 March 2010 para 37.

²⁶ Human Rights Watch 'The war within war: Sexual Violence against women and Girls in Eastern Congo' (2002) 3.

²⁷ G Zeender 'Displacement trends in the DRC' (2013) 6 *Kas International Report* 12.

²⁸ UNESCO & UNHCR 'The educational response to HIV and AIDS for refugees and internally displaced persons: discussion paper for decision-makers' (2007) *United Nations* 9.

²⁹ UNESCO & UNHCR (n 28 above) 9-11.

³⁰ C Phuong 'The international protection of internally displaced persons' (2004) *Cambridge University Press* 39.

find sections dealing with the protection and assistance of displaced children living with HIV in a variety of international human rights³¹ and humanitarian law instruments.

Among the human rights instruments at the international level which may protect IDPs, in particular children in the DRC, we can cite the Convention on the Rights of the Child (CRC),³² the International Covenant on Economic, Social and Cultural Rights (CESCR),³³ the Universal Declaration of Human Rights (Universal Declaration),³⁴ the UN Guiding Principles on Internal Displacement³⁵ and the UN Security Council Resolutions that have been taken on the situation of Eastern DRC.³⁶ At the regional level, the dissertation analyses mainly the African Charter on Human and People's Rights, African Union's Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)³⁷ and the African Charter on the Rights and the Welfare of the Child.³⁸ At the domestic level it analyses the Constitution of the DRC of 18 February 2006³⁹ as amended by Act No 11/002 of 20 January 2011; the 2006 laws against rape and sexual violence⁴⁰; the 2008 law protecting persons living with HIV⁴¹; and the 10 January 2009 law protecting children.

These human rights instruments may be able to sufficiently protect displaced children living with HIV in the DRC should they be implemented. For instance, state parties to the CRC have undertaken to respect and to ensure respect for rules of international humanitarian law applicable in armed conflict which are relevant to the child.⁴² Article 38(4) provides the states' international obligations to protect the civilian population in armed conflict by taking feasible measures to ensure protection and care of children who are affected by armed conflict. Under article 39, states must take appropriate measures that promote physical and psychological recovery and social reintegration of a child victim of any form of neglect,

³¹ D Campanelli 'Le droit de l'occupation militaire à l'épreuve du droit des droits de l'homme' <http://www.icrc.org/fre/resources/documents/article/review/review-871-p653.htm> (accessed 13 November 2012).

³² CRC <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed 13 November 2012)

³³ CESCR <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (accessed 13 November 2012).

³⁴ Universal Declaration of Human Rights <http://www.un.org/en/documents/udhr/> (accessed 13 November 2012).

³⁵ OCHA *Guiding principles on internal displacement* (2004).

³⁶ In particular Resolution 2098 (2013) creating an 'Intervention Brigade' within the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) in the DRC.

³⁷ Kampala Convention <http://www.unhcr.org/4ae9bede9.html> (accessed 13 November 2013).

³⁸ Available at <http://www.au.int/> accessed 13 November 2013).

³⁹ 'Constitution of the Democratic Republic of the Congo' <http://www.leganet.cd/Legislation/JO/2006/JO.18.02.2006.pdf> (accessed 29 May 2013).

⁴⁰ Available at <http://www.leganet.cd/JO.htm> (accessed 29 May 2013).

⁴¹ Available at <http://www.leganet.cd/JO.htm> (accessed 29 May 2013).

⁴² Art 38(1) CRC.

exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment, or victims of armed conflicts. Such recovery and reintegration must take place in an environment which fosters the health, self-respect and dignity of the child.⁴³ Displaced children living with HIV find protection under article 39 of the CRC. Articles 38(2) and (3) protect children from being recruited and from participating in armed conflicts before they turn fifteen. The CRC illustrates that human rights instruments supplement the international humanitarian law which regulates the conduct of parties to the armed conflict.

Since armed conflict forces populations into displacement in the eastern provinces, humanitarian law inevitably plays a crucial role as a source of protection for internally displaced persons.⁴⁴ Thus, the analysis of the Geneva Conventions regarding the Protection of Victims of non-international Armed Conflict (Protocol II) and Common article 3 to the Geneva Conventions will help to highlight the obligations of the government and responsibilities of non-state armed groups.

As mentioned above, although Protocol II and Common article 3 bind states and non-states parties, this dissertation intends to illustrate that these instruments are not respected. According to Jean-Marie Henckaerts, generally, the violation of humanitarian law does not result from the inadequacy of its provisions. Rather, it results from an unwillingness to respect them, insufficient means to guarantee their respect, uncertainty of their application in some circumstances, ignorance of political leaders, commandants, combatants and the public at large.⁴⁵

3. Research questions

For the purpose of this dissertation, four questions are analysed:

1. Which children's rights are relevant to HIV in the situation of internal displacement?
2. Do human rights and humanitarian law instruments provide clear obligations to be respected by the government and non-state actors regarding displaced children affected or at risk to be affected by HIV in situations of armed conflicts?
3. In the context of the DRC, are these obligations effectively fulfilled?

⁴³ Art 39 CRC.

⁴⁴ Phuong (n 30 above) 45.

⁴⁵ JM Henckaerts & L Doswald-Beck *Customary international humanitarian law* (2005) xxxiii.

4. How can these actors improve in fulfilling their obligations?

4. Literature review

Authors have noted the absence of specific instruments protecting IDPs under international law, except the UN Guiding principles which are not binding. While the majority have asserted that IDPs may find sufficient protection under general international human rights and humanitarian law instruments, some authors plead for ‘enhanced protection’⁴⁶ for IDPs, after they observed the failure in the protection of IDPs in some African countries.⁴⁷

In the DRC, much research has been conducted on the human rights situation of children during conflicts. On the whole, they concluded that armed conflicts and displacement increase the vulnerability of displaced children. According to Greta Zeender and Jacob Rothing,⁴⁸ displacement exacerbates vulnerability in the DRC, where IDPs suffer gross human rights violations and social marginalisation. It is reported that in the North-Kivu Province, displaced children have been forced to integrate into the armed forces.⁴⁹ ‘Left on their own, many have become homeless. Without food, medicine and shelter, displaced children are being denied a range of other essential rights, including the right to education.’⁵⁰

Greta Zeender and Jacob Rothing mention that:

‘Rape has been used extensively in the context of military operations by most of the forces involved in the conflicts. Within the context of existing gender relations in DRC, much of the sexual violence is directed against women and girls; however, internally displaced men and boys are also sexually assaulted by combatants. Despite all initiatives undertaken to counter sexual violence, it continues to be widespread throughout the country, used against the population generally, against displaced people, and as an instrument of displacement.’⁵¹

This shows the involvement of a state actor (the DRC army forces) and non-state actors (armed groups) in the perpetration of grave breaches of international humanitarian law and

⁴⁶ A Kiessling ‘The internally displaced in international law: do they require enhanced protection?’ unpublished Master of Laws dissertation, University of Cape Town 2006 59 & S T Kleine-Ahlbrandt *The protection gap in the international protection of internally displaced persons: the case of Rwanda* (2004) 2 *Institut Universitaire des Hautes Etudes Internationales* 12.

⁴⁷ SE Davies & L Glanville ‘Protecting the Displaced: Deepening the Responsibility to Protect’ (2010) *Brill’s journal Global Responsibility to protect* 38.

⁴⁸ G Zeender & J Rothing ‘Displacement trends in the DRC’ (2010) 36 *Forced Migration Review* 11-12.

⁴⁹ Zeender & Rothing (n 48 above) 12 & Human Rights Council A/HRC/13/63 8 March 2013 para 37.

⁵⁰ Zeender & Rothing 11.

⁵¹ Zeender & Rothing 12.

the gross violation of children's rights in the Eastern DRC. This dissertation analyses the rights of displaced children regarding their vulnerability to HIV in the situation of armed conflicts. In the DRC, interventions for displaced children should take into account their vulnerability to contract HIV since they are being sexually abused and because of their modest social and economic conditions.

The human rights to be enjoyed by displaced children affected by HIV in situations of armed conflicts relate to protection and assistance. Protection concerns the physical and moral integrity of displaced children. For their physical welfare, the government must prevent and repress all kinds of physical violence upon them and any threat to their lives. For their moral welfare, displaced children living with HIV must be protected from discrimination and stigmatisation. The government should guarantee justice by punishing individuals and non-states actors who may discriminate and stigmatise them for being displaced persons, and living with HIV. Assistance that is provided for displaced children living with HIV, including medical care and food, must adapt to their specific needs, which are the criteria of their best interests during displacement.

Regarding the responsibility to protect authors argue that, in pursuance to the principle of sovereignty and the principle of non-interference in internal affairs, the responsibility to protect IDPs is indeed borne by the DRC. The principle 'posits primary responsibility for the welfare and the safety of IDPs with their government'.⁵²

There is an argument that the responsibility to protect cannot be restricted to the government. In 1990, the Refugee Policy Group argued that when the government does not have the willingness or ability to protect their displaced populations, international involvement becomes essential.⁵³ The current UN Secretary-General, Ban Ki-moon, has highlighted in his report the idea of 'promoting the responsibility to protect'.⁵⁴ In situations of emergency such the one in the DRC, international law opens borders for humanitarian intervention. It is thought that if a state obstructs humanitarian interventions, the international community has a

⁵² R Cohen 'Reconciling responsibility to protect with IDPs protection' in SE Davies & L Glanville *Protecting the displaced* (2010) 39.

⁵³ Cohen (n 52 above) 38.

⁵⁴ L Glanville 'The International Community Responsibility's to Protect' in Davies & Glanville (n 52 above) 184.

right - and even a responsibility - to take a series of calibrated actions⁵⁵ which include political and diplomatic pressure, sanctions, and, as a last resort, military intervention.⁵⁶

Considering the current situation in the Eastern DRC, the inability of the government to protect internally displaced children is illustrated by the widespread human rights violations that they are facing. Moreover, the Group of Experts on the DRC of the Security Council Sanctions Committee has criticised the failure on the part of the Armed Forces of the Democratic Republic of Congo (FARDC) to prioritise the protection of civilians.⁵⁷ The government has neglected its responsibilities to protect and assist internally displaced persons.⁵⁸ Displaced children living with HIV have difficulty in accessing humanitarian assistance, including health and food which are essential for their survival. At this stage, the intervention of the international community is legitimated by the increased vulnerability of displaced persons, including children. It is evident that intervention should concentrate specifically on protecting and providing assistance to IDPs, in particular vulnerable groups such as displaced children living with HIV. It should also try to stop the violence in the region without provoking violent military reaction from rebels which may impact on the lives of thousands of civilians.⁵⁹

Protection by the international community ‘implies accountability or answerability’.⁶⁰ Unfortunately, the international community has failed to stem the massive violence and displacement in the DRC. That has ‘undermined public confidence in the United Nations to protect’.⁶¹ In addition, peacekeeping missions in the DRC have been accused of having an ‘ambiguous’ mandate, and of being involved in abusing internally displaced populations, in particular women and girls, whom they are expected to protect.⁶² Government troops have

⁵⁵ Cohen (n 52 above) 41.

⁵⁶ For instance collective actions in accordance with the VII Chapter of the UN Charter.

⁵⁷ Human Rights Council A/HRC/16/68 9 March 2011 para 10.

⁵⁸ Human Rights Council A/HRC/13/63 8 March 2010 para 111.

⁵⁹ In Darfur it was suggested that the interveners could save thousands of civilian lives, with low risk of provoking a violent military reaction from the government in Khartoum if they concentrate their energies on protecting and policing refugee and internally displaced persons camps, rather than trying to stop all the violence in the region. See C Pischedda ‘A plan for military intervention in Darfur’ (2007) *African Security Review-Institute for Security Studies* 81.

⁶⁰ Glanville (n 52 above) 187.

⁶¹ Cohen (n 52 above) 42.

⁶² Cohen 49.

also been accused of abuse. Furthermore, a few UN peacekeepers have been seduced by the wealth of mineral resources in the Eastern DRC.⁶³

The responsibility of non-state armed groups has been provided for in the four Geneva Conventions, particularly through Common article 3 and Additional Protocol II.⁶⁴ Both define the obligations of each party to conflicts that are not of an international character, which by definition occurs between states and organised armed groups. According to Andrew Clapham, the humanitarian law which applies during internal armed conflict gives rise to certain duties for rebels.⁶⁵ Traditional international law required for armed groups to be recognised by the state against which they were fighting as a condition for them to become ‘assimilated to a state actor with all the attendant rights and obligations which flow from the laws of international armed conflict’.⁶⁶ The purpose of such recognition is to bring the laws of war, in particular the rule of humanitarian law in armed conflict, into operations in an internal armed conflict.⁶⁷

This dissertation shows how Common article 3 and Protocol II can be used to protect displaced children affected by HIV during armed conflicts. As parties to the conflict, non-state armed groups must respect and protect civilian⁶⁸ populations, including children, since they are not taking part in the hostilities. They must observe ‘good practice’⁶⁹ that conforms to customary international law on the protection of civilians.

5. Research methodology

The research questions mentioned above require the use of different research methods, particularly the interpretation of legal texts. This will help to understand international human rights law and humanitarian law instruments protecting displaced children affected by HIV. In order to analyse the obligations of state and non-state actors, the dissertation analyses

⁶³ See R Crilly ‘UN peacekeepers ‘traded gold, ivory and guns with Congo rebels’ *Times Online* 28 April 2008 <http://www.timesonline.co.uk/tol/news/world/africa/article3834034.ece> (accessed 19 November 2012).

⁶⁴ Art1 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II).

⁶⁵ A Clapham ‘Human rights obligations of non-states actors in conflicts situations’ (2006) 88 *International Review of the Red Cross* 495.

⁶⁶ Clapham (n 65 above).

⁶⁷ R Wolfrum & C E Phillip ‘The status of the Taliban: Their obligations and rights under international law’ http://www.mpil.de/shared/data/pdf/pdfmpunyb/wolfrum_philipp_6.pdf (accessed 13 November 2012).

⁶⁸ ST Kleine-Ahlbrandt (n 46 above) 12.

⁶⁹ Geneva Academy of international humanitarian law and human rights ‘Armed Non-State Actors and international norms: Toward a better protection of civilians in armed conflict’ (2010) *Adh Genève* 1.

pertinent international human rights instruments and relevant internal law. We also use informal interviews and personal observations from displaced persons living with HIV (PLHIV).

6. Chapter outline

This dissertation examines the human rights situation of internally displaced children affected by conflict and HIV in the DRC. The next chapter, chapter 2, examines international human rights and humanitarian law instruments, at international, regional and domestic levels, which provide international obligations and responsibilities of state and non-state actors for the protection and support of displaced children affected by the conflict and by HIV. Chapter 3 assesses the situation in the Eastern DRC, particularly in the displaced camp of Mugunga III,⁷⁰ and shows how displaced children are specifically vulnerable to HIV. It raises challenges and gaps that should be covered with the purpose to protect displaced children living with HIV. Chapter 4 addresses useful recommendations that are likely to improve different interventions in favour of displaced children living HIV.

⁷⁰ Located in West Goma.

CHAPTER 2

INTERNATIONAL OBLIGATIONS REGARDING DISPLACED CHILDREN LIVING WITH HIV/AIDS IN SITUATIONS OF ARMED CONFLICT

1. Introduction

This chapter analyses the obligations of the government of the DRC and the responsibilities of non-state actors regarding the protection of and assistance to internally displaced children living with HIV. Since there are many causes of displacement, I focus specifically on situations of armed conflict. Even if there is no specific policy on internal displacement at the domestic level, the protection of displaced children living with HIV in situations of armed conflicts may be found in international humanitarian and human rights law instruments. Before analysing those instruments, this chapter defines some key concepts such as internally displaced children living with HIV and non-state actors.

1.1 Some definitions

1.1.1. Internally Displaced Children

The definition of internally displaced children is not different from the definition of IDPs provided in the Guiding Principles on Internal Displacement. Internally displaced persons are:

‘persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised state border.’⁷¹

This work focuses on internally displaced children living with HIV who are affected by conflicts in the Eastern part of the DRC.

⁷¹ OCHA UN *Guiding Principles on internal displacement: Introductory note* (2004) <https://docs.unocha.org/sites/dms/Documents/GuidingPrinciplesDispl.pdf> (accessed 2 June 2013).

1.1.2. Internally displaced children living with HIV

Internally displaced children living with HIV are displaced by armed conflicts, and who are affected or infected by HIV. They are affected when they leave with their relatives who are infected, or because they have lost their relatives who were infected. They are infected when they have HIV. The 2008 Congolese law protecting the rights of PLHIV/AIDS and persons affected in the DRC considers PLHIV as spouse, child or other relative who suffers the collateral effects of the PLHIV/AIDS; and affected persons, as those who are already sick or asymptomatic person with HIV.⁷²

1.1.3. Non-state actors

In the context of armed conflict and human rights violations such as in the DRC, it appears really difficult to identify what falls under the category of non-state actor and what does not. This difficulty comes from the fact that the displacement itself is a result of armed conflicts involving various armed groups,⁷³ governmental and rebels. The intervention of the international community through the UN peacekeeping mission, including the collaborative humanitarian assistance of UN agencies and international non-government organisations (NGOs), for displaced children in the Eastern DRC, shows how non-state entities are playing a vital role in mitigating the consequences of displacement. According to the African Union Convention on the protection and assistance of IDPs in Africa, non-state actors are private actors who are not public officials of the state, including other armed groups whose acts cannot be officially attributed to the state.⁷⁴

By non-state actors this dissertation refers to armed groups involved in conflicts, which are not affiliated to the government of the DRC, and to humanitarian agencies which assist IDPs.

1.2. Protection of internally displaced children living with HIV under humanitarian law

The nature of the conflict in the Eastern DRC will be discussed in order to determine the international humanitarian instruments that can apply for the protection and assistance of displaced children living with HIV.

⁷² Art 1 Law of 2008 protecting the rights of PLHIV/AIDS and persons affected.

⁷³ E Paddon & G Lacaille 'Stabilising the Congo' (2011) 8 *University of Oxford Refugee Studies Centre* 15.

⁷⁴ Art 1(n) Kampala Convention.

1.2.1 Defining the applicable law and the status of armed groups in the Eastern DRC conflicts

International humanitarian law is the law that regulates situations of armed conflicts, either of an international or non-international character. The definition of an armed conflict is necessary in international law to determine the applicable law to the conflict and to the effects that it generates. Although the DRC is opposed to many armed groups, some analysts describe the situation in the Eastern part as 'the externalisation of neighbouring instability'; in particular that of Rwanda,⁷⁵ among the causes of persistent conflict. However the definition of the situation in the DRC corresponds with the definition of non-international armed conflict, provided by Common article 3 and article 1 of the Additional Protocol II to the four Geneva Conventions. Non-international armed conflicts are defined as:

'Protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State (party to the Geneva Conventions). The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.'⁷⁶

According to some studies, when 'foreign States extend military support to an armed group acting against the government, the conflict will become international in character'.⁷⁷ Even if many assert the presence of Rwandese in the North Kivu supporting M23, it is not easy to demonstrate unequivocally that this presence results from a commitment by the government of Rwanda to intervene in the DRC on the side of M23, in order to qualify the situation as an international armed conflict. For Fleck the use of military force by individuals or group of persons will not suffice⁷⁸ to conclude that a conflict has an international character.

Furthermore, the presence of UN forces and those of the African Union does not change the nature of the conflict in the DRC. 'There are instances where it may be argued that the

⁷⁵ Paddon & Lacaille (n 73 above) 7.

⁷⁶ ICRC 'How is the term armed conflict defined in international humanitarian law' (2008) <http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.ht...&> (accessed 9 August 2013); J Pejic 'The protective scope of Common Article 3: more than meets the eye' (2001) 189 *International Review of the Red Cross* 191.

⁷⁷ M N Schmitt, CHB Garraway and Y Distein 'The manual on the law of non-international armed conflict with commentary' (2006) *International Institute for Humanitarian Law* 2 <http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf> (accessed 9 August 2013).

⁷⁸ D Fleck *The handbook of humanitarian law in armed conflict* (1995) 41.

international force has become a party to the non-international armed conflict',⁷⁹ despite legal issues raised by the regime governing multinational force conduct,⁸⁰ and the applicability of the 1994 Convention on the Safety of UN and Associated Personnel.⁸¹

The conflict in the DRC results in a greater need for the protection of civilians, particularly children living with HIV, in accordance with international humanitarian law applicable to non-international armed conflict.

The question whether non-state actors, such as armed groups, have international duties and responsibilities, in situations of armed conflicts, has been discussed in doctrine and jurisprudence. Many arguments support the idea that armed groups are bound by international norms. It has been stated that 'the commitment made by a State not only applies to the government but to any established authorities and private individuals within the national territory of that state and certain obligations are therefore imposed upon them.'⁸² Also in situations of armed conflicts, where armed rebel groups are exercising the governmental-like functions, they 'should be held accountable' for the reason that 'they are exercising the *de facto* governmental functions of the state'.⁸³ According to the Appeals Chamber of the Sierra Leone Special Court, non-state actors are bound by international humanitarian law 'even though only States may become parties to international treaties.'⁸⁴ In the same vein, the UN Security Council, with regard to Afghanistan, has reaffirmed that all the parties to the conflict are bound to comply with the obligations under the Geneva Conventions.⁸⁵

Concerning the situation in the DRC, the UN Security Council has recognised the continuation of serious violations of international humanitarian law and abuses of human rights by M23 and other armed groups,⁸⁶ and has considered them as 'parties in the conflict'.⁸⁷ Therefore, recalling its Resolution 1906 (2009), on 23 December 2009, the UN

⁷⁹ Pejic (n 76 above) 194.

⁸⁰ Pejic 195.

⁸¹ As above.

⁸² YC Sandoz & C Swinarski *et al* (eds) *Commentary on the additional protocol of 8 June 1977 to the Geneva Conventions of 12/08/1949* (1987) cited by Clapham (n 64 above) 498.

⁸³ Clapham (n 65 above) 499.

⁸⁴ Clapham 499.

⁸⁵ As above.

⁸⁶ UN Security Council S/RES/2098 (2013) Preamble para 10.

⁸⁷ As above, para 17.

Security Council has called on all parties to the armed conflict to comply with the obligations applicable to them under international humanitarian law.⁸⁸

With regard to the applicability of Common article 3, the obligations provided by it reflect international customary law and does not need formal ratification as a condition for their respect. Moreover, the International Court of Justice has considered that the fundamental rules contained in common Article 3 are rules which reflect ‘elementary considerations of humanity’.⁸⁹

It is realistic, however, to recognise that, even if the armed groups are bound by international humanitarian and human rights instruments, the analysis of Common article 3 and Additional Protocol II will show how difficult it is for them to fulfil some rights of internally displaced children living with HIV.

1.2.2 International humanitarian law and the protection of displaced children living with HIV

The international humanitarian law contained in the four Geneva Conventions and their two additional protocols regulates conduct permissible in times of armed conflicts. Its main purpose is to limit the effects and the consequences of conflicts on civilian populations. The dissertation shows below how this can be accomplished with regard to internally displaced children living with HIV.

Under international humanitarian law, the rights of displaced children living with HIV may come from the interpretation of Common article 3, Protocol II to the Four Geneva Conventions, and from the Guiding Principles on Internal Displacement.

Common articles 3 as well as Additional Protocol II to the Geneva Convention of 12 August 1949 apply to conflict which is ‘not of international character.’⁹⁰ In paragraph one, Common

⁸⁸ As above, para 4.

⁸⁹ V Chetail ‘The contribution of the International Court of Justice to international humanitarian law’ (2003) 85 *International Review of the Red Cross* 245.

⁹⁰ Common article 3(1) Four Geneva Conventions of 12 August 1949.

<http://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf> (accessed 22 August 2013) & Art 1(1) Additional Protocol II to the Four Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolII.aspx> (accessed 22 August 2013).

article 3 provides the minimum obligations which bind ‘each party’ to the armed conflict. Persons who are not taking part in the hostilities shall be treated humanely and without any discrimination. The same obligation is provided under article 4 of the Additional Protocol II which enumerates fundamental rights for persons who do not take part in the hostilities. The two instruments prohibit in all circumstances certain criminal acts directed at those persons. According to Common article 3, the prohibition concerns murder of any kind, mutilation, cruel treatment and torture, taking of hostages, humiliating and degrading treatment, passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court. By way of supplement, Protocol II prohibits at any time and in any place whatsoever: violence, threat to the life, health and physical or mental well-being of people, collective punishments, acts of terrorism, outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, slavery and slave trade in all their forms, pillage, and threats to commit any of the foregoing acts.⁹¹

These instruments also create an obligation for each party to the armed conflict to collect and care for the wounded and sick, whether or not they have taken part in the armed conflict.⁹² Regarding displaced children living with HIV, from article 7(2) they have the right to humane treatment and the right to receive, without discrimination, and ‘to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition’. In complying with those obligations each party to the hostilities is encouraged to collaborate with the International Committee of the Red Cross (ICRC).

However, Common article 3 (2) and article 18(1) of Protocol II confer on the ICRC the right of *humanitarian initiative*.⁹³ It is thought that an impartial humanitarian body, such as the ICRC, may offer its services to the parties to the conflict⁹⁴ for the performance of their traditional functions in relation to the victims of the armed conflict.⁹⁵ This supposes that the government, the dissident authority or other warring parties to which the ICRC addresses its

⁹¹ Art 4(2) Additional Protocol II.

⁹² Common article 3(2) & Art 7(1) Protocol II.

⁹³ T Pfanner ‘Various mechanisms and approaches for implementing international humanitarian law and protecting and assisting war victims’ (2009) 279 *International Review of the Red Cross* 303.

⁹⁴ Common article 3(2) Four Geneva Conventions of 12 August 1949
<http://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf> (accessed 22 August 2013).

⁹⁵ Art 18(1) Protocol II.

offers of services may not decline them ‘for arbitrary or capricious reasons’.⁹⁶ By offering its services, the humanitarian organisation is not simply intended to enable aid workers to be sent to a country engaged in an armed conflict,⁹⁷ but, ‘as the conflict develops, and with it the needs of the people affected, specific offers will have to be prepared, discussed and accepted.’⁹⁸ Then, the ICRC may validly reach vulnerable persons such as displaced children living with HIV for the medical, nutritional and material assistance that they require.

The collaboration of armed groups with the ICRC and other humanitarian organisations is essential particularly regarding the situation of children living with HIV. During conflicts non-state armed groups are not in a position to provide all the care services that these children need, which includes adequate access to healthcare services such as specific Antiretrovirals (ARVs), to qualitative treatment, to food and to adequate and hygienic sanitation. The inaccessibility, and some times, unavailability of healthcare services on the side of non-state armed groups can limit their interventions for the persons who are wounded and sick, including displaced children living with HIV.

Regarding the protection and assistance of civilian populations, national authorities concerned have to ensure the free passage of humanitarian assistance and to facilitate access to internally displaced people.⁹⁹ Additional Protocol II prohibits attacking and destroying objects indispensable to the survival of the civilian population, such as food, water installations and supplies, etc.¹⁰⁰ In addition, as it is recommended by Protocol III, although it applies to conflicts of an international character, each party to the conflicts has to respect and to ensure the protection of the humanitarian personnel,¹⁰¹ including the protection of relief consignments, and to facilitate their rapid distribution.¹⁰² Moreover, articles 9 and 11 of Protocol II protect medical units from attacks.

Common article 3 applies to situations of displaced children living with HIV because they are not excluded from the category of protected persons during non-international armed conflict.

⁹⁶ Pfanner (n 93 above) 303.

⁹⁷ Pfanner 304.

⁹⁸ As above.

⁹⁹ Principle 25(3) UN Guiding Principles on Internal Displacement

<https://docs.unocha.org/sites/dms/Documents/GuidingPrinciplesDispl.pdf> (accessed 22 August 2013).

¹⁰⁰ Art 14 Protocol II.

¹⁰¹ Art 71 (2) Protocol III.

¹⁰² Art 70 (2) Protocol III.

Indeed, paragraph one protects civilian persons who are not taking active part in the hostilities. This may be justified by the idea that international humanitarian law expressly provides that civilians are protected from direct attack (meaning that they may not be targeted), ‘unless and for such time they take direct part in hostilities.’¹⁰³ Article 8 of the Rome Statute of the ICC considers it a ‘grave breach of the Geneva Conventions of 12 August 1949, when a party to a conflict makes the civilian population or individual civilians the object of attack.’¹⁰⁴

Thus, for the purpose of the conduct of hostilities, it is important to make a distinction between members of organised forces or armed groups and civilians. ‘In non-international armed conflicts, all persons who are not members of state armed forces or organised armed groups of a party to the conflict are civilians and are therefore entitled to protection against direct attack’,¹⁰⁵ as long as they are not taking direct part in hostilities. Therefore, there is no reason, for instance, to target the displaced persons in camps during military operations, for the unique reason that many vulnerable and innocent persons such as children may lose their lives.

The protection of internally displaced children living with HIV does not come directly from the reading of the Guiding Principles on Internal Displacement. However, in analysing some provisions protecting displaced children, it is possible to extend them to the protection of displaced children living HIV. Despite the fact that these principles are not binding, they apply for the reason that they ‘reflect and they are consistent with international human rights and humanitarian law, and analogous refugee law.’¹⁰⁶

Principle 7 provides that national authorities must take all feasible alternative measures in order to avoid the displacement, and to take all measures in order *to minimise displacement and its adverse effects*, where alternatives do not exist.¹⁰⁷ It is in the same vein that article 17 of Protocol II prohibits forced movement of civilian populations. In forcing people into displacement, members of armed groups incur criminal responsibility.

¹⁰³ Pejic (n 76 above) 220.

¹⁰⁴ Art 8(2)(c) Rome Statute of the International Criminal Court
[http://untreaty.un.org/cod/icc/statute/english/rome_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf) (accessed 22 August 2013).

¹⁰⁵ Pejic (n 76 above) 222.

¹⁰⁶ UN Guiding Principles on Internal Displacement: *Introductory note by the Representative of the Secretary-General on IDPs* <https://docs.unocha.org/sites/dms/Documents/GuidingPrinciplesDispl.pdf> (accessed 22 August 2013).

¹⁰⁷ Principle 7(1) Guiding Principles on Internal Displacement.

According to this provision, the armed conflict in itself does not constitute sufficient grounds for ordering the displacement, unless it is for the safety of the civilians involved or for imperative military reasons. In that case measures have to be taken by the government to reduce the negative effects of displacement on the civilian population. Indeed, public authorities shall ensure, ‘to the greatest practicable extent’, that proper accommodation is provided to the displaced persons, and that such displacement is done in ‘satisfactory conditions’ of safety, nutrition, health and hygiene, and that members of the same family are not separated.¹⁰⁸ At this stage, all actions concerning displaced children living with HIV undertaken by any person or authority must take into account their best interests as the primary consideration.¹⁰⁹ All proceedings affecting a child who is capable must consider ‘his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.’¹¹⁰ In doing so, the effects of displacement on persons for whom social conditions require special needs, such as displaced children living with HIV and unaccompanied minors,¹¹¹ would be reduced.

Among unaccompanied minors there are those who would have lost their parents to AIDS-related disease. When measures taken to prevent separation have failed, parties to a conflict have the obligation to facilitate in every possible way the reunion of families temporarily separated and dispersed as a result of armed conflict.¹¹² In the same way, principle 17 (3) provides the responsibility for national authorities to take all appropriate steps to reunite separated families, particularly when children are involved. As said before, cooperation with humanitarian organisations will help implement that obligation. Indeed, in accordance with principle 25.2 and paragraph 2 of Common article 3, international humanitarian organisations and other appropriate actors have the duty to offer their services in support of the internally displaced.

Another way of mitigating the effects of displacement on children consists of the obligation of government to provide humanitarian aid for them. In the distribution of relief consignments, priority must be given to persons who deserve privileged treatment or special

¹⁰⁸ Principle 7(2) Guiding Principles on Internal Displacement & Art 17 (1) Protocol II.

¹⁰⁹ Art 4 (1) African Charter on the rights and the welfare of the child.

¹¹⁰ Art 4 (2) African Charter on the rights and the welfare of the child.

¹¹¹ Principle 4(2) Guiding Principles on Internal Displacement.

¹¹² Art 4 para 3 (b) Additional Protocol II to the Four Geneva Conventions.

protection, such as children. The assistance provided to children must take into account their different conditions. In situations of armed conflicts, displaced children living with HIV do not necessarily have the same needs as other displaced children. For instance, they should have access to ARVs that they might need on a regular basis. Even when the conflict worsens, these children must have access to their medication as they will otherwise build resistance and ultimately die. They have a greater need for adequate nutrition, water and sanitation, especially when taking ARVs. Thus, when providing assistance for displaced children, parties to the conflict must provide them with the care and aid they require, whether because of their age or for any other condition including the HIV status.

Also, principle 18 determines the level that has to be reached when providing assistance to displaced persons. In all circumstances, competent authorities (the government) shall provide, at the minimum, services such as essential foods and clean water, basic shelter and housing, appropriate clothing and essential medical services and sanitation. In providing essential medical services, national authorities must ensure the existence of medical structures within displaced persons camps for the treatment of displaced persons who are sick and children living with HIV who need medical attention. Under principle 19.1, they have the right to receive to the fullest extent practicable, and with the least feasible delay, the medical care and attention they require. However, principle 19 provides that special attention must be given to the prevention of contagious and infectious diseases, including AIDS-related diseases.

A preventive strategy may consist of counselling on how to avoid the transmission of HIV within displaced persons camps. It may also include raising awareness on hygiene issues and education on reproductive health for displaced people. This can limit the risk of HIV transmission from mother to child.

2. The protection of displaced children living with HIV under international human rights instruments

International humanitarian law instruments are not sufficient for the protection of displaced children living with HIV affected by an armed conflict.

There is a discussion in international law on whether human rights provisions can apply during conflicts which are regulated by international humanitarian law. After discussing whether human rights instruments can apply or not, these instruments will be analysed at the international, regional and domestic levels.

2.1. Applicability of international human rights law in situations of armed conflict

Internally displaced children, as human beings, are entitled to enjoy all the rights under international humanitarian law, regardless of the context of armed conflict. However, some authors argue that in situations of armed conflict, international human rights law rules are suspended and only international humanitarian law applies.¹¹³ It has been considered for many years that what distinguishes international human rights law from international humanitarian law is that the former applies in peacetime and the latter during armed conflict.¹¹⁴ But, ‘modern international law considers that distinction inaccurate’,¹¹⁵

‘since human rights obligations derive from the recognition of inherent rights of all human beings and that these rights could be affected both in times of peace and in times of war, international human rights law continues to apply in situations of armed conflict.’¹¹⁶

The Human Rights Committee and the Human Rights Council have adopted the same position, recalling that the International Covenant on Civil and Political Rights (ICCPR) also applies to situations of armed conflicts and that international human rights law and international humanitarian law are complementary and mutually reinforcing.¹¹⁷ This is to confirm that human rights are non-derogable even in time of armed conflicts.

2.2 The protection of displaced children living with HIV through international human rights instruments

The Convention on the Rights of the Child (CRC) contains several provisions which determine the obligations of states regarding the protection of children. State parties to the CRC, considering the need to protect women and children in situations of armed conflict, recognised that in each country in the world, children live in specific difficulties and require special protection.¹¹⁸ Thus, looking at the situation of armed conflicts, they have committed to respect international humanitarian law rules that apply to the particular situation of

¹¹³ D Campanelli ‘Le droit de l’occupation militaire à l’épreuve du droit des droits de l’homme’ <http://www.icrc.org/fre/assets/files/other/campanelli-fra-pr-web.pdf> (accessed 19 August 2013).

¹¹⁴ Campanelli (n 113 above).

¹¹⁵ United Nations *International legal protection of human rights in armed conflict* (2011) *Human Rights Office of the High Commissioner* 5 http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf (accessed 19 August 2013).

¹¹⁶ Campanelli (n 113 above) 5.

¹¹⁷ Campanelli (n 113 above) 1.

¹¹⁸ CRC Preamble para 10.

children.¹¹⁹ This is an implicit recognition of the vulnerability of children during armed conflicts.

The obligation of the government to respect international humanitarian law rules applicable to children extends to the obligation to prevent violations resulting from acts of third parties such as armed groups. It is a general principle that '[s]tates are obliged to respect and to ensure respect for international humanitarian law'.¹²⁰ Thus, article 38 of the CRC prohibits the involvement in hostilities of people who have not reached the age of fifteen, and it obliges state parties to refrain from recruiting those persons.¹²¹ Members of non-state armed groups engage their criminal responsibility when they act in violation of humanitarian law protecting children during armed conflicts.

However, article 38 creates expressly an obligation on states to take care of children affected by conflicts. More clearly, article 39 of the CRC provides an obligation on state parties to take all appropriate measures likely to promote the recovery of the physical and psychological well-being, and social reintegration of a child victim of an armed conflict. For example, state must provide for children who are victims of armed psychological, legal and medical assistance. Although articles 38 and 39 do not expressly refer to displaced children living with HIV, they cannot be discriminated against in their application. Their status as PLHIV is also not a basis for their discrimination.

Since the problem of displaced children living with HIV refers to the right to health, the standard of health in the DRC is questionable. Articles 24 of the CRC and 12 of the International Covenant on Economic, Social and Cultural Rights (CESCR), provide the right of the child to the enjoyment of the highest attainable standard of mental and physical health, and the duty of states to provide 'facilities for the treatment of illness and rehabilitation of health'.¹²² The right to health as defined at article 12.1 of the CESCR and interpreted by the Committee refers to:

¹¹⁹ CRC article 38 para 1.

¹²⁰ T Zych 'The scope of the obligation to respect and to ensure respect for international humanitarian law' (2009) 27 *Windsor Yearbook of Access to Justice* 251.

¹²¹ Art 38 para 1 & 2 CRC.

¹²² Art 24 CRC.

‘timely and appropriate health care, and to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.’¹²³

This supposes that state make health facilities available, accessible, acceptable, and of good quality for displaced children living with HIV. Concerning information and education, the Committee on the Rights of the Child has asserted that state parties have the obligation to ensure that all adolescents have access to adequate information that is essential for their health and development in order to make appropriate health behaviour choices, which include information on the prevention of HIV and AIDS and of sexually transmissible diseases.¹²⁴

According to the World Health Organisation’s (WHO) constitution, the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without the distinction of race, religion, political belief, economic or social condition.¹²⁵ The fact that a displaced child is living with HIV does not justify denying him or her rights provided by article 24. Situations of armed conflict can impede the government’s ability to fulfil these rights. Moreover, it is not realistic to expect that a government may provide adequate food and housing for IDPs during armed conflict.

In addition, articles 24.2 of the CRC and 12.1 of the CESCR recommend that state parties should take measures which can reduce child mortality, ensure appropriate pre-natal and post-natal health care for mothers, fight disease and malnutrition, improve all aspects of environmental health, create conditions that assure to all, medical services and medical attention in case of illness,¹²⁶ and so on. All these measures are likely to benefit displaced children living with HIV and to improve their conditions. They ensure, for example, primary health care for children and are likely to reduce the risk of HIV transmission from mother to child. Unfortunately, as the analysis of the actual situation of the displaced persons camps in the Eastern DRC shall demonstrate, articles 24 and 12 are violated daily.

¹²³ Committee on Economic Social and Cultural Rights, *General Comment N° 14: The Right to the Highest Attainable Standard of Health (Art 12)* para 11 Document E/C.12/2000/4.

¹²⁴ Committee on the Rights of the Children *General comment No 1414 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art 3 para 1) para

78. http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (accessed 20 August 2013).

¹²⁵ Constitution of the World Health Organisation, http://www.who.int/governance/eb/who_constitution_en.pdf (accessed 20 August 2013).

¹²⁶ Art 12 para 1(a) CESCR <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (accessed 21 August 2013).

Also, although it is not binding itself, the Universal Declaration of Human Rights (UDHR) should apply to the situations of displaced children living with HIV in the DRC. The current Constitution incorporates the rights and values expressed by it,¹²⁷ such as the principle of equality and the right to equal protection¹²⁸ and to non-discrimination.¹²⁹

The HIV status of internally displaced children cannot be a reason to limit their protection and their enjoyment of human rights and fundamental freedoms. But the fact that a person is a PLHIV exposes him to several detrimental acts to his dignity and honour. These acts consist of demeaning words or denigration, and even by physical violence. Article 12 of the Universal Declaration provides legal protection against such interference and such attacks. Moreover, in the DRC, the law on the protection of PLHIV/AIDS and those affected criminalises acts of discrimination and stigmatisation with punishments of 6 months and a fine of 50.000 to 100.000 Congolese Francs (60 to 120 USD).¹³⁰

2.3 The protection of displaced children living with HIV through regional human rights instruments

Our analysis is limited to the African Charter on Human and Peoples' Rights (African Charter), to the African Charter on the Rights and the Welfare of the Child, and to the African Union Convention for the protection and assistance of internally displaced persons in Africa (Kampala Convention), even if the DRC has not yet ratified the last two instruments.

In general, the African Charter provides the enjoyment of rights and fundamental freedoms without discrimination¹³¹ and proclaims the equality of all and equal protection before the law.¹³² It protects the privacy and integrity of the person,¹³³ respect for the right to dignity¹³⁴ and security of the person.¹³⁵ So, it is appropriate to argue that HIV status and quality of displaced children shall not exclude them from enjoying all the rights inherent to human beings provided by the African Charter. It is up to the State to protect displaced children living with HIV against discrimination in all its negative forms, and to ensure that they

¹²⁷ Constitution of the DRC Preamble para 5 & art 45.

¹²⁸ Art 7 Universal Declaration of Human rights.

¹²⁹ Art 2 Universal Declaration of Human rights.

¹³⁰ Art 42 Law of 2008 on the Protection of PLHIV/AIDS and Persons Affected.

¹³¹ Art 2 African Charter.

¹³² Art 3 African Charter.

¹³³ Art 4 African Charter.

¹³⁴ Art 5 African Charter.

¹³⁵ Art 6 African Charter.

receive equitable treatment, taking into account their vulnerability. The State must also invest in the repression of acts of individuals who violate the rights of these children and undermine their physical and moral integrity.

The African Charter, like the CRC and CESCRC analysed above, recognises the right of everyone to enjoy 'the best attainable state of physical and mental health'¹³⁶ and recommends that states take necessary measures to protect the health of their people and ensure that they receive medical care when they are sick.¹³⁷ It is not by chance that such obligation returns more than once in international human rights instruments. This provision seems to reflect the awareness by States of the weakness of their health systems and their willingness to adopt national strategies and programs for their improvement. The Charter protects individuals against discrimination, particularly discrimination directed at children,¹³⁸ including displaced children living with HIV.

The African Charter on the Rights and Welfare of the Child (ACRWC) and the African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted in Kampala in 2009, deserve special analysis concerning the protection of displaced people in general and the protection of displaced children living with HIV in particular.

The protection provided by the ACRWC comes from the recognition that the situation of most African children remains critical due to, among many other causes, the armed conflict, and that they need special safeguards and care.¹³⁹ Article 22 provides the obligation for states parties to respect and to ensure the respect of international humanitarian law rules in armed conflicts which affect children, and to take measures for their care and their protection.

Regarding the health of the child, the ACRWC provides the obligation of the state to ensure the effective enjoyment of the best attainable state of physical, mental and spiritual health.¹⁴⁰ As we mentioned it previously, it is an obligation of the state to direct the upbringing of the child and the promotion of the understanding of primary health care.¹⁴¹ Education focused on

¹³⁶ Art 16(1) African Charter.

¹³⁷ Art 16(2) African Charter.

¹³⁸ Art 18(3) African Charter.

¹³⁹ Preamble of the Charter.

¹⁴⁰ Art 14 African Charter.

¹⁴¹ Article 12(2)(h) ACRWC.

primary care has a preventive role for children affected by HIV and serves to reduce the effects of HIV for those who are already infected.

This instrument contains other provisions that can offer specific protection of the displaced child living with HIV. For example, articles 1, 3 and 4 protect children from discrimination and provide the obligation on the state to adopt legislative measures and policies to give effect to the provisions of the ACRWC.

From the reading of the Kampala Convention, it should be noted first that it does not expressly talk about displaced children living with HIV. This does not mean that the Convention leaves them without protection. Indeed, the Kampala Convention generates and apportions international obligations for state and non-state actors. These include articles 3, 4, 5, 11 and 12 which define the obligations of state parties, and articles 6, 8 and 9 which define the obligations of international organisations and of the African Union in situations of displacement. It is through the analysis of these provisions that may be concluded that the Kampala Convention implicitly protects children living with HIV.

With regard to the obligations of states parties, it can briefly be mentioned the obligation to respect and to ensure respect for human rights, including humane treatment, non-discrimination, equality and equal protection of law;¹⁴² the obligation to ensure assistance and protection for internally displaced persons considering their basic needs,¹⁴³ and by providing necessary funds.¹⁴⁴ In addition, the state has the general obligation to refrain from, to prohibit and to prevent arbitrary displacement,¹⁴⁵ which may be the result of armed conflicts. Article 5 of the Kampala Convention requires for states parties to take measures to reassure that non-state actors comply with the requirements of article 7 relating to the prohibition for armed groups acts which may cause arbitrary displacement,¹⁴⁶ acts which would deprive the displaced of their right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter; or that may separate the members of the same family¹⁴⁷ and then

¹⁴² Art 3(1)(d) Kampala Convention.

¹⁴³ Art 3(1)(j) Kampala Convention.

¹⁴⁴ Art 3(2)(d) Kampala Convention.

¹⁴⁵ Art 3(1)(a) Kampala Convention.

¹⁴⁶ Art 7 (5)(a) Kampala Convention.

¹⁴⁷ Art 7(5)(c) Kampala Convention.

cause the situation of unaccompanied displaced children. Article 7 also prohibits the recruitment of children and their involvement in hostilities by armed groups.¹⁴⁸

The responsibility of international organisations consists essentially in the respect of the rights of every displaced person in accordance with international law,¹⁴⁹ in particular, respect of principles of humanity, neutrality, impartiality and independence of Humanitarian actors.¹⁵⁰ They must also ensure respect for relevant international standards and codes of conduct when they provide protection and assistance to IDPs.¹⁵¹ The obligation of the African Union concerns its interventions in any member State in cases of genocide, crimes against humanity and war crimes, at the decision of the Assembly¹⁵² or at the request of a state party.¹⁵³ However, the Kampala Convention provides that the African Union must support the efforts of the state parties to protect and assist internally displaced persons.¹⁵⁴

Regarding displaced children living with HIV, apart from certain provisions cited above that would protect them; article 9(c) provides that state parties shall provide special protection and assistance for internally displaced persons with special needs, including separated and unaccompanied children, mothers with young children, the elderly, and persons with disabilities or with communicable diseases. Special protection and assistance of displaced children living with HIV, as a particular group, include the medical care adapted to their age and to their health situation, adequate food and sanitation, accompaniment by parents or by adult person for unaccompanied displaced children living with HIV, protection from discrimination and stigmatisation within displaced persons camps, etc. Furthermore, they can be considered as children with communicable disease, since the inadequacy or absence of education or sensitisation campaigns on the prevention and the treatment of HIV within the displaced persons camps increase the risk for other uninfected children to contract HIV when they are engaged in risky sexual behaviour.

¹⁴⁸ Art 7(5)(e) Kampala Convention.

¹⁴⁹ Art 6(2) Kampala Convention.

¹⁵⁰ Art 6(3) Kampala Convention.

¹⁵¹ Art 6(3) Kampala Convention.

¹⁵² Art 4(h) Constitutive Act of the African Union.

¹⁵³ Art 4(j) Constitutive Act of the African Union.

¹⁵⁴ Art 8(3) Kampala Convention.

2.4 The protection of displaced children living with HIV in domestic laws

At the domestic level, internally displaced children living with HIV find protection in the Constitution of the DRC of 18 February 2013 as amended in 2011. The Constitution incorporates the CRC, and many fundamental human rights instruments, as we mentioned it earlier.¹⁵⁵ It provides the obligation for the government to protect children in difficult situations,¹⁵⁶ by enacting laws that provide fundamental principles relating to the protection of vulnerable groups.¹⁵⁷ It is for this reason that in 2009 the DRC has adopted the Law on the Protection of the Child, and earlier in 2008, the law on the protection of PLHIV/AIDS and those affected by HIV/AIDS.

The law on the protection of the child defines the displaced child, the child in a difficult situation and the child in exceptional situations, which may validly include internally displaced children living with HIV/AIDS. The *displaced child* is a child who is not accompanied by his/her parents or his/her guardian, who has been forced to leave his living environment as a result of war, natural disaster or other serious events and moved to another place within the country where he resides.¹⁵⁸ The *child in a difficult situation* is a child who does not enjoy his fundamental rights and who does not have access to basic social services such as health, housing, nutrition and education.¹⁵⁹ And the *child in an exceptional situation* is a child in a situation of armed conflict, tension and civil disturbance, natural disaster, or in situation of sensitive and prolonged degradation of socio-economic conditions.¹⁶⁰

These children are considered as vulnerable under article 123 (16) of the Constitution. It results from the Constitution that the state has the obligation to protect children in difficult situation and to prosecute perpetrators and accomplices of violence against them.

By way of conclusion we can state that the domestic law provides similar protections to the international and regional law. For example, article 4, 13, 21, 72 of the law on the protection of the child protect the right to equality, the right to life, the right to the highest attainable standard of health, the right to education for displaced children, the right to privacy. And article 5 and 9 prohibit discrimination and torture against children. Article 36 provides the

¹⁵⁵ Preamble of the Constitution of the DRC.

¹⁵⁶ Art 41 Constitution of the DRC.

¹⁵⁷ Art 123(16) Constitution of the DRC.

¹⁵⁸ Art 2 (2) Constitution of the DRC.

¹⁵⁹ Art 2(4) Constitution of the DRC.

¹⁶⁰ Art 2(5) Constitution of the DRC.

role of social assistants on the reunion of separated families they can also help displaced children living with HIV who are traumatised by their condition or by the conflict.

This chapter has shown that the obligations of the DRC as state actor and the responsibility of non-state actors are based on the protection and assistance of internally displaced children living with HIV.

To sum up, under humanitarian law instruments state and non-state armed forces, as parties to the conflict, must respect international humanitarian law and human rights instruments protecting children. They must treat humanely and without discrimination all persons who are not or no longer taking part to the conflict, including displaced children. In the context of Eastern DRC, they have the obligation to not get involved in criminal acts prohibited by common article 3 and by the Protocol II, including the forced conscription of children, targeting children and displaced person camps during military operations, sexual violence and all forms of child abuse and exploitation, which may increase their vulnerability to HIV. They have the obligation to facilitate humanitarian assistance by protecting, respecting and cooperating with humanitarian personnel. They have also to protect from destruction and pillage, medical infrastructures, food, water, etc., which are essential for the survival of displaced persons, in particular for children living with HIV. In instance where they do not conform to these rules, members of state and non-state armed forces incur their criminal responsibility for grave breaches to the Geneva conventions defined under article 8 of the Rome statute of the ICC. Then, the obligations provided by Protocol II and Common article 3 bind both state and non-state actors as parties to the conflict.

Regarding the obligations of humanitarian organisations and the international community, even if they do not bear primarily the obligation to provide assistance for IDPs in the DRC, they have to supplement the government in addressing particular situations of vulnerability such as that caused by HIV. They must intervene also in order to prevent the perpetration of international crimes against children. All their interventions must conform to international law and to rules of ethic which govern them.

Under humanitarian law instruments (at international, regional and domestic levels), the government bears primarily the obligation to protect, to respect and to fulfil human rights. In situation of armed conflict, it must protect children by preventing them from arbitrary displacement. It follows that the government must ensure the criminal accountability of non-State actors concerned in such act. However, when it is impossible to avoid the displacement,

the government has the obligation to minimise its effects on populations, including on children living with HIV. In particular, the government must ensure that the displacement happens in decent conditions where health facilities, humanitarian assistance are provided, and security guaranteed within the displaced persons camp. Therefore in accordance with the Constitution, the DRC has the obligation to provide emergent response for ‘children in difficult situations’ such as displaced children living with HIV, by addressing their specific needs related to their HIV status, and by assuring them the medical care and the attention required by their condition. However, the government must ensure that these children are not unfairly discriminated on the basis of their HIV status or because they are displaced persons. It must punish all forms of discrimination against displaced children living with HIV.

In instances of separation, state actors must reunite separated families, in particular when children are involved.

CHAPTER 3

THE SITUATION OF DISPLACED CHILDREN LIVING WITH HIV IN THE DISPLACED PERSONS CAMPS OF GOMA

1. Introduction

This chapter assesses whether states and non-state actors are complying with their obligations and responsibilities analysed in Chapter 2 under international human rights and humanitarian law instruments. In assessing how the rights of displaced children living with HIV in Mugunga III¹⁶¹ are affected, we informally interviewed different persons, including some displaced PLHIV and some members of NGOs who work in the displaced persons camps. This chapter refers also to NGOs reports, including the UN reports and resolutions, on the situation in the Eastern part of the DRC.

As analysed before, the DRC is party to some of the international instruments protecting children, and it has defined national strategies on fighting against HIV and sexual violence. This chapter argues that these texts need to be implemented and fulfilled. With regard to displacement, the government must intervene in displaced persons camps for the protection and assistance of vulnerable persons.

2. Access to health and to humanitarian assistance for displaced children living with HIV

The DRC has defined a national strategy in the health sector through which it undertook to provide medical assistance for displaced persons living with HIV. However, the situation is different in the displaced camp of Mugunga III, where there is not a single state health centre. Difficult access to health services, and the fact that the humanitarian assistance does not respond to the specific needs of displaced children, increase their vulnerability to HIV. This situation is perceived through the painful experience of a HIV positive displaced child who lost his mother to AIDS after they were both turned away from one of the hospitals in Goma.¹⁶²

¹⁶¹ Located in the North Eastern part of the city of Goma at about 15 kilometres.

¹⁶² Interview with some displaced PLHIV.

2.1.1 Response to HIV through the national health strategy policy

The Constitution provides that the protection and the promotion of vulnerable groups are state obligations.¹⁶³ It also states that the protection of these vulnerable groups must be defined by the law,¹⁶⁴ at the national level or even by policies developed at the provincial level.¹⁶⁵ It is within this context that there are laws in the DRC protecting children and people living with HIV and AIDS as analysed earlier.

Regarding the right to health, basic principles and rules organising public health are established by the law.¹⁶⁶ The promotion of primary healthcare in the DRC is in the exclusive jurisdiction of the provinces.¹⁶⁷

Thus, the national health strategy is defined under the 2006 Constitution; the 2008 law protecting persons living with HIV and those affected by HIV; the 2009 Law on the Protection of the Child; the 2008 Strategic Plan on the fight against HIV and AIDS;¹⁶⁸ and the 2009 National Strategy on the Fight against Sexual Violence and Gender Based Violence.¹⁶⁹

The healthcare system in the DRC, based on primary health care, is organized into three pyramids. The first one is at the *operational level*¹⁷⁰ where the DRC is divided into several 'health zones', each comprising of at least one main Reference Hospital, one Reference Health Centre and one Health Centre. Each health zone is an operational unit for the planning and implementation of the national health policy. It functions as an autonomous decentralized entity, with its own management bodies and its action plan. The second one is at the *intermediate level*¹⁷¹ where the provincial health policy is placed under the authority of the Provincial Minister of Health (who collaborates closely with the central government). At this level, there is a Provincial Office for the Coordination of the Fight against HIV/AIDS which works within the Provincial Health Division. The third one is at the *central level*¹⁷² where the

¹⁶³ Art 51 Constitution of the DRC.

¹⁶⁴ Art 123(16) Constitution of the DRC.

¹⁶⁵ Art 203(25) Constitution of the DRC.

¹⁶⁶ Art 47 Constitution of the DRC.

¹⁶⁷ Art 204(18) Constitution of the DRC.

¹⁶⁸ 2008 Strategic Plan of Fight against HIV/AIDS in the DRC.

¹⁶⁹ National Strategy on Fight against Sexual Violence and Gender Based Violence in the DRC

http://monusco.unmissions.org/LinkClick.aspx?fileticket=RxbG_S-GaVo (accessed 20 August 2013).

¹⁷⁰ n 169 above 16.

¹⁷¹ n 169 above 16.

¹⁷² n 169 above 17.

National Ministry of Public Health and its General Secretariat coordinate the entire health sector and provide normative and technical support to the provinces and health zones.

The Strategic plan against HIV/AIDS from 2010 to 2014 in the DRC defines four strategic axes of interventions: Reduction of sexually transmissible infections and the reduction of HIV infection, improvement of access to universal care and treatment, attenuation of socio-economic impact of HIV/AIDS, and support for the implementation of the national strategic plan. Each strategic axis has its strategic intervention domain. Some of those strategic domains may concern displaced children living with HIV. For example, under the reduction of sexually transmissible infection and HIV, the strategic plan aims at reinforcing access to prevention services for groups with a high risk of contracting HIV such as sex workers, women within armed forces, and for vulnerable groups which include young persons, women and populations in situations of crisis and humanitarian emergency. It also aims to reduce the transmission of HIV through blood in the general population, and from mother to child. The strategic axis 2 aims at improving medical, psycho-social and home-based care for persons living with HIV. Concerning the social and economic impact of HIV/AIDS, strategic axis 3 addresses stigmatisation and discrimination within the general population.

Regarding national institutions dealing with HIV, the DRC has a Multi-sectorial National Programme for the Fight against HIV, under the authority of the President of the Republic and the Multi-sectorial National Council for the Fight against AIDS under the supervision of the Prime Minister. Those programmes manage and implement the national strategic plan for the fight against HIV / AIDS and collaborate with relevant institutions and different partners who work in the same field.

The Congolese government has acknowledged in its national strategic plan on the fight against HIV/AIDS that armed conflicts lead to displacement of populations, and that this displacement is likely to cause the economic and social precariousness that make persons more vulnerable vis-à-vis the HIV infection. The strategic plan against HIV and the 2009 national strategy on the fight against sexual and gender based violence have both considered sexual violence to be one of the causes of the spread of HIV in the DRC during armed conflicts.

2.1.2 Inadequate access to health services and to humanitarian assistance for displaced children living with HIV

Access to health services is very important for displaced persons living with HIV. Their survival in situations of displacement depends, among other factors, on the medical attention they receive. Despite the fact that the Strategic Plan on the Fight against HIV acknowledges the increasing vulnerability to HIV infection for displaced populations,¹⁷³ it did not, however, define any specific approach or programme to tackle the issue of HIV within the displaced persons camps. Indeed, at the operational level, the DRC health system does not provide services for displaced children living with HIV. The absence of health centres within displaced persons camps confirms this idea.

Medical services that displaced persons living with HIV are receiving from NGOs¹⁷⁴ are very limited. Displaced PLHIV claimed for instance that those medical humanitarian organisations do not cover their hospitalisation cost when they are transferred in Goma. Without assistance, they are not able to bear the financial cost.¹⁷⁵ Some PLHIV in Mugunga III state constantly that some of their colleagues died because of the lack of medical assistance.¹⁷⁶ Difficult access to health services increases the risk of death for displaced PLHIV including children and may leave many displaced children without parents.

There are also issues regarding HIV counselling, testing and ARVs supply within displaced persons camps. Displaced persons and children living with HIV have insufficient information on HIV¹⁷⁷ because of limited access to education and to counselling services. Voluntary testing campaigns need to be organised within displaced persons camps. Many of displaced PLHIV who are receiving treatment are those who have been tested before 2013.¹⁷⁸ This increases the risk of HIV propagation among IDPs and children who are not aware of their

¹⁷³ Strategic Plan on the Fight against HIV and AIDS in the DRC 2008-2012 13 & 28
http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/lega... (accessed 7 November 2013).

¹⁷⁴ Such as Heal Africa, Johanniter, Médecins Sans Frontières, Médecins du Monde and the Baptist Community in the Central Africa (CBCA).

¹⁷⁵ This is a statement from a support group of PLHIV in Mugunga.

¹⁷⁶ Those who passed away because of the lack of medical care belonged to a support group of PLHIV in Mugunga III.

¹⁷⁷ Their knowledge is limited to the modes of HIV transmission.

¹⁷⁸ According to a nurse of Johanniter health centre whom we met in Mugunga III.

status. The voluntary testing organised between April and May 2013 has reached a small number of displaced children.¹⁷⁹

Concerning access to ARVs, the problem in the displaced persons camp of Mugunga III relates to their quality. The ARVs that were distributed in June 2013 for use until September 2013 expired in July 2013.¹⁸⁰ Also, every three months PLHIV are required to pay 2 USD for medical follow-ups, including medical consultations. Even if the responsible person of the Health Division in North Kivu told us that that amount is not related to the cost of ARVs,¹⁸¹ the problem is not resolved since the delivery of ARVs comes after the medical consultations for which the amount of 2 USD is payable. One can therefore conclude that the service and medication are not free of charge. This contradicts the 2008 law protecting PLHIV which provides for free services¹⁸² from the Congolese government.

Concerning humanitarian assistance, in particular food distribution, IDPs are suffering from food deficiency and food that is not acceptable.¹⁸³ According to an IDPs representative in Mugunga III:

‘Humanitarian organisations which supply food take many months before they distribute food. I have seen one old woman who was dead from hunger. The quantity of food distributed cannot cover two weeks. We are receiving always the same food which does not correspond to our needs.’¹⁸⁴

Adequate access to food is essential for medical care for displaced children living with HIV. The antiretroviral treatment that they receive requires for them to have enough quality food. The 2011 Political Declaration on HIV and AIDS adopted by the UN General Assembly recognised that

¹⁷⁹ According to a nurse working at Johanniter health centre in Mugunga III, 43 of 130 people tested were HIV positive.

¹⁸⁰ After being alerted by a support group of PLHIV, we have consulted the Health Division in Goma which confirmed these facts with some explanations: According to their explanations, there was a stock of ARVs which were about to expire in one or two months from that time. Instead of destroying them, health zones have been authorised to distribute those ARVs instructing PLHIV that they should give them back before they expire. Because of a miscommunication, many PLHIV used them even after their expiry date.

¹⁸¹ He explained to us that partners (such as Médecins du Monde) who were paying the fees of the doctors who treat PLHIV have suspended their support to the General Hospital.

¹⁸² Art 11 Law on the Protection of PLHIV and Persons Affected.

¹⁸³ These are the terms used by the leader of the displaced persons camp of Mugunga III during our interview of 25 June 2013.

¹⁸⁴ This was declared to us during interview with the Mugunga III displaced Leader on 25 June 2013.

'people die prematurely from AIDS because poor nutrition exacerbates the impact of HIV on the immune system and compromises its ability to respond to opportunistic infections and diseases, and that HIV treatment, including antiretroviral treatment, should be complemented with adequate food and nutrition.'¹⁸⁵

Access to food for displaced children living with HIV must be considered as 'part of a comprehensive response to HIV and AIDS'¹⁸⁶ in the displaced persons camps.

3. Security and protection of displaced children living with HIV

Ensuring security and protection for displaced children living with HIV is primarily the obligation of the government. The government has a duty to protect displaced children from human rights abuses, including sexual violence, recruitment by armed groups, stigmatisation, discrimination, forced labour, and from any violations tied to the armed conflict.

3.1. The insufficient presence of the government within the displaced persons camps

The context of armed conflicts in the Eastern DRC has forced populations to displacements.¹⁸⁷ It is reported that civilians have been subjected to human rights violations committed by armed groups in the areas conquered by them.¹⁸⁸ International law provides that in a situation where it is impossible to avoid the displacement, competent authorities have to take measures in order to attenuate the effects of such displacement on populations.¹⁸⁹

Many displaced persons camps are located in areas where the Congolese government exercises effective control.¹⁹⁰ Thus, in accordance with international law, the government bears primarily the obligation to protect and to provide humanitarian assistance for IDPs.¹⁹¹

¹⁸⁵ General Assembly Political Declaration on HIV/AIDS 60/262 (2011) para 20.

¹⁸⁶ n 185 above para 70.

¹⁸⁷ It is reported that insecurity in many parts of eastern part of the Democratic Republic of the Congo led to significant displacement. See Human Rights Council A/HRC/24/33 13 July 2013 para 5.

¹⁸⁸ S/RES/2098 (2013): the Security Council has expressed its deep concern regarding the threat posed by the presence of M23 in the immediate vicinity of the city of Goma in violation of resolution 2076 (2012), as well as the continuation of serious violations of international humanitarian law and abuses of human rights by the M23 and other armed groups; See also Human Rights Watch 'World Report: Democratic Republic of Congo' <http://www.hrw.org/world-report/2013/country-chapters/democratic-republic-congo> (accessed 10 September 2013).

¹⁸⁹ Principles 5 & 7 Guiding Principles.

¹⁹⁰ For instance displaced persons sites and camp of Mugunga I, II and III are located at about 15 kilometres of North Goma where the Congolese administrative and political authorities and the police and military exercise their official functions.

¹⁹¹ UNHCR *Forced displacement in the context of climate change* (2009) 4

<http://unfccc.int/resource/docs/2009/smsn/igo/049.pdf> (accessed 10 September 2013); D Miller 'The

For instance, the government should ensure that proper accommodation is provided for displaced persons and that the displacement occurs in satisfactory conditions of safety, good nutrition, good health and hygiene; and that children are reunited with their families in case of separation. Unfortunately, among the interveners within displaced persons camps relevant state services are lacking. According to the report submitted by seven UN experts to the Human Rights Council in March 2010 the government had neglected its responsibilities to protect and assist IDPs and returnees, who therefore have to rely entirely on the support provided by the international community.¹⁹²

Indeed, the protection and assistance of displaced children living with HIV are fulfilled by the UN and some NGOs. Their intervention is limited by the availability of funds and does not ensure stability.¹⁹³ This may explain why IDPs are complaining about the quality, consistency, timeliness of these services provided by NGOs,¹⁹⁴ especially those providing food and health¹⁹⁵ services. For instance, the fact that ARVs are provided by NGOs limits their ability to guarantee their sustainability for the displaced persons living with HIV. The situation would be different if ARVs were provided by the government.

However the DRC intervenes in the displaced persons camps only through the Congolese National Police and the National Council for Refugees which are not providing relevant assistance for the survival of internally displaced persons. It is unfortunate that the National Police has been pointed at by displaced persons and some NGOs' employees for having committed some abuses such as arbitrary detention, intimidation followed by extortion of money and cellular phones belonging to IDPs. The National Council for Refugees intervenes in the administration of the displaced persons camps by giving permit to persons and organisations demanding to attend IDPs for instance.

The fulfilment of the DRC's obligations to protect and to provide assistance for displaced persons living with HIV requires for the government to adopt specific strategies that respond to the emergencies caused by displacement. This supposes that the national budget be

responsibility to protect human rights' (2007) 006 *Centre for the Study of Social Justice* 3; L Glanville 'The responsibility to protect beyond borders' (2012) 12 *Human Rights Law Review* 3

¹⁹² Human Rights Council A/HRC/13/63 8 March 2010 para 111.

¹⁹³ Human Rights Council (n 191 above).

¹⁹⁴ Words used by the Mugunga III IDPs' Representative (Interview held on 17 July 2013).

¹⁹⁵ In Mugunga III the IDPs' leader claimed that distributed food's quantity is insufficient and will not last up to the forthcoming distribution and that IDPs are receiving the same food over and over again (Interview held on 17 July 2013).

allocated to the health sector integrates the response to situations of emergency such as the displacement. Unfortunately, the government is not providing enough funds in the health sector.¹⁹⁶ The dependence of the DRC on external donor funding for the financing of the fight against HIV/AIDS is evaluated at 90 per cent. This does not enable the DRC to implement its national policies on the fight against HIV in the health sector. The Document on the Strategy of Reinforcement of the Health System¹⁹⁷ asserts that

‘The almost constant decline of the state budget devoted to the health sector led to consequences such as:

- (i) loss by the Ministry of Health of much of its autonomy to decide, direct and lead the national health policy and sub-sectorial policies,
- (ii) insufficient coordination of donors because the national leadership has declined,
- (iii) lack of control by the Ministry of Health on the financing of the health sector, which puts persons in charge of that sector in circumstances where they do not know, at the beginning of each budget year, how many resources they will have at their disposal and where those resources have to come from, for realising the national health policy. This makes it difficult to exercise any long-term planning,
- (iv) the conceptual model of the health system based on the Health Zone as an operational unit is thus disrupted by other models through which donor funds carry their funding.’

The medical clinics supported by NGOs within the camp of Mugunga III cannot offer all the services needed by children living with HIV and other displaced PLHIV. In cases where displaced PLHIV were transferred out of their camps for hospitalisation, they have not been received because they did not have money.¹⁹⁸ In accordance with the 2008 Law on the Protection of PLHIV/AIDS and Affected Persons, the Congolese government is the first responsible in the fight against HIV/AIDS,¹⁹⁹ and it must adopt an appropriate budget for it. This may ensure free access to preventive care, treatment and support for displaced children

¹⁹⁶ Strategic Plan on the Fight against HIV/AIDS of the Health Sector of the DRC (2008) 36
http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/leg (accessed 15 September 2013).

¹⁹⁷ Cited in the Strategic Plan on the Fight against HIV/AIDS of the Health Sector of the DRC (n 173 above).

¹⁹⁸ This has been mentioned by members of a support group of PLHIV in Mugunga III.

¹⁹⁹ Art 5 Law Protecting PLHVI and Affected Persons.

with HIV/ AIDS in the public and private health institutions included in the strategy of primary health care in the DRC.²⁰⁰

3.2 Security and protection issues affecting displaced children living with HIV

Security and protection of displaced children living with HIV concern their life in family and within society where they live with other displaced persons. The current problems that these children encounter are often in connection with their rejection from their families, the acts of discrimination and/or stigmatisation they face and their precarious social and economic conditions.²⁰¹

For most of them, displaced children are abandoned by their parents and get into prostitution and forced labour because they have to contribute to the survival of their families.²⁰² According to the UNHCR assessment which aimed ‘to review the HIV and AIDS activities and services in place for the Internally Displaced Populations in the DRC,’²⁰³ in North-Kivu:

‘Many parents are relying on the financial income of their children who are working, some of whom are forced to live in the streets or engage in sex work. Some young displaced men said that they exchange sex for money with older women. Women are turning to men in uniform (who are often married), including UN peacekeepers, for financial support and protection. This movement towards multiple sexual partners increases the risk of HIV transmission.’

There are also many unaccompanied children who are separated from their families because of armed conflicts²⁰⁴, family dislocations (family ruptures) caused by poverty,²⁰⁵ and because of their HIV status.²⁰⁶ Displaced children living with HIV are discriminated against within their own families, and some of them are excluded by their relatives from sharing the same

²⁰⁰ Art 11 Law Protecting PLHVI and Affected Persons.

²⁰¹ Strategy Plan on Fight against HIV/AIDS of the Health Sector (n 173 above) 12.

²⁰² This has been witnessed by the workers of IEDA and PAMI intervening in the protection of IDPs in Mugunga III.

²⁰³ Conducted in March 2007 by UNHCR *and al* ‘Mission conjointe d’évaluation de l’impact du conflit et des besoins liés au VIH dans les zones humanitaires au RDC’ <http://www.unhcr.org/480db2542.pdf> (accessed 1 September 2013).

²⁰⁴ PAMI, an NGO focusing on the unaccompanied displaced children within the IDP camp of Mugunga III has registered hundreds of displaced children separated from their parents.

²⁰⁵ As stated by PAMI

²⁰⁶ There was a case of two children living with HIV who were rejected by their families within the displaced persons camp of Mugunga III, and for whom the hospital Heal Africa has temporarily found host families within the camp.

shelter. Some NGOs are working on the reunion of children with their families,²⁰⁷ but, for cases relating to rejection of HIV displaced children, they are not doing enough in raising awareness on tolerance within the displaced persons camps.

‘Children and adolescents whose families are poor, who are excluded from services due to stigma and discrimination, or who have lost the protection and care of their parents are at increased risk of violence, abuse, exploitation and neglect. HIV increases the likelihood that children will experience any one of these forms of vulnerability, and many affected children contend with all of them simultaneously.’²⁰⁸

Discrimination against displaced children living with HIV extends to many areas of their lives. For instance, in Mugunga III, despite the fact that an NGO is providing free primary school for displaced children,²⁰⁹ there is a child who has refused to go to school because he was pointed out by other children and by his teacher to have parents who are HIV positive. He told his parents that he was being considered every day in his class ‘as an orphan while his parents are alive’.²¹⁰ Moreover, the parents of that child noticed that for a while he did not play with other children in the playground that was arranged for them within the displaced persons camp.

Another issue that affects the dignity of displaced children living with HIV is sexual violence. The International Emergency and Development Aid (IEDA Relief),²¹¹ supported by the UNCHR, witnesses every week cases of rape and premature marriage of displaced young girls within and out of the displaced persons camps. In the displaced persons camp of Mugunga III, Displaced children, because of food shortages, are sent by their parents for registration in other camps with the aim of getting more food.²¹² It is reported that some displaced girls are sexually exploited or raped by other persons who take advantage of them because of their precarious social and economic conditions.²¹³ In these conditions these girls

²⁰⁷ PAMI collaborates with the IOM, the Red Cross movement of the DRC and the ICRC in the meetings of separated families.

²⁰⁸ UNICEF *Enhanced protection for children affected by AIDS* (2007) 10.

²⁰⁹ AVSI is an NGO which pays school fees for displaced children in primary schools and maintains the playground for displaced children within the displaced persons camps in Mugunga III.

²¹⁰ This has been shared by the parents of that child who are HIV positive and live in the Mugunga III displaced persons Camp.

²¹¹ The IEDA Relief is an NGO which intervenes in the protection and assistance of IDPs in Mugunga.

²¹² Statement of one of the IEDA personnel working within the displaced persons camp of Mugunga III (Interview of 15 June 2013).

²¹³ UNHCR *and al* ‘Mission conjointe d’évaluation de l’impact du conflit et des besoins liés au VIH dans les zones humanitaires an RDC’ <http://www.unhcr.org/480db2542.pdf> (accessed 1 September 2013).

are vulnerable to contracting HIV and when they contract it, they may contribute to its propagation among other displaced children and displaced persons. Moreover, many of them do not benefit from post-exposure prophylaxis (PEP) treatment because of the long waiting period before they report their situations.²¹⁴

4. Non-compliance of the government and non-state actors with their international law obligations and responsibilities

In accordance with the Vienna Convention on the Law of Treaties, a government must execute its international obligations in good faith.²¹⁵ The situation in the Eastern DRC shows that the government needs to protect displaced children and to ensure that they are prevented from human rights violations by individuals, state and non-state armed forces, and to implement human rights instruments protecting children ratified by the DRC.

4.1 Violations of human rights and humanitarian law

The conflict in the Eastern DRC occasions human rights and humanitarian law violations by both the government and non-state actors. These violations affect the rights of displaced children in general and, by their nature, are likely to increase the suffering of displaced children living with HIV and/ or the spread of HIV.

Several reports from the UN Security Council and Human Right Watch, assert that ‘State security forces and Congolese and foreign armed groups committed numerous and widespread violations of the laws of war against civilians in eastern and northern Democratic Republic of Congo’.²¹⁶ It has been recently recognised that M23 and other armed groups are violating international humanitarian law and abusing human rights²¹⁷ in the North Kivu.

The DRC security services²¹⁸ are accused of having committed serious human rights violations and grave breaches of international humanitarian law which include summary executions, sexual and gender-based violence; torture and other cruel, inhuman or degrading treatment or punishment, arbitrary arrest and detention, forced labour and extortion.²¹⁹

²¹⁴ According to the Johanniter health centre operating within the Mungunga III displaced persons camps, most of girls and women who have been raped, denounced that situation after many months and the post-exposure prophylaxis treatment could not operate for them (Interview of 15 June 2013).

²¹⁵ Art 26 Vienna Convention on the Law of Treaties.

²¹⁶ HRW *World Report: Democratic Republic of Congo* (2013) <http://www.hrw.org/world-report/2013/country-chapters/democratic-republic-congo> (accessed 6 September 2013).

²¹⁷ UN Security Council S/RES/2098 (2013) Preamble para 10.

²¹⁸ Which include the army, national police and the national intelligence agency.

²¹⁹ Human Rights Council ‘Second joint report of seven United Nations experts on the situation in the

Despite the fact that the DRC and armed groups are both bound by Common article 3 and Protocol II to the Geneva Conventions; they are continuously cited to have recruited and enrolled children and to have committed ‘grave violations of children’s rights, including the direct involvement of children on the front lines, the killing and maiming of children and sexual violence’.²²⁰ There are cases of death among displaced children reported recently by the UN General-Secretary during the M23 attacks in Goma from 20 to 22 May 2013.²²¹ The UN concluded that both the FARDC and the M23 are responsible for ‘war crimes and crimes against humanity’²²² defined under articles 7 and 8 of the Rome Statute of the International Criminal Court which are integrated into the DRC domestic criminal law. Therefore, when the human rights of children are violated in the context of a conflict (for instance sexual violence committed as weapon of war²²³), this situation falls under the international criminal law defined by among others the Rome Statute.

As previously mentioned, when children are raped, they are vulnerable to contract and to transmit HIV during armed conflict, since they do not generally benefit from medical post exposure treatment. However sexual violence in conflict situations leads to more unwanted pregnancies and unsafe abortions, and increases the risk of HIV infection for girls.²²⁴ The violation of the rights of displaced children by the FARDC and non-state actors manifests the failure of the government to respect and to ensure the respect of the rights of displaced persons.

Democratic Republic of the Congo’ A/HRC/13/63 8 March 2010 para 18.

²²⁰ Human Rights Council A/HRC/13/63 8 March 2010 (n 15 above) & W Wakabi ‘The Democratic Republic of the Congo in crisis’ [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(08\)61854-1](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(08)61854-1) (accessed 6 September 2013).

²²¹ Security Council ‘Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo’ S/2013/388 Para 5 28 June 2013.

²²² Report of the Joint Office of the United Nations on Human Rights on violations of human rights perpetrated by members of the Congolese armed forces and M23 combatants in Goma and Sake, in North Kivu Province, and in Minova and its surrounding, in South Kivu Province, between the period of 15 November to 2 December 2012. http://www.ohchr.org/Documents/Countries/ZR/UNJHROMay2013_fr.pdf (accessed 6 September 2013); Human Rights Council Human Rights Council ‘ Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo’ A/HRC/24/33 12 July 2013 Summary para. 3.

²²³ The International Bureau for Children’s Rights uses the term ‘tactique of war’ in Bureau International des Droits de l’Enfant (IBCR) *Les enfants dans les conflits armés: un guide en matière de droit international humanitaire et des droit international des droits de la personne* (2010) 210.

²²⁴ J Ward & M Marsh *Sexual violence against women and girls in war and its aftermath: Realities, responses, and required resources* (2006) 30.

It has also been claimed that non-state armed groups have obstructed the free passage of humanitarian assistance, when humanitarian organisations have tried to reach out to vulnerable displaced persons. ‘Often, the fighters block medical and humanitarian workers access to communities. Health units are routinely being looted, and many report that they are running out of supplies.’²²⁵ The representative of the ICRC and the Red Cross of the DRC denounced the situation in these terms:

‘Let us, please access to the most vulnerable people and respect the emblem of the red cross. Even in strained situations, there are certain rules to follow and it is a matter of life or death.’²²⁶

When medical and humanitarian assistance are blocked, the health situation of displaced persons with special needs, such as children infected by HIV, is likely to deteriorate. The vast majority of them are then condemned to die from preventable or treatable diseases including HIV/AIDS, because they can't access basic healthcare services. Indeed, their condition requires uninterrupted treatment or any other assistance they receive. Moreover, that behaviour is prohibited by customary international law and by Protocols II and III to the four Geneva Conventions which require the parties to a conflict to facilitate rapid distribution of humanitarian assistance and to protect humanitarian personnel.²²⁷ The Joint Office of the United Nations on Human Rights report²²⁸ recalled what we mentioned earlier on the compliance by state and non-state actors with the Geneva Conventions during non-international armed conflict:

‘International humanitarian law applicable to non-international armed conflicts binds all parties involved in the conflict, including the FARDC and non-state actors such as M23. Therefore all parties to the conflict must respect international humanitarian law provided by Common article 3 to the Four Geneva Conventions of 12 August 1949 and by Additional Protocol II on the protection of victims of non-international conflicts of 8 June 1977, as well

²²⁵ Wakabi (n 126 above).

²²⁶ North Kivu ‘North Kivu: More than 30,000 IDPs of Mugunga camp wish to return to their villages’ <http://radiokapi.net/actualite/2012/11/22/nord-kivu-plus-de-30-000-deplaces-de-mugunga-de...> (accessed 6 September 2013).

²²⁷ Article 11 of Protocol II protects medical units and transports; Article 70 and 71 of Protocol III protects relief consignments and persons who are participating in relief actions.

²²⁸ (n 218 above).

as customary international law, which guarantee the protection of persons who are not or no longer taking part in hostilities.’

4.2 Non-implementation of human rights instruments protecting displaced children

It is not sufficient to ratify human rights instruments without working on their implementation. In ratifying human rights instruments, the DRC enlists to adopt, at the domestic level, strategies on the fulfilment of the obligations arising out of those instruments.

Apart that the DRC is not party to certain African Union human rights instruments that may enhance the protection of displaced children living with HIV, the government must implement existing legal mechanisms. For instance, the DRC being party to the Protocol on the Protection and Assistance to Internally Displaced Persons (‘Great Lakes Protocol’), adopted at the International Conference on the Great Lakes Region (ICGLR)²²⁹ should incorporate into domestic law the obligations provided by the UN Guiding Principles on internal displacement. This has been recommended by the Second joint report of seven United Nations experts on the situation in the DRC of 8 March 2010.²³⁰ The Experts of the ICGLR have also recommended that the government should develop a legislative framework, strategy and plan of action for the implementation of these obligations.²³¹ Furthermore, in ratifying the CRC, the DRC committed to respect and to ensure the respect of human rights of children in situation of armed conflicts.²³²

In 2010 a Proposal on a law on Fundamental Principles of the Protection and Assistance of Internally Displaced Persons in the DRC was submitted to the National Assembly.²³³ Unfortunately, the proposal is still being studied at the Commission in charge of Administrative, Legislative and Legal Affairs, despite the fact that the situation in the Eastern DRC should push for it to enter into force.

²²⁹ ‘Great Lakes Protocol’ http://www.brookings.edu/fp/projects/idp/greatlakes_idpprotocol.pdf (accessed 12 September 2013).

²³⁰ Human Rights Council A/HRC/13/63A/HRC/13/63 para 88.

²³¹ n 226 above para 88.

²³² Art 38(1) CRC.

²³³ Bill drafted by Honourable NYABIRUNGU mwene SONGA and submitted to the National Assembly on 14 April 2010.

CHAPTER 4

HOW CAN ACTORS IMPROVE THEIR COMPLIANCE WITH THEIR INTERNATIONAL OBLIGATIONS REGARDING DISPLACED CHILDREN AFFECTED BY CONFLICTS AND HIV?

1. Introduction

In the previous chapters the dissertation showed that displaced children living with HIV who are affected by armed conflicts can be protected under international humanitarian and human rights instruments. It has been noted that the problem is the respect of these instruments analysed as sources of rules regulating the behaviour of each party to the conflict, and that the non-compliance with them is a denial of relevant rights for displaced children living with HIV, including the right to protection, to access health services and to humanitarian assistance. However, the DRC has to do more to stop the violations of human rights and humanitarian law affecting children, and to comply with its international legal obligations.

2. Recommendations regarding the armed conflict in the region

The peaceful way is always the best to end armed conflicts. It preserves the lives of civilians, particularly the most vulnerable. But, by choosing this way, the government of the DRC has to ensure that persons (including members of armed groups) who, during conflicts, have committed international crimes are prosecuted before national or international criminal jurisdictions. This is important also in the context of the fight against impunity of crimes tied to conflicts which impact negatively on children.

2.1. Peaceful settlements of disputes are beneficial for displaced children living with HIV

Before using weapons, the government has to exploit all possible peaceful options that can offer the context of conflicts in the Eastern DRC. Dialogue and negotiation play a crucial role in preventing hostilities, and therefore prevent populations from displacement. It is stated that 'one fundamental step that states can take to exercise their responsibility with regard to

internal displacement is to take steps to prevent it'.²³⁴ In his speech of 15 December 2012 before the Congress, President Joseph Kabila himself advanced the same view. He declared himself willing to follow diplomatic and political solutions, before military options, as strategies for ending the conflicts in the North-Kivu.²³⁵ This can save children from displacement and avoid damages that may be caused by armed conflict. Also, the peaceful settlement of the dispute in the Eastern DRC can decrease the risk for displaced children to be recruited by armed forces (groups), the risk for young girls being raped by armed persons and, consequently, the risk to contract HIV. The process of negotiations requires good faith from armed groups to end the fight, and for the government to accept some concessions without violating the Constitution. The situation has proved that M23's conditions and terms fluctuated²³⁶ during the negotiations that took place in Kampala since December 2012. However, at the regional and sub-regional levels, efforts have been made through discussions within the African Union and at the International Conference on the Great Lakes Region (ICGLR). The ICGLR has adopted on 24 February 2013 in Addis Ababa a 'Framework for Peace, Security, and Cooperation in the Democratic Republic of the Congo and the Region',²³⁷ where the eleven ICGLR states concluded 'to neither tolerate nor provide assistance to armed groups.'²³⁸ Our hope is to see these states respecting their commitments.

2.2. Fight against impunity of crimes related to the conflict

As stated earlier on, the conflicts in the Eastern DRC have been marked by the violations of human rights and humanitarian law. Children have been the greatest victims as they are easy targets of the people who are holding guns. Even if efforts focus on a peace agreement, justice for children remains necessary in the process of their rehabilitation. For the purpose of recovering the dignity of children, it is important that the DRC prosecutes all actors known to

²³⁴ University of Bern *Protecting IDPs: A manual for law and policymakers* (2008) 23.

²³⁵ Public speech of the President of the DRC to the nation of 15 December 2012.

²³⁶ When the negotiations took place, the M23 rebels demanded predominantly the fulfilment of the terms of the agreement of 23 March 2009 which entail a better protection of the political opposition leaders as well as a proper investigation of the murders of opposition figures in the DRC, the release of political prisoners, the disbandment of the National Electoral Commission CENI as well as the convening of a new national assembly. See S Krüger 'The M23 rebellion: a further chapter of the violence in Eastern Congo' (2013) 6 *Kas International Report* 66. In September 2013, M23 added on the list of their demands the tracking of the Rwandese rebel group FDLR "Forces Démocratiques pour la Libération du Rwanda" and the return of the Congolese refugees from Rwanda, Uganda and Burundi. See <http://www.congoforum.be/upldocs/Semaine%207-13.9.2013.doc> (accessed 26 September 2013).

²³⁷ Adopted by the United Nations, the African Union and the Southern African Development Community (SADC). See Steffen Krüger (n 236 above).

²³⁸ <http://www.un.org/wcm/webdav/site/undpa/shared/undpa/pdf/SESG%20Great%20Lakes%20Framework%...> (accessed 26 September 2013).

have committed abuses on them including recruitment in armed forces and sexual violence. Adequate reparation must be provided for children who are still suffering from the effects of these criminal acts, such as children who contracted HIV during the conflicts and are living with HIV.

The DRC may also continue to cooperate with the ICC which may supplement the national justice as it did through the case *The Prosecutor v Thomas Lubanga Dylo* and currently through the case *The Prosecutor v Bosco Ntaganda*.²³⁹ Therefore, the Congolese and the international criminal justice systems will play a relevant role in preventing violence against children and their displacement. According to a study, ‘the most important factor in preventing displacement is to fully respect the international law, in particular human rights and humanitarian law.’²⁴⁰ We think that justice is the effective instrument for the respect of the rule of law. However, the past shows that peace agreements with rebels and armed groups did not prioritise justice for victims, and this is probably the cause of lack of trust in the judicial system.

However, training on the rights of IDPs, particularly children, is necessary for state officials and for armed-groups. This may make them aware of their obligations and responsibilities during conflicts. Media and neutral organisations such as the ICRC may help in disseminating information on the human rights and the rules of the humanitarian law which are relevant for children and need to be respected during conflicts. This may decrease the vulnerability of displaced children to HIV.

3. Implementation and fulfilment of human rights instruments protecting children

The DRC must conform to the international and domestic instruments relevant to the protection of children in situations of conflicts. In accordance with the Great Lakes Protocol mentioned above, the DRC has to integrate the UN Guiding Principles into national legal framework. In concrete terms, we recommend that the draft bill submitted to the National Assembly since 14th April 2010 be discussed, adopted by the Parliament and promulgated by the President of the DRC. However, that draft bill does not provide specific protection and assistance for displaced children living with HIV. Then it is urgent that at the operational level, the government adopt policies and strategies which respond to the need of displaced

²³⁹ See *The Prosecutor v Thomas Lubanga Dylo* ICC (10 July 2012) (2012) ICC-01/04-01/06 & *The Prosecutor v Bosco Ntaganda* ICC-01/04-02/06.

²⁴⁰ University of Bern *Protecting IDPs* (n 234 above).

persons within the displaced persons camps of North-Kivu. These policies and strategies have to integrate HIV/AIDS in the mitigation of the effects of displacements on IDPs and particularly on children and women. The current situation that are facing displaced boys and girls, which includes uncontrolled sexual behaviour because of their economic and social conditions, sexual exploitation, rape, and so on, make the case for the Congolese government to provide urgent responses on HIV prevention and treatment within displaced persons camps. In implementing its international obligations, the government will have to ensure that displaced children living with HIV are accessing their fundamental economic and social rights, particularly their right to adequate standard of living and the highest attainable standard of physical and mental health.²⁴¹ It is time for the government to get involved in providing medical assistance and food for displaced persons, and ensuring that the vulnerability of displaced children living with HIV is taken into account by stakeholders within displaced persons camps. The DRC with the support of the international community must ensure that the humanitarian and medical aid provided within the displaced persons camps fulfil these rights.

4. Enhancing the protection for displaced children affected by armed conflicts and HIV

In accordance with the Guiding Principles, the international community does not bear primarily the responsibility to protect IDPs. National authorities 'have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.'²⁴² The situation in the displaced persons camp of Mugunga III has shown that the government is less involved in any process that can mitigate the effects of the conflicts on vulnerable persons. The protection to be guaranteed by the government must include security for displaced children, by protecting them from human rights violations related to the conflict, collaboration with relevant organisations intervening within the displaced persons camps, reinforcement of existing legal mechanisms protecting children in situations of armed conflict, and creation of monitoring mechanisms to assess the improvement made regarding the protection of the rights of displaced children.

The response to displaced children living with HIV includes many approaches. Firstly, armed conflict and displacement imposes responsibilities on authorities to take measures which

²⁴¹ Art 12(1) CESC.R.

²⁴² Principle 3 para 1 Guiding Principles on Internal Displacement.

secure and protect vulnerable groups such as displaced children. Such measures must prevent violence and crimes connected to the conflict which may target them. Secondly, armed conflict and displacement create medical and humanitarian emergencies which oblige the government and its partners to adopt an urgent response in order to save lives of displaced persons. Thus protection, medical care and humanitarian assistance are the most important obligations to be fulfilled by the government for displaced children living with HIV in a situation of armed conflict.

4.1 Security for displaced children living with HIV

The security that the government has to provide for displaced children includes protection from human rights abuses tied to the armed conflicts, protection from stigmatisation and discrimination against displaced children living with HIV, and protection from all acts of violence arising from other IDPs and directed at the displaced children because of their HIV status.

In the displaced persons camp of Mugunga III there is an urgent need for the government to reinforce the number of the National Police Units appointed for the protection of IDPs. In order to address particularities raised by the protection of displaced children living with HIV, it is desirable that the government extend the Congolese National Police Special Unit in charge of Protection of Women and Children, a specific mandate to intervene within the displaced persons camps in favour of vulnerable groups such as displaced children and women living with HIV. That special police unit can play a relevant role in repressing authors of subversive acts that violate the rights of displaced children, such as sexual violence, denial of food and medical assistance, stigmatisation and discrimination against displaced children living with HIV.

4.2. Humanitarian organisations

Humanitarian organisations have to continue to collaborate with the government in the protection of displaced children. It is necessary that the government participate regularly in the protection and prevention cluster,²⁴³ through which the UN and other relevant humanitarian organisations and NGOs intervene for IDPs in addressing vulnerabilities within

²⁴³ The Protection Cluster set up by the UN comprises key humanitarian agencies and NGOs and is entrusted with identifying and addressing protection needs related to internal displacement; see n 238 above 24.

the displaced persons camps under the ‘collaborative response.’²⁴⁴ Humanitarian organisations have to continue supporting the government in covering the three aspects of internal displacement in the Eastern DRC, which consist of ‘preventing or minimising displacement, responding to needs in the immediate displacement phase; and establishing conditions for the achievement of durable solutions.’²⁴⁵

However, humanitarian organisations should be the relevant partners of the DRC in the response to HIV. With regard to the protection of displaced children living with HIV, they have to protect confidentiality of the status of those who are HIV positive and ensure that they are receiving, without discrimination, assistance and protection required by their condition. However, experience shows that humanitarian personnel, including health care providers need to be trained on how to assist vulnerable persons, particularly displaced PLHIV. Thus, it is necessary that the humanitarian personnel receive information on the rights of IDPs, in particular the rights of children, and be trained on the Guiding Principles on Internal Displacement and on the Guidelines for HIV Interventions in Emergency Settings.²⁴⁶ This training can impact positively on the quality of multi-sectorial interventions that they have to provide for displaced children living with HIV.

4.2.1. Reinforcing existing legal mechanisms for the protection of children

Even if we said earlier that the vulnerability of displaced children living with HIV in the DRC has nothing to do with the available legal framework, it remains necessary for the DRC to adhere to the Kampala Convention and to the African Charter on the Rights and Welfare of the Child. The ratification of these two instruments must be followed by their implementation. We have shown that these instruments contain provisions that may enhance the protection of displaced children in the DRC. However, the displacement in the DRC raises a need for the government to adopt policies which define how it may intervene in emergency situations to protect vulnerable such as children. HIV must be considered by the government as one of the priority issues to deal with during armed conflicts.

²⁴⁴ It is ‘a response in which a broad range of UN and non-UN, governmental and non-governmental actors (including humanitarian, human rights and development actors) work together in a transparent and cooperative manner to respond to the needs of IDPs on the basis of their individual mandates and expertise.’ See, Inter-Agency Standing Committee (IASC) *Implementing the collaborative response to situations of internal displacement* (2004) 4.

²⁴⁵ University of Bern *Protecting IDPs* (n 234 above) 39.

²⁴⁶ Inter-Agency Standing Committee ‘Guidelines for HIV Interventions in Emergency Settings’ www.humanitarianinfo.org/iasc (accessed 13 October 2013).

4.2.2 Involving displaced children in the planning of the humanitarian interventions

Since there is an obligation on state and non-states actors to provide humanitarian assistance that responds to specific needs of IDPs, it is important to discuss the needs of displaced children living with HIV with them. This will ensure that the assistance is done in their best interests. The Committee on the Rights of the Child considers the best interests of the child as a priority: ‘Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.’²⁴⁷ Therefore, an evaluation of what assistance is needed for displaced children living with HIV must take cognisance of the needs expressed by them.

4.2.3 Monitoring and evaluation

Systems for monitoring and evaluation need to be created in Eastern DRC, where the government, humanitarian organisations and IDPs representatives interact. This may impact positively on the improvement of the protection and the provision of humanitarian assistance for IDPs, in particular, for all vulnerable people including children living with HIV.

5. Special procedures

The existence of a Special Rapporteur on the Rights of IDPs is an opportunity to strengthen the international response to internal displacement. The current situation in the Eastern DRC can justify country visits from the Special Rapporteur, to assess the human rights issues that are facing displaced persons, including displaced children living with HIV. I recommend that the government allows visits from the Special Rapporteur. Annual reports produced by him can serve as recommendations to improve the human rights situation of displaced persons, and particularly, displaced children living with HIV in the DRC.

²⁴⁷ Committee on the Rights of the Child *General Comment 14 (2013) On the right of the child to have his or her best interests taken as a primary consideration* Art 3 para 1 para 6(c).

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