

**LEGAL FRAMEWORK GOVERNING PROTECTION OF CHILDREN'S
RIGHTS IN ARMED CONFLICT REGIONS: A COMPARATIVE STUDY
BETWEEN DRC AND UGANDA**

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**A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE
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2023

CERTIFICATION

The undersigned certifies that they have read and hereby recommend and approve for acceptance by the Open University of Tanzania a thesis entitled: **“Legal Framework Governing Protection of Child Rights in Armed Conflict Regions: A Comparative Analysis Between DRC and Uganda”** This thesis is submitted as a partial fulfilment of the requirements for the Degree of Doctor of Philosophy (Ph.D.).

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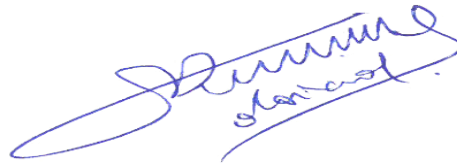
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A handwritten signature in blue ink, appearing to read 'Rugaza David', written over a horizontal dotted line.

.....
(Signature)

18/11/2023

.....
Date

DEDICATION

To my loving family, relatives and friends in the Democratic Republic of Congo,
Rwanda, Uganda and Tanzania

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I take this opportunity to truly acknowledge the brave assistance of specialist literature on this subject, which I referenced while providing the theoretical framework that buttressed my work. Institutional support, notably from the Open University of Tanzania, particularly the law faculty.

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ABSTRACT

Over 6 million of the world's 13 million refugees are children in Africa. African countries have enacted various international, regional, and national child protection legislation. Despite all these legal commitments, there have been breaches of children in African states (including DRC and Uganda) during times of war. With the existing legal instruments and protocols addressing children's victims of armed conflicts, how far are these victims satisfied with the results. How are the practice and implementation varied, and what's causing the gaps from being addressed adequately. The research methodology employed a review of secondary data. Comparative legal research given that the research straddled two distinct jurisdictions of Uganda and the Democratic Republic of Congo, Field visited of the affected areas by armed conflict. Doctrinal Legal research was used to undertake an examination of existing legislation. Findings included chronic poverty and underdeveloped essential service systems. Recurrent armed conflict, acute malnutrition, and major epidemic outbreaks like the coronavirus pandemic 2019. In the Democratic Republic of the Congo, four million children desperately need protection (In 2020, violent crimes against children increased by 16% in Ituri, North and South Kivu provinces). The study recommends establishing a National Human Rights Office and a Truth and Reconciliation Commission in Uganda and DRC Congo, enacting and implementing national legislation to address crimes against children, and improving access to justice in rural areas. The study concludes that law enforcement and judicial institutions are weak in some parts, and Uganda needs a comprehensive government policy and legal framework to address crimes in pre-conflict, conflict, or post-conflict situations.

Keywords: *Law, War-torn, Children, Resolution*

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The *Code Judiciaire Militaire* (military justice code), Acts No. 023-2002

The law No 87-010 regulating family code, 1987

The Child Protection Code (Law 09/001), of 2009

The *Code Pénal militaire* (military criminal code), Act No. 024-2002

Articles 10-16 of Ministerial Order No. 12 (55, 56)

(II) Regional Instruments

The American Convention on Human Rights

The African Charter on Human and Peoples' Rights

The African Charter on the Rights and Welfare of the Child

The European Convention on Human Rights 1950 (ECHR),

(III) International Instruments

The Convention on the Rights of the Child, 1989

The International Covenant on Civil and Political Rights, 1966

The International Covenant on Economic, Social and Cultural Rights, 1966

The Universal Declaration of Human Rights, 1948

The Optional Protocol on the Involvement of Children in Armed Conflict, 2002

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, 2000

The Convention on the Elimination of All Forms of Discrimination against Women, 1979

The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984

The Refugee Convention and 1967 Protocol,

The Rome Statute of the International Criminal Court, 1998

The Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa, 1997

LIST OF ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AIDs	Acquired Immune Deficiency Syndrome
AU	African Union
CEJIL	Center for Justice and International Law
CRC	Convention on the Rights of the Child
CRIN	Child Rights Information Network
CSO	Civil Society Organization
CSO	Forum Civil Society Forum on the ACRWC
CNDP	The National Congress for the Defence of the People (<i>French: Congrès national pour la défense du peuple</i>)
DDR	Disarmament, Demobilization and Reintegration
DRC	Democratic Republic of Congo
FARDC	Armed Forces for the Democratic Republic of Congo (<i>French: Forces armées de la République démocratique du Congo</i>)
FDLR	Democratic Liberation Forces of Rwanda (<i>French: Forces démocratiques de libération du Rwanda</i>)
FNI	The Nationalist and Integrationist Front (<i>French: Front des Nationalistes et Intégrationnistes</i>)
FPJC	Popular Front for Justice in Congo (Front Populaire pour la Justice au Congo)

FRPI	The Front for Patriotic Resistance of Ituri (<i>French: Forces de Résistance Patriotique d'Ituri</i>)
ILO	International Labour organization
LRA	Lord's Resistance Army
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MRM	Monitoring and Reporting Mechanism
NGO	Non Governmental Organization
PARECI	The Coalition of Patriots in the <i>Congolese</i> Resistance (<i>French: Coalition des patriots résistants congolais</i>)
SRSR CAAC	Special Representative of the Secretary-General for Children and Armed Conflict
EU	European Union
GNA	Government of National Accord
GNC	General National Congress
ICC	International Criminal Court
IDP	Internally Displaced Persons
ISIL	Islamic State of Iraq and the Levant
LNA	Libyan National Army
LPA	Libyan Political Agreement
NATO	North Atlantic Treaty Organization
NTC	National Transitional Council
UN	United Nations
UNICEF	United Nations Children Fund

UNSC	United Nations Security Council
WHO	World Health Organization
HRC	(UN) Human Rights Council
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
OAS	Organization of American States
OHCHR	Office of the High Commissioner for Human Rights
UPR	Universal Periodic Review
ECHR	European Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPEC	International Programme for the Elimination of Child Labour
PRSP	Poverty Reduction Strategy Programme
UDHR	Universal Declaration of Human Rights
UNHCHR	United Nations High Commission for Human Rights

CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

Children are always the first to suffer the consequences of war, whether directly or indirectly. Wars have a variety of effects on their life, and even if they are not killed or injured, kids can be orphaned, abducted, raped, and left with profound emotional scars and trauma as a result of direct exposure to violence or as a result of relocation, poverty, or the death of loved ones. Armed conflicts will almost certainly result in children being denied access to critical services such as education and health care. Education is frequently disrupted in this regard as a result of poor roads or a lack of teachers. Certain battles produce horrific dreams that remain as wounds in the minds of their victims, which has a ripple effect on the society in which these terrified individuals reside.

The plight of children affected by armed war has always attracted significant attention during the last few decades. While heightened attention to the difficulties of children in war whose significant outcome is advancements in their protection, many of the matters identified then have become even more serious, and new challenges have arose to test the world's willingness to protect its children¹. For some years, the African continent has been wrecked by some extremely atrocious wars and conflicts. Yet the frequency of disputes has escalated in recent years. Since 1998, the Democratic Republic of Congo's (DRC) prolonged conflict has decimated an estimated 3.3 million people, predominantly women, children, and the elderly².

¹<https://www.unicef.org/sowc05/english/conflict.html>, accessed in November 20th 2020

²The International Rescue Committee (IRC) report, 2000

The conflict, that is allegedly caused mostly by natural resource exploitation and power disputes, has been described as one of the world's worst humanitarian catastrophes and the pernicious war in Africa's history. At least six African countries' armed forces have been operating in the DRC conflict, as have countless non-state armed players and organizations³. Both foreign and indigenous actors have perpetrated flagrant violations of international human rights and humanitarian law, including extensive abuses against Congolese children and adolescents⁴. The situation in the Democratic Republic of the Congo is partly the product of decades of bad government and broader regional insecurity.

Meanwhile, the Lord's Resistance Army (LRA), led by Joseph Kony, has wreaked havoc in Northern Uganda for nearly eighteen years, displacing approximately 1.5 million people (IDPs)⁵. Jan Egeland, the United Nations' Under-Secretary-General for Humanitarian Affairs, recently described the situation as one of the world's worst humanitarian catastrophes. In February 2004, the LRA slaughtered around 200 civilians in one of the most heinous murders since the conflict began, exposing major shortcomings in the government's abilities to defend the populace and fight the insurgency⁶. To ascertain the extent to which children suffer from the effects of armed conflict and the extent to which they are protected within their national jurisdictions in Africa, this study examines the legal framework governing child

³The International Rescue Committee (IRC) report, op.cit

⁴Ibid

⁵<https://www.crisisgroup.org/africa/horn-africa/uganda/northern-uganda-understanding-and-solving-conflict>, visited November 20th 2020

⁶<https://www.crisisgroup.org/africa/horn-africa/uganda/northern-uganda-understanding-and-solving-conflict>

protection in Uganda and the Democratic Republic of Congo, two African countries undergoing armed conflict.

Despite ongoing worldwide efforts to end the practice, the use of young soldiers in war is a chronic problem. Child soldiers are defined by the United Nations as those under the age of 18 who are recruited or utilized in any capacity by an armed force or group. Additionally, the International Criminal Court considers recruiting or utilizing children under the age of 15 to be a form of war crime⁷. Military groups continue to recruit children, according to Wood, since they are inexpensive and easy to influence. Numerous children are compelled at an early age to join military units. Additionally, child soldiers are more easily duped and coerced into battle. Recruiters frequently target adolescents from problematic areas or conflict zones, who are more likely to be habituated to violence and have less educational or employment possibilities⁸.

According to Dallaire, children under the age of 18 account for more than half of the population in a number of African conflict or post-conflict zones. As a result, one of the justifications for using child soldiers is that "they are considered as expendable, replaceable," and their maintenance is inexpensive. Additionally, they are more mentally sensitive than many adults, who already possess a more developed personality. Due to the fact that younger children, in particular, often lack a sense of fear, they may be preferred over adults because they readily accept more dangerous

⁷Article 4 of the Rome Statute, 1998

⁸Woods, D. *Child Soldiers: The Recruitment of Children into Armed Forces and Their Participation in Hostilities*. London: Quaker Peace and Service, 1993, pp. 14-18

tasks⁹.

Children's and adolescents' identities are still forming, which makes them more susceptible to manipulation and control, as they rely on protection and guidance. If children lose their parents, family, and friends, they may transfer their devoted to another adult, particularly one with the authority to reward and punish. They can be psychologically manipulated through a deliberate program of starvation, thirst, exhaustion, voodoo, indoctrination, beatings, drug and alcohol abuse, and even sexual abuse in order to conform to the new child soldiering norms¹⁰.

Despite the fact that the Democratic Republic of the Congo is plentiful of natural resources, her GDP remains dismal due to unbalanced distribution of social services such as access to education and inadequate infrastructure. This leads to vulnerability of children to serving as young soldiers in armed conflict, among other things. It's prevalent to see children join military groups voluntarily in order to elude the snare of poverty, gain protection, or find something mirroring a family. Military organizations are perceived as a safe and secure group of comrades, detached from the hardships of everyday life¹¹.

Additionally, when children join armed forces and groups, they are frequently promised a reward. These can be categorised as pecuniary or non-pecuniary rewards, with fiscal rewards consisting primarily of "wages, one-time financial rewards (often

⁹Dallaire, R. *They Fight like Soldiers, They Die like Children*. London: Arrow Books, 2011, p. 3

¹⁰Dallaire, R., *supra*, p.3

¹¹Woods, D. *supra*

associated with loot), and other tangible rewards such as drugs and alcohol."¹² Non-quantifiable rewards may include advancement in rank, developing bonds with comrades and commanders, and establishing a group identity. All of these factors are used to motivate group members, the reason for the allegiance is hardly earned through financial enticement, but rather through certain socialisation procedures¹³. Thus, not all children are coerced into becoming combatants; in many cases, their decision is effected by their social, cultural, and economic circumstances, as well as their finite conveniences.

Additionally, children are pushed out as a result of armed conflict. Generally, these are children who relocate within their own country in order to be pacifists at best. Forsaken and deserted children who have been detached from their families as a consequence of conflict may also be included. They are not orphans, but they are forlorn. Children who are involved in armed conflict become victims of that conflict spontaneously. They serve as fighters, messengers, porters, cooks, and sexual service providers. Given the poor infrastructure and forest cover in the DRC and Northern Uganda, it is all the effortless victimization of children in armed conflict that remains.

1.2 Statement of the Research Problem

Africa has consistently been reported as a continent with palpable armed conflicts and violence deeply ingrained in its sociocultural fabric, a history of armed conflict

¹²Andvig, Jens C. and Gates, Scott Recruiting Children for Armed Conflict. In Gates, Scott and Reich, supra

¹³Vermeij, Lotte Socialization and Reintegration Challenges: A Case Study of the Lord's Resistance Army, op.cit

and subsequent violence, recurrent reports of violence in all countries, the most haunted by armed conflicts, the highest statistics of violent conflicts in the world, suffering from the aftermath of social instability, economic crisis, war, or conflict, and approximately 6 million of the world's 13 million refugees, many of whom are children.

Further, African countries have enacted a variety of child protection legislation at the international, regional, and national levels. The 1989 Child Rights Convention and the 1990 African Charter on the Rights and Welfare of the Child are significant instruments protecting children (as legislative measures). These legislative instruments establish institutional mechanisms at the local and international levels. The African perspective, all member states of the Organization of African Unity (now AU) and Parties to the present Charter are required to recognize the rights, freedoms, and obligations in line with their constitutional provisions and framework. The fulfilment of a children rights and welfare is contained in a state party's domestic law or any other international Convention or agreement in force in that State however, any custom, tradition, cultural or religious practices could be inconsistent with the present Charter's rights, duties, and obligations are will be dampened to the magnitude of the incompatibility.

Despite the existence of the aforementioned legal commitment, according to the UN Security Council, there have been breaches of children in African states (including DRC and Uganda) during times of war. The study delved in finding the extent to which local constitutional implementation has the ability to adequately address matters of children protection in conflict areas and what unique lessons have been

learned from the prolonged conflicts in the areas under the study (DRC and Uganda). The study was anchored on the premise that the position of professionals in finding and designing home grown solutions based on the evolving conflicts and lessons there from.

As such, this thesis included a detailed case study of the current level of protection for children in armed conflict in the Democratic Republic of the Congo and Uganda. The study scrutinised the issue from four viewpoints: (a) international law as relevant; (b) national law; and (c) DRC public policy, contrasting how Uganda approaches the issue. The study identified inadequacies in the forthwith level of legal and public policy protection for children caught up in armed conflicts and gave an inventory of instructions for the UN Committee on the Rights of the Child and the DRC to implement in order to prevent future abuses.

1.3 Research Objectives

This study contains general objectives and specific objectives as follows:

1.3.1 General Objective

The general objective of the present study is to analyze gaps in the protection of children from abuse of their rights in the countries with armed conflict of Democratic Republic of Congo and Uganda.

1.3.2 Specific Objectives

The general objective of the present study is to analyze gaps in the protection of children from abuse of their rights in the countries with armed conflict of Democratic Republic of Congo and Uganda. The specific objectives of the research

were:

- i. To identify gaps in the international legal framework governing child protection in DRC and Uganda
- ii. To identify gaps in the domestic legal framework governing child protection in the Democratic Republic of Congo
- iii. To examine gaps in the domestic legal framework governing child protection in Uganda.

1.4 Research Questions

The study attempted to answer three (3) research questions:

- i. What are the existing gaps in the international legal framework governing child protection in the DRC and Uganda?
- ii. What are the gaps in the domestic legal framework governing child protection in the Democratic Republic of Congo?
- iii. What are the gaps in the domestic legal framework governing child protection in Uganda?

1.5 Research Methodology and Data Collection Methods

1.5.1 Methodology

This study conducted a thorough review and assessment of the law governing the protection of children in Uganda and the Democratic Republic of Congo, with the goal of increasing the law's effectiveness. This procedure includes discovering, arranging, and utilizing data gathered from these two countries that has aided in the support of particular legal arguments pertaining to the study's subject. The researcher also utilised primary data collected directly from the field. The field data was sought

so as to fill the data gaps that emerged due to the evolving nature of the conflict in the two selected study regions. The primary data was collected from those that were perceived to have more current information, first-hand experience or those that have handled the victims, live with them or even interacted with them in their course of day-to-day activities in their line of work.

To accomplish the preceding work, three distinct research methodologies were used: doctrinal legal methodology; comparative legal methodology; and analytic legal methodology. The application of these approaches has been significant in establishing law by highlighting ambiguities and deficiencies in the law, critically examining the laws to ensure their coherence, consistency, and stability, conducting a social audit of the law, and suggesting legislative amendments.

1.5.1.1 Doctrinal Legal Methodology

This study used a Doctrinal Legal Research Methodology to arrive at its conclusions. The researcher used this method to undertake an analytical examination of existing legislation, related instances, and authoritative documents pertaining to the protection of children in war-torn areas. The doctrine legal research helped the researcher to anchor the research on applicable international law, relevant national constitutions, and other enabling relevant statutes. With the use of the legal doctrine the researcher was able to ascertain the extent of existing knowledge on legal issues relating to child safety in war-torn zones based on the existing legal framework and practices. While individuals have been doing the same thing for a long period of time in society, there are numerous concerns, and most importantly, the efficacy of knowledge in some particular field of law may be below par at the moment. While

society is always evolving, it is critical to conduct a thorough and systematic evaluation of existing legal knowledge. As a result, doctrinal legal research functions as knowledge creation in the legal sector¹⁴.

1.5.1.2 Comparative Legal Research Methodology

The study further utilised the comparative legal research theory. The researcher hoped to glean insights based on this theory. Given that the research straddled two distinct jurisdictions, of Uganda and the Democratic Republic of Congo, to the same issue of child safety in war zones. The Comparative legal research was considered appropriate as it helped researcher in identifying gaps existing the legal systems, and practices of DR Congo and Uganda and draw parallels in the two jurisdictions under the study. There is a widespread perception that life's problems are resolved through the same or comparable legal solutions because law regulates social aspects in all jurisdictions and legal concerns are similar. The notion that practical outcomes are comparable to comparable social facts prompted comparative lawyers to begin with the bare minimum of similarity in order to avoid illusionary or ludicrous comparisons¹⁵.

Jansens asserts by connecting juxtaposition to the function of the legal system, Comparative Legal Research expands its scope by put forward social discourse into action. Comparative Legal Research in Practice makes use of functional comparisons to aid in the reform of laws and the unification of disparate statutes. This involves

¹⁴Kharel, A. Doctrinal Legal Research, National Law College, SSRN Electronic Journal, 2018

¹⁵Gutteridge, H. Introduction to the Comparative Method of Legal Study and Research 2 (Cambridge University Press, Cambridge, 1946), p. 40

discerning the prerequisites from the coincidental, the causes from the differences, and investigating their action within the social framework in which the legal system functions¹⁶.

The researcher chose comparative legal study to facilitate understanding across diverse communities and nations in order to alleviate global tensions surrounding unprotected children in war zones. Comparative law was intended to resolve accidental and divisive differences in the laws of peoples at comparable stages of cultural and economic development, and to reduce the number of divergences in law attributable to historical accident or temporary circumstances rather than to the political, moral, or social characteristics of the various nations.

1.5.1.3 Voluntary Recruitment

Another important aspect of the definition of child soldier recruitment is the difference between forced and voluntary recruitment. The international community has previously focused mainly on forced recruitment of young children. Although, in reality we see a high degree of children and adolescents who voluntarily join armed groups (Brett and Specht, 2004). Little research has focused on voluntary recruitment due to lack of valid information concerning why children join armed groups (Ames, 2010).

This argument is built upon previous qualitative research where opportunities have been highlighted as one of the most important mechanisms in explaining the causal

¹⁶Jansen, N. "Comparative Law and Comparative Knowledge" in Mathias Reimann and Reinhard Zimmerman (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2006)

relationship between the variables (Brett and Specht, 2004; Maclure and Denov, 2006). The most comprehensive analysis of the causal chain has been developed by Brett and Specht (2004). In sum, the authors argue that lack of educational opportunities lead to that children search for alternative opportunities and are therefore more attracted to employment in armed groups as a valid alternative to education or more vulnerable for forced recruitment. The authors highlight two main important factors that effects educational opportunities.

The data on child soldiers has not separated these two categories and therefore an assumption is made that both forced and voluntary recruited children are present in the data. So, in this research paper, the term recruitment refers to “compulsory, forced and voluntary conscription or enlistment of children into any kind of armed forces or groups” (UN, 2007: 7).

1.5.2 Data Collection Methods

Data collection is the act of acquiring and analysing data on relevant variables in a structured appearance that enables one to address stated research questions, test hypotheses, and evaluate outcomes. The objective of any data collecting is to collect high-quality evidence, which translates into rich data analysis and enables the construction of a convincing and believable response to the given questions. This study collected data from both primary and secondary sources to arrive at its results, conclusions, and recommendations. The primary data was collected through two key methods; The researcher visited the war-torn areas in DRC Congo and Uganda to meet the randomly selected victims, participants in the intervention mechanisms, the non-state actors, informants, government representatives and the refugees’ areas to

get first-hand experience and data to validate the existing literature reports on the same issues.

1.5.2.1 Primary Data Collection Methods

The data was collected through observation by the researcher over the period of the physical visits. Further data was collected through interviewing using a structured interview questionnaire that was executed by the researcher and his trained enumerators, who collected the data on behalf of the researcher as they accompanied the researcher on the trips

Table 1.1: The Population, Sample Size

Population Type	Sample size	Country (DRC Congo)	Percentage	Country (Uganda)	Percentage (%)
Victims (Survivors/ guardians or parents) & Refugees	183	97	53	86	47
Non-state actors	37	20	53	17	47
Informants,	18	10	53	8	47
Government representatives	67	36	53	31	47
Total	305	162	53	143	47

Source: Primary Data, (2022).

1.5.2.1.1 Interviews

The researcher met with government officials in the Democratic Republic of Congo's Goma Municipality; with UN officials in Goma; with diplomats representing the DRC and Uganda in Rwanda; and with representatives of international non-governmental organizations concerned with the protection of children's rights based in Rwanda, and gathered the necessary information on this subject from them.

1.5.2.1.2 Indirect Personal Interviews

Due to the vastness of the study region, which spans two nations, the researcher used indirect personal interviewing and observation to gather extra primary data in the

field. Indirect personal interviews were conducted with third parties and witnesses who possessed information about child safety in the war zones of the Democratic Republic of the Congo and Uganda. This included the Mahama Refugee Camp in Rwanda's Kirehele area. This technique was used to fill in information gaps when direct sources were unavailable or informants were hesitant to respond for various reasons. The reliance was not solely on the testimony of a single witness, as some informants are likely to provide false information on purpose.

1.5.2.1.3 Observation

The researcher employed the observation technique by visiting numerous refugee camps in Rwanda, most notably Ngarama Refugees Camp in Rwanda's Gatsibo district, which houses children rescued from war zones, some of whom were active soldiers in the troubled area of study. Additionally, the researcher travelled to Goma, a city near the border between Rwanda and the Democratic Republic of the Congo, where he observed children dressed in military uniforms.

1.5.2.2 Secondary Data Collection Methods

The researcher supplemented the main data collected with secondary data, which refers to information gathered from a source that has already been published in any form on the safety of children in Uganda and the Democratic Republic of the Congo's war zones. This also serves as a review of pertinent literature in this field of study. These secondary data were gathered by another party for a different purpose but are being used by the current researcher for a different goal. Secondary data are necessary because it is impractical to conduct a fresh survey that fully captures

historical change and/or development¹⁷. Secondary data sources include books, records, biographies, newspapers, published censuses or other statistical data, data archives, internet articles, research articles written by other researchers (journals), and databases, among others.

1.5.3 Ethical Considerations

The researcher has considered all the ethical and legal concerns about the research participants. The researcher has accepted full responsibility for safeguarding and preserving the research participants' privacy, dignity, respect, privacy, and protection. In all cases where the researcher suspected contentious concerns, the researcher obtained agreement from the study participants prior to publishing the contentious or personal information about the research participants. By avoiding publishing the names and identities of research participants, the researcher demonstrates that he or she knows and has considered this.

1.6 Scope and Limitation

1.6.1 Scope of the Study

This paper does a comparative examination of the Legal Framework for the Protection of Child Rights in Armed Conflict Regions. Between the Democratic Republic of the Congo and Uganda. The study's primary focus is on child safety in Uganda and the Democratic Republic of the Congo, which are both war-torn countries. The study examined the effectiveness of existing child protection measures in these two states. The primary reason for choosing these two countries is the long-running unresolved conflict within their borders and the widespread

¹⁷Kabir, S. M., *Methods of Data Collections*, Curtin University, 2016, copied from t: <https://www.researchgate.net/publication/325846997>

violations of children's rights committed by illegal armed groups and army units in the country, as reported by various institutions¹⁸.

Additionally, the states were chosen based on the severity of the violence and the number of child soldiers in the area. For instance, the Democratic Republic of the Congo has undergone the world's largest humanitarian disaster, with over 38,000 people reportedly dying each month as a direct or indirect result of the violent war¹⁹. Similarly, the reported information on the DRC's humanitarian crises was accompanied by a continuous dearth of studies evaluating the Congolese judicial system.

Numerous socio-legal studies have been conducted on the influence of armed conflict on the development of children in the Democratic Republic of the Congo and other African nations characterized by civil or interstate strife²⁰. However, as demonstrated by the preceding literature study, examination of the DRC's legislative framework that permitted abuses of children's rights to occur was scarce. As a result of the study's emphasis on doctrinal legal research, it aspires to make a significant theoretical contribution toward enhancing the protection of children's rights during armed conflict in the Democratic Republic of the Congo and Uganda.

¹⁸See for example: Valentine, S. Trafficking of child soldiers: Expanding the United Nations Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflict. *New Eng. J. Int'l & Comp. L.*, 9, 2003,. Available at www.watchlist.org.

¹⁹International Rescue Committee. Mortality in the Democratic Republic of Congo: An Ongoing Crisis (New York: 2008, pp. ii–iii.

²⁰Peters, K., & Richards, P. Fighting with open eyes: youth combatants talking about war in Sierra Leone. *Rethinking the trauma of war*, 1999, pp. 76-111.

; Faulkner, F. Kindergarten killers: Morality, murder and the child soldier problem. *Third World Quarterly*, 22(4), 2007, pp. 491-504

1.6.2 Limitations of the Study

The Democratic Republic of the Congo was a country embroiled in an ongoing war struggle, and many of the Western democratic values were not fully or even partially implemented. As such, the author anticipates that this will provide considerable difficulties for the study. For instance, access to official policy documents should be restricted, as this would affect the level of analysis of the criminal justice system, education system, as well as healthcare and social assistance systems in the DRC. Additionally, the country's official language and legal system are French, however the analysis of that legal system was conducted in English, the language of this thesis. While some legal sources, like as the country's constitution, were available in an official translated version, the majority of those sources were accessible only in French and were to be translated by the author.

This may initiate prejudices into the research as a result of the translation quality of various national law provisions and choices. To go around such prejudice, the author always used the official English translations of the legal documents covered in the paper. If the English version was unavailable and the author anticipated that an inadequate or biased translation might distort the study's findings, an external, independent legal translator was hired to assist with the study.

Finally, the study analysed DRC's conformity with its CRC responsibilities. As such, the examination of the national legal framework for the protection of children in armed conflict in the DRC was constrained by the CRC's inherent restrictions, particularly the Convention's self-contradictory nature with regard to the age limit for distinguishing between children and adults. The emergence of COVID 19, a

lethal disease, has caused countries to implement severe laws surrounding travel and admission through borders, posing another substantial constraint on data gathering for this study. This was corrected through the researcher's use of the methods outlined above.

1.7 Literature Review

Numerous authors have sought to write on child protection and child rights, particularly in places of wartime conflict. The literatures consulted for this study have been classified as follows. This section has conceptualized the application and implementation of international human rights law, specifically the CRC, in the Democratic Republic of the Congo in the context of child protection during armed conflict. Accordingly, the first section of the review focused on the effectiveness of the CRC in addressing various forms of child abuse committed during armed conflict, while the second section examined the laws preventing such abuse in the DRC, including the CRC's implementation.

The CRC was a comprehensive convention ratified by the vast majority of eligible states²¹. These states signed it with the lofty goal of recognizing "the inherent dignity and equal and inalienable rights of all members of the human family," including children²². Nonetheless, the Convention has come under fire over the years for its significant shortcomings in providing protection for children, particularly in the context of armed conflict. According to Valder²³, the above-mentioned Convention

²¹The only eligible member state which is not a party to the Convention is the USA.

²²Hafen, B. C., & Hafen, J. O. Abandoning children to their autonomy: The United Nations Convention on the Rights of the Child. *Harv. Int'l. LJ*, 1996, p. 449.

²³Valder, K.. A Stolen Childhood: A Look into the World of Female Child Soldiers and the Initiatives Targeting the Ending of the Practice. *Albany Government Law Review*, 34(7), 2014, p.7

on the Child has amounted to "nothing more than a slap on the wrist" for those members most responsible for child abuse during armed conflict²⁴. She specifically noted that Article 38, the section of the Convention most relevant to the use of child soldiers, set the age limit for army recruits at 15, leaving children between the ages of 16 and 18 without reasonable protection²⁵.

According to Webster, this limit was established to "minimize the burdens on states to protect children aged fifteen to eighteen,"²⁶ which could be argued to defeat the purpose of having a convention in this area in the first place. As Vachachira explained, this provision weakened the more protective standard established by the International Criminal Court ("ICC"), which "identifies the recruitment of children under the age of fifteen and their use in hostilities as a war crime."²⁷ Additionally, Vimug noted that the CRC's shortcomings are particularly evident in the context of child military service²⁸. This was because many of the children involved in violent movements appeared to be doing so voluntarily, casting doubt on the CRC's application, particularly to those over the age of 15²⁹. The problem was complicated further by the fact that the exited third world civil wars occurred in countries that adhered to at least some democratic standards, limiting the UN's ability to intervene³⁰. These placed children involved in those conflicts in a difficult position,

²⁴Valder, K. Ibid, p. 29

²⁵Rosen, D. M. Who Is a Child-The Legal Conundrum of Child Soldiers. *Connecticut Journal of International Law*, 25(1), 2009, p. 81.

²⁶Webster, T. Babes with Arms: International Law and Child Soldiers. *The George Washington International Law Review*, 39(2), 2007, pp. 227-231.

²⁷Vachachira, J. S. Report 2002: Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. *New York Law School Journal of Human Rights*, 18(2), 2001, p. 543.

²⁸Vimug (n 1), p. 59.

²⁹ibid, p. 60.

³⁰ibid, p. 61.

exposing them to the threat of legally valid punishment for their actions, a challenge that member states were to address in the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. As Webster, put it, the Protocol made several significant changes aimed at protecting the rights of children involved in armed conflicts, including prohibiting the army³¹ from recruiting children on a compulsory basis and requiring member states to take "all reasonable measures" to prevent children under the age of 18 from directly participating in army activities³², but it failed to raise the age limit for voluntary army recruitment³³.

Another limitation of the Optional Protocol was that it required states to enact criminal provisions prohibiting the recruitment of children under the age of 18 by non-state armed groups, which could result in a paradoxical situation in which the state recruited children over the age of 16 to its armed forces while prosecuting internal armed groups for the same activity³⁴. As Davison noted, the Optional Protocol's measures represented a serious gesture by the international community, demonstrating the community's readiness to confront the issue of child involvement in armed conflict³⁵. However, the Protocol's phrasing was far from adequate to accomplish the objective it set out to accomplish³⁶. Additionally, Quéniwet stated

³¹Helle, D. (2000). Optional Protocol on the involvement of children in armed conflict to the Convention on the Rights of the Child. *International Review of the Red Cross*, 82(839), 2000, pp. 797-823.

, Art. 2.

³²ibid, Art. 1.

³³Webster, op.cit

³⁴Webster, op.cit. p. 8.

³⁵Davison, A. Child Soldiers: No Longer A Minor Incident. *Willamette Journal of International Law and Dispute Resolution*, 12(2), 2004, p. 124.

³⁶Quéniwet, N.. Does And Should International Law Prohibit the Prosecution of Children For War Crimes? *European Journal of International Law*, 28(1), 2017, p. 433

that youngsters who volunteer for army activities are not protected under the CRC in terms of their criminal liability for their actions, as neither the Convention nor the Optional Protocol establish an age limit for criminal liability³⁷.

On the contrary, Article 40 of the CRC requires member states to ensure that when children are involved in the legal process, the process is fair and takes their unique needs and vulnerabilities into account; thus, acknowledging that children may bear criminal liability for their actions during armed conflict³⁸. More importantly, under Article 40 (3) (a) of the CRC, the age of criminal responsibility was left to the discretion of each member state. According to Malone, this hindered the International Criminal Court's ability to confront state abuses of power in the context of child prosecution for war crimes³⁹. Additionally, Udombana emphasized that the Protocol cannot be implemented effectively unless individual member states are committed to establish and institutionalize child rights perspectives at the national level throughout the executive branch, the legislature, and the judiciary⁴⁰.

Udombana continued by arguing that in order for this process to succeed, member states should cease viewing the Protocol's implementation as a "charitable procedure heaping favors on children" and instead view it as an "essential B."

³⁷Quénivet, N.. Does And Should International Law Prohibit the Prosecution of Children For War Crimes?. *European Journal of International Law*, 28(1), 2017, p. 433

³⁸Happold, M. Child soldiers: Victims or perpetrators. *University of La Verne Law Review*, 29(1), 2008, p. 56.

³⁹Malone, L. A. Maturing Justice: Integrating the Convention on the Rights of the Child into the Judgments and Processes of the International Criminal Court. *Georgia Journal of International and Comparative Law*, 43(1), 2014, p. 599.

⁴⁰Udombana, N. J. War is Not Child's Play-International Law and the Prohibition of Children's Involvement in Armed Conflicts. *Temple International and Comparative Law Journal*, 20(1), 2006, p. 57.

Apart from direct involvement in military operations, children may be impacted by armed conflict in other ways, such as sexual exploitation. Articles 34 and 35 of the CRC seek to eliminate this form of abuse by specifically prohibiting the encouragement or pressure of a child to engage in any unlawful sexual behavior⁴¹, as well as the abduction, sale, and trafficking of children⁴². Nonetheless, when Art. 38 is analyzed in conjunction with Articles 34 and 35, the CRC becomes self-contradictory⁴³.

To address the issue, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography further regulates the special challenge of safeguarding children in armed conflict from sexual exploitation. However, Gilbertson (2008) asserts that the combined effect of the CRC and the two Protocols resulted in an uneven level of protection that was gender-specific, given that the first Protocol protects "boys (and some girls)" while the second Protocol protects "girls (and some boys)"⁴⁴.

Finally, in 2012, the Committee on the Rights of the Child ("CRC Committee") sought to rectify the Convention's "weakness"⁴⁵ by introducing the third Optional Protocol to the CRC on a Communications Procedure. Buck and Wabwile stated shortly after the third Protocol's adoption that it provided "new opportunities for States and non-state actors/interest groups to advance the cause of children's rights in

⁴¹CRC, Art. 34(1).

⁴²ibid, Art. 35.

⁴³Gilbertson, J. A. Little Girls Lost: Can the International Community Protect Girl Soldiers. *University of La Verne Law Review*, 29(1), 2008, p. 219.

⁴⁴Gilbertson, J. A, p. 220.

⁴⁵Weissbrodt, D., Hansen, J. C., & Nesbitt, N. H. The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law. *Harvard Human Rights Journal*, 24(1), 2011, p. 115.

the global context."⁴⁶

They argued that the Protocol's mechanisms empowered the CRC Committee to hear both individual and inter-state complaints and to conduct investigations into "grave and systematic violations," arguing that "the potential and promise of this new communications/complaints regime [could] be harnessed through strategic phased implementation, including the establishment of an office of a Special Representative on CRC Communications Procedures."⁴⁷ Nonetheless, as Lee noted, complaints on CRC violations could only be presented to the CRC Committee pursuant to the third Protocol⁴⁸.

As such, the existence of the complaints mechanism did not resolve the aforementioned issue with the Convention's wording, notably in relation to the recognized age of children permitted to participate in army activities⁴⁹. In light of the aforementioned obstacles, it was evident that the CRC featured some severe shortcomings that precluded it from properly addressing some of the most prevalent issues relating to children's involvement in armed conflict globally. However, it was necessary to evaluate the extent to which those types of problems occurred especially in the DRC in order to assess the CRC's relevance to the country's unique

⁴⁶Buck, T., & Wabwile, M. (2013). The Potential and Promise of Communications Procedures under the Third Protocol to the Convention on the Rights of the Child. *International Human Rights Law Review*, 2(2), 2013, pp. 205-239. Available at: <https://doi.org/10.1163/22131035-00202005>

⁴⁷Smith, R. The Third Optional Protocol to the UN Convention on the Rights of the Child? –Challenges arising transforming the rhetoric into reality. In *The Future of Children's Rights* , 2014, (pp. 178-195) Available at: <https://doi.org/10.1163/15718182-5680020>

⁴⁸Lee, Y. Communications procedure under the convention on the rights of the child: 3rd optional protocol. *The International Journal of Children's Rights*, 18(4), 2010, 567-583.

⁴⁹De Beco, G. The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: Good news?. *Human Rights Law Review*, 13(2), 2013, pp. 367-387. Available at: <https://doi.org/10.1093/hrlr/ngt015>

concerns for children.

Twikirize and Spitzer present an outline of international legal frameworks governing children in war and analyse the function of social work in northern Uganda's overall rehabilitation process. Armed conflict and war violate the rights of children⁵⁰. They assert that an armed opposition group has abducted and recruited thousands of children through coercion. Since 2006, despite relative peace and stability, children have suffered from the destruction of social, economic, and educational infrastructure, as well as a lack of protection for their fundamental rights. Additionally, they underline the importance of introducing children's rights as guiding principles and a critical reference point for programming and practice.

Their contribution and focus are on a complex and protracted conflict in northern Uganda that has resulted in thousands of deaths, hundreds of thousands of internally displaced people, and grave human rights violations against civilians, including children. Children who have been coerced into joining the military ranks of an armed group called the Lord's Resistance Army have received special attention. These authors have taken a negative stance toward other authors' use of the term 'kid soldier.' They argue that the word may focus too narrowly on minors who have possessed weapons.

The authors appear to have focused their attention on the consequences of children being involved in Uganda's war, but they do not discuss what motivates children to

⁵⁰Twikirize, J. M. & Spitzer H., War Affected Children in Northern Uganda: No easy Path to Normality, *International Social Work* 56(1), 2012, pp. 67–79

continue being child soldiers. The fragmented legal framework governing child protection in Uganda, as well as the lack of a link between the national legal framework and available international instruments governing child protection, are among the reasons for conducting the preceding study.

The literature on the protection of children in armed conflict in the Democratic Republic of the Congo was extremely limited, which justified the need for the study proposed in this research proposal. The available literature addressed only a subset of critical issues concerning the legal framework in this area and its implementation at the national level in the DRC. Children's protection in armed conflict in the DRC was frequently discussed briefly as part of more comprehensive studies of several different African countries. Those studies that concentrated exclusively on DRC were frequently limited in scope.

Cahn, for example, examined reactions to sexual violence offenses committed during armed conflict in the Democratic Republic of the Congo, concentrating on both girls and women⁵¹. Her study made a significant addition to the evaluation of the protection against sexual abuse provided by public services to victims⁵². Additionally, she highlighted the country's law enforcement procedures' shortcomings, including a lack of sufficient awareness and support from the police and judges⁵³. Despite the study's major contributions, Cahn's results fell short of offering a thorough evaluation of the legal protections available to children caught

⁵¹Cahn, N. Beyond retribution and impunity: responding to war crimes of sexual violence. *Stan. Stanford Journal of Civil Rights & Civil Liberties*, 1(1),2005, p. 217.

⁵²ibid, p.220.

⁵³ibid, p.221.

up in armed conflict in the DRC.

Mukhar expressed reservations about the DRC's current legal framework and its implementation in the context of protecting children in armed conflict⁵⁴. Unlike Cahn, he concentrated on children's involvement in armed conflict and so saw the need for the legislature to address their unique requirements when enacting legislation in this area⁵⁵. Mukhar concentrated on the rights of child soldiers and the impact of peace agreements on their reintegration into society following the fighting. He concluded that recent ICC decisions, such as the Prosecutor v. Thomas Lubanga Dyilo case⁵⁶, which found the commander of the Union of Congolese Patriots guilty of recruiting and forcibly conscripting children under the age of 15, demonstrated a positive shift toward increased prosecution of child-related crimes under the CRC⁵⁷.

However, such improvement should not be insufficient to significantly improve the lives of those children who remain compelled to engage in the DRC's armed conflict, as the ICC can prosecute individuals only for "the most serious crimes of international concern."⁵⁸ As a result, Mukhar stated that the ICC will not prosecute local military and rebels involved in army recruitment methods⁵⁹. Although the study provided an important contribution, its focus on the extent to which the CRC's provisions address the sorts of abuse done or permitted by the state in the DRC is

⁵⁴Mukhar, R. Child Soldiers and Peace Agreements. *Annual Survey of International and Comparative Law*, 20(1), 2014, p. 73.

⁵⁵ibid, p. 76.

⁵⁶[2012] ICC-01/04-01/06.

⁵⁷Mukhar (n 33), p. 76.

⁵⁸Nagle, L. E. Child Soldiers and the Duty of Nations to Protect Children from Participation in Armed Conflict. *Cardozo Journal of International and Comparative Law*, 19(1), 2011, p. 1.

⁵⁹ibid, p. 79.

restricted. Neither did the research conduct a thorough examination of the extent to which the DRC complied with its commitments under the CRC regarding the protection of children during armed conflict.

With a similar emphasis on the Lubanga case, Jenks conducted a critical study of the ICC's ruling and the implications for the legal status of children embroiled in armed violence in Congo (and other countries)⁶⁰. Jenks stated in particular that the ICC's ruling misapplied the law regulating civilian participation in conflicts, putting juvenile soldiers at an increased danger of assault⁶¹. As Jenks put it, the ICC "established a false line between active and direct participation in hostilities," so broadening the range of behaviours for which child soldiers can be charged⁶².

Jenks asserted that the Lubanga judgement had the potential to have a severe detrimental influence on the prosecution of Congolese child soldiers⁶³. In any case, the study concentrated heavily on the analysis of the Lubanga decision and omitted any discussion of the decision's impact on the reforms required or already implemented in the DRC as a result of it. Another study tackled by Reyes examined the use of child labour in mineral mining as a means of steering the violence in the Democratic Republic of the Congo⁶⁴. Reyes noted that despite the existence of UN-backed action plans requiring states to enact domestic legislation addressing child labour abuses, children in Congo continued to be exploited as sources of manual

⁶⁰Jenks, C. Law as a Shield, Law as Sword: The ICC's Lubanga Decision, Child Soldiers and the Perverse Mutualism of Participation in Hostilities. *University of Miami National Security & Armed Conflict Law Review*, 106(3), 2013, p. 1.

⁶¹ibid, p. 5.

⁶²ibid, p. 6.

⁶³ibid, p. 10.

⁶⁴Reyes, op.cit. p. 1

labour in support of the armed war⁶⁵. Additionally, she noted that while Article 32 of the CRC expressly inscribed child labour and children's participation in army activities, the DRC lacked a national legal framework that would hold businesses and other relevant legal entities accountable for violating those provisions⁶⁶.

Reyes argued, in particular, that Art.3 of the second Optional Protocol, taken together with General Comment 16 of the Committee on the Rights of the Child, imposed on states an obligation to ensure that businesses, enterprises, and transnational corporations did not have a negative impact on children in their operations within the state. Despite this, no legislative structure to this effect existed in the DRC⁶⁷. Despite its significant contribution to this field, the study was primarily concerned with the role of minerals extracted in the Democratic Republic of the Congo and the impact of any extraction activities on influencing civil conflict.

As a result, it cannot be considered complete study on child safety in armed conflict in the Democratic Republic of the Congo. Concerning sexual violence in times of armed conflict in Congo, Warpinski conducted research of the legislative framework that was implemented in the DRC as a result of the CRC and the second Optional Protocol with the goal of protecting women and girls⁶⁸. She evaluated the Congolese Law 06/018 outlawing sexual slavery in particular, noting that the Law's definitions and interpretations of criminal charges were derived directly from international law

⁶⁵Abelardo, J. Who Starved for That Smartphone?: Limitations of the SEC's Approach to the Congolese Conflict Minerals Trade Problem and the Need for the European Union to Better Address Its Associated Human Rights Abuses. *Fordham International Law Journal*, 40(2), 2016, pp. 583-591.

⁶⁶Reyes, *ibid*

⁶⁷*ibid*, p. 6

⁶⁸Warpinski, *op.cit.* p. 157

sources, demonstrating the CRC's impact on the Congolese legal system⁶⁹.

Additionally, she recognized the passage of Congolese Law 06/019, which "prescribes faster and enhanced legal responses to sexual assaults under 06/018."⁷⁰

However, due to the study's broader scope, her research of the wording and enforcement of these laws was somewhat limited. Additionally, Warpinski, like Cahn (2005), did not make a clear distinction between women and girls as victims of sexual violence, and armed conflict was only one of the contexts in which she examined such violence.

Finally, Mbaku suggested that addressing child abuse and exploitation in African countries such as the DRC would require comprehensive institutional reforms at the national level of each state, aimed at strengthening democratic processes within the state, such as combating corruption and bolstering legal enforcement⁷¹. Coleman, in a far earlier study, highlighted the public service's shortcomings in providing safety for children caught up in violent conflict⁷². Coleman, for example, emphasized the state's incompetence and/or unwillingness to address economic and social conditions that contributed to child conscription to the armed forces, such as extremely low average daily income⁷³.

⁶⁹Warpinski, op.cit. p. 157

⁷⁰ibid, p. 158.

⁷¹Mbaku, J. M. The Rule of Law and the Exploitation of Children in Africa. *Hastings International and Comparative Law Review*, 42(4), 2019, p. 287.

⁷¹Warpinski, op.cit. p. 157

⁷¹Warpinski, op.cit. p. 157

⁷¹ibid, p. 158.

⁷¹Mbaku, J. M. The Rule of Law and the Exploitation of Children in Africa. *Hastings International and Comparative Law Review*, 42(4), 2019, p. 287.

⁷²Coleman, J. Showing Its Teeth: The International Criminal Court Takes on Child Conscription in the Congo, But Is Its Bark Worse Than Its Bite. *Penn State International Law Review*, 26(1), 2007, p. 765.

⁷³ibid, p. 767

He also criticized the ineffectiveness of the DRC's school system in educating children about the legal ramifications of military service. He emphasized in particular the society's prevalent beliefs, which viewed child soldiers as "military heroes defending against 'foreign aggressors'" and lacked an awareness that the use of minors in armed conflict is a war crime⁷⁴. While the study gave an interesting look into the recruitment of minors into the army, particularly the role of public policy in promoting conscription, it fell short of discussing the legal environment in the DRC in sufficient detail.

The aforementioned examination of the literature confirmed that there was a substantial gap in the research regarding the analysis of the legal framework for the protection of children in armed conflict in the Democratic Republic of the Congo. Previous studies lacked in-depth legal research of key legislation and case law at the national level, contributing to a lack of clarity regarding the DRC's present level of implementation of the CRC. The existing research concentrated on the public service's lack of assistance for children during armed conflict, often ignoring the legal analysis required to determine if such help was backed up by an appropriate legal spine.

Those studies that did conduct more extensive legal analysis suffered from two limitations: (a) they focused on the interpretation of the CRC in an international context rather than on the DRC context, or (b) they failed to make a clear distinction between children's rights and adult rights affected by armed conflict. Thus, this assessment of the literature demonstrated the importance of conducting complete

⁷⁴Coleman, J. *ibid*, p. 768

research of the legal protection afforded to children in the context of armed conflict in the Democratic Republic of the Congo.

1.8 Justification of the Study

The purpose of this study was to get critical insight into the state of legal protection afforded to children caught up in armed conflict in the Democratic Republic of the Congo and Uganda. The analysis aided in identifying inadequacies and limits in both the Ugandan and DRC legal systems that are incompatible with the CRC and other international instruments. The study demonstrated how the existing legal framework for the protection of children in armed conflict should not be as successful as the two countries' domestic legal frameworks.

Additionally, after analyzing such restrictions, it would recommend legal measures that should be implemented to improve children's safety during armed conflict on a national basis, as well as to comply with the CRC. The current effort will assist other scholars in broadening their knowledge of the legal situation in the Democratic Republic of the Congo. Additionally, it would educate DRC decision-makers on how to better protect the rights of children involved in armed conflict in Uganda and the DRC.

Women and children comprise 82 percent of the refugee population in Uganda, the largest refugee hosting country in Africa. The children represent 56 percent of the host population in Uganda, and share already strained basic services including education, health facilities, and water sanitation and hygiene. Some authors have written about Children Born of War (CBOW). The war of northern Uganda by the

lord's resistance army lasted for a period of 21 years i.e. 1987 to 2008. This is singled out as the most violent conflict in Uganda's post-independence era. Opio, 2015, Allen et al 2020

The conflict features included gross violation of human rights and specific thrumbling of children rights that included abductions of thousands of children and massacres. The abductions were occasioned on the children by force using threats of torture and other forms of severe brutalization, in some cases killing of children who collapsed under heavy workload, or disobedience, or any attempt to escape. (Akhavan,2005) According to studies by Akello,2013, at least 10,000 girls and young women were abducted and became forced wives, sired children out of these atrocities and experiences. These forced wives were used as cooks, sexual services and performing other domestic roles.

Returning mothers and their children faced a lot of stigmata and found it more difficult to reintegrate compared to other ex-combatants (Apio, 2016) whose study was collaborated that of Carlson and Mazurana 2008). This was a consequent stigma for children and mothers that led to shunning by their families and being labelled as bush women by their communities (Esukuru,2011) these acts resulted to these women earning a living as prostitutes or alcohol brewers More recent studies (Seymour et al 2022) indicated that many children and women were raped and abducted and sometimes killed. They suffered both short- and long-term consequences of the sexual violence that include fistula, bullet wounds, stigma and rejection. The survivors also grappled to raise children they had as a result of sexual violence. These are painful experiences that have not been satisfactorily addressed.

The methodology that was used to carry out the studies according to resilience research centre, 2018 was semi structured interviews, these interviews were audio recorded and consent forms were used with options of seeking consent from guardians in case of minors or adult participants asked a witness to observe the informed consent process. To ensure that the research was ethically conducted, approval was sought by the northern Uganda based Lacor Hospital Research Ethics Committee (LHIREC). Child tracing as studied by Stewart, Beth⁷⁵, explained that child tracing is a social project that doesn't override international and national human rights laws. It seeks to ensure that the rights of children enshrined in various human rights instruments are realised through community-based peace processes and peace building initiatives.

The Rome statute of the international criminal court recognises sexual violence - rape, forced pregnancy and prostitution as crimes against humanity. Even though the many legal instruments and protocols address the issue of sexual violence during conflict and post conflict, Children born of war are often overlooked as victims of sexual violence crimes (Acan)⁷⁶ they address the right and wellbeing of children living in conflict and post conflict settings. They identify a child's right to an identity, education, health and their right to be heard and protected

The Uganda constitution under article (34) provides children "the right to know and be cared for by their parents or other people. It further stipulates that the welfare of the child should be the guiding principle when making decisions concerning the

⁷⁵Stewart, Beth. (2015) We are all the same: experiences of children born into LRA captivity. The justice and reconciliation project, Gulu, Uganda

⁷⁶Acan, race. Not yet sunset: a story of survival and perseverance in LRA captivity, Fountain Books, 2017

child's wellbeing. Born out of good intentions to address the many questions in the mind of victims, the process is long and strenuous as it is costly. It takes anywhere from a few months to years to complete, engaging the paternal and maternal clans is a process that is also quite sensitive because it awakens memories and responsibilities child tracing entails.

1.9 Conclusion

For a long time, the world community refused to recognize the conflict in northern Uganda and the Democratic Republic of Congo, despite the fact that it is one of the longest-running, most complex, and deadly conflicts on the African continent in recent history. This occurred despite the fact that these two countries had already signed a number of international protocols, regulations, and legislation addressing child protection issues. Uganda has put in place laws considered good to protect children. However, this is just on paper and not the case practically. Several strides have been made towards ending the recruitment of child soldiers but there is a need of doing a lot more to protect children's rights from abuses particularly about their recruitment into armed conflicts.

Children in armed conflicts are perceived to be victims having been forced to commit the atrocities. It is therefore, the duty to the state to stop the use of children in armed conflicts in Uganda as well as elsewhere internationally through a myriad of legislations as well as allowing the community to participate in the practices of protecting children in the society with guiding principles acceptable by the state and its people. This discussion is followed by a discussion of the theoretical and conceptual framework pertinent to the research challenge addressed in this study.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORKS

2.1 Introduction

In the majority of Africa, conflicts between states and armed groups have continued or gotten worse, as have attacks on civilians. This has prompted the African Union to propose 2020 as a watershed year for 'gun silence.'⁷⁷ By 2020, this project aims to 'stop all wars, civil conflicts, gender-based violence, violent conflicts, and genocide on the continent.' While no one can argue with such an admirable objective, the continental body and its member nations were tasked with performing miracles in order to accomplish it by the end of that year. This chapter discusses the conceptual and theoretical frameworks surrounding child safety in armed conflict zones.

2.2 Conceptual Framework

2.2.1 Understanding Armed Conflict

Armed conflict is the study's primary focus, and it has been prevalent in numerous parts of Africa. Armed wars within countries are political disputes between populations seeking internal change. Some are secessionist movements, primarily led by a group of people, usually a minority within a community, who take up arms to fight for the establishment of either an autonomous entity inside an existing state or a totally new and independent state. Such conflicts have occurred recently in Asia and Europe. Conflicts have been relatively rare in Africa, despite the fact that themes

⁷⁷Danzi, P., Regional Director for Africa for the International Committee of the Red Cross (ICRC), recently told journalists in Johannesburg that her organisation, along with other major humanitarian organisations, were struggling to cope with existing situations that strain already limited attention and resources, from <https://reliefweb.int/report/world/conflict-still-africa-s-biggest-challenge-2020>

of ethnic identity play a significant role in African politics⁷⁸. Within States, a second and bigger type of armed conflicts frequently involves a group of individuals who are armed and prepared to fight for the purpose of taking political power. Occasionally, battles are the result of organized crime rather than politics. These groups are motivated by money. Unlike secessionists, these organizations are often willing to coexist with other groups regardless of the outcome of the battle⁷⁹.

The majority of armed conflicts are waged not only by conventional armies, but also by militias and armed citizens who lack discipline and operate under ill-defined command structures. Indeed, such clashes are frequently guerrilla wars with no clearly defined front lines. Additionally, such conflicts frequently result in the collapse of state institutions, particularly the police and judiciary, resulting in paralysis of governance, a breakdown of law and order, and widespread banditry and chaos. Not only are government functions suspended in some cases, but government assets are destroyed or looted, and experienced officials are assassinated or flee the country⁸⁰.

Additionally, fighting occurs intermittently in the majority of conflicts, with a wide range of intensity. It is typically not fought on clearly defined battlefields but in and around communities, and is frequently characterized by individual acts of violence, such as atrocities committed by former neighbors or, in extreme cases, genocide. In certain instances, violence spills over into neighbouring nations that are used by one

⁷⁸Williams A., A World Flying Apart? Violent Nationalist Conflict and the end of the Cold War, *Journal of Peace Research*, Vol. 37, no. 1, 2000, pp.105-117

⁷⁹Williams A., A World Flying Apart? Violent Nationalist Conflict and the end of the Cold War, *supra*

⁸⁰*ibid*, p. 112

of the conflicting sides as supply channels or safe havens for soldiers.

Many people are maimed in armed conflicts by indigenous weapons such as machetes and spears, while foreign machine guns, grenades, mortars, and armoured vehicles kill many more. Warring parties buy weapons through either hard money transactions or what is referred to as "parallel funding," which involves the sale or barter of goods such as diamonds, oil, lumber, and coffee⁸¹. External involvement is almost always present, whether in the form of arms supplies to warring factions, military advisers, or direct combat backing for one side, as was previously highlighted in the Democratic Republic of Congo, Liberia, and Sierra Leone⁸².

The majority of military conflicts are characterized by brief ceasefires. Armed conflicts can be resolved in a variety of ways, including through peace treaties that the warring parties join into to specifically regulate or address controversial matters. They may also conclude with an outright win, in which one side is vanquished and/or removed by the opposing party. According to some experts, hostilities may also be declared resolved when, despite the absence of a formal ceasefire, violence has been dormant for two years.

According to some, there are numerous complicated causes that contribute to intra-state violent conflicts. Several factors contribute to the likelihood of conflict, including governments' inability to provide fundamental decent governance and

⁸¹Sivard, R. L., *World Military and Social Expenditures*, 1996, pp.18-19

⁸²Armed Conflict Report 1993, 1994, 1995 and 1998, Project Ploughshares, Institute of Peace and Conflict Studies, Waterloo, Ontario (Canada)

protection for their own populations⁸³. In many situations, weak governments lack the power to prevent or contain the eruption and spread of violence that might have been prevented or contained by more organized and legitimate governments. Armed conflicts can also be viewed as a battle for power by a segment of the elite that has been excluded from exercising power under authoritarian one-party rule systems.

On the other hand, countries ravaged by war frequently suffer from severe inequities between socioeconomic categories. This, rather than poverty, appears to be a major factor, despite the fact that poor countries have been far more prone than rich countries to be involved in armed wars. Whether on the basis of ethnic origin, religion, national identification, or economic class, inequality frequently manifests itself in unequal access to political power, which all too frequently precludes peaceful change. Economic decline and mismanagement are also related with violent conflicts, not least because the politics of a contracting economy are intrinsically more conflict-prone than those of a growing economy. In several cases, it has been seen that the impact of severe market-oriented economic reforms and structural adjustment enforced without offsetting social programs has harmed political stability⁸⁴.

However, racial and religious hostility, widespread breaches of human and minority rights, and ethnic cleansing as a result of extreme forms of nationalism pushed by hate media all contribute to conflict escalation. The relative ease with which

⁸³ Armed Conflict Report 1993, 1994, 1995 and 1998, Project Ploughshares, Institute of Peace and Conflict Studies, Waterloo, Ontario (Canada)

⁸⁴ Seul, J. Ours is the Way of God; Religion, Identity and Intergroup Conflict, *Journal of Peace Research*, Vol.36, no.5. 1999, pp.553-569

armaments are traded globally, particularly in countries and regions ravaged by civil conflicts, is also a role. While the widespread availability of such weapons is not a cause of war, it tends to exacerbate it, undermine peace agreements in instances where fighters have not been entirely disarmed, heighten violence and criminality in society, and obstruct economic and social progress⁸⁵.

2.2.2 The Concept of ‘Non-State Actors’

There will always be gaps and weaknesses in a state's ability to address a range of traditional and non-traditional security concerns during armed conflict. As a result, ad hoc security governance networks have formed. Numerous these networks are legal in nature and entail collaboration between governments, the commercial sector, non-governmental organizations, and international organizations. They enable actors to access geographical, technological, and intellectual resources that they would not be able to access on their own⁸⁶.

Although there is no universally accepted definition of Non-State Actors, they are often characterized as any organized group with a basic command structure functioning independently of state supervision and employing force to achieve its political or ostensibly political objectives⁸⁷. These actors include ‘rebel groups and governments of entities that are not recognized as states (or are not popularly recognized as such). This definition excludes paramilitaries that are 'effectively

⁸⁵ibid, p. 555

⁸⁶DCAF & Geneva Call, Armed Non-State Actors: Current Trends & Future Challenges, DCAF HORIZON WORKING PAPER No. 5, 2015, p.2
https://www.dcaf.ch/sites/default/files/publications/documents/ANSA_Final.pdf

⁸⁷Sjöberg, A. Armed Non-State Actors and Landmines. Volume III: Towards a Holistic Approach to Armed Non-State Actors? (Geneva: Geneva Call and the PSIO, 2007, p. 3

controlled' by a state, but not when an NSA is engaged in combat with another NSA. The requirement of a fundamental command structure is critical for humanitarian practitioners, as without a chain of command, the NSA is more of a loose association of armed individuals than a defined actor⁸⁸.

Typically, conflict academics and humanitarian practitioners focus on politically driven groups, i.e., those that articulate a political agenda rather than private (including economic) interests, albeit no formal political manifestos are required⁸⁹. Many practitioners refer to this notion as a 'armed group' or a 'non-state armed group,' while many scholars use phrases such as 'rebel groups' and 'insurgents.' However, there are NSAs that de facto rule a region, have attained a level of organization comparable to that of states, and are engaged in active conflict or 'no peace, no war' situations with states⁹⁰.

'Non-state actors,' whether they be armed groups or giant multinational corporations, play a critical role in contemporary international affairs⁹¹. Today, the majority of armed conflicts are non-international in nature, including various armed factions with the power to dominate territory or populations, raising concerns about the adequacy of the existing protective framework provided by international human rights and humanitarian law⁹².

⁸⁸ibid, p.3

⁸⁹Pablo Policzer, *Neither Terrorists nor Freedom Fighters*, 2004, p. 8

⁹⁰Sjöberg, A. , *Armed Non-State Actors and Landmines*. Volume III, ibid

⁹¹Zarei, M. H. *The Status of Non-State Actors under the International Rule of Law: A*

Search for Global Justice, https://www.culturaldiplomacy.org/academy/content/pdf/participant-papers/2014-04-lhrs/Dr_Zarei_and_Azar_Safari_-_The_Status_of_Non-State_Actors_under_the_International_Rule_of_Law_-_A_Search_for_Global_Justice.pdf

⁹²United Nations Security Council, Resolution 1540, *Non-Proliferation of Weapons of Mass Destruction*, 28 April 2004.

Similar difficulties exist in the course of business or global company operations, most notably when they operate in conflict zones or areas of armed violence. The international community has expressed concern about this controversy, and in light of the potential dangers that non-state actors may pose in the context of war, the United Nations Security Council has resolved that states must abstain from providing goods or services to or supporting non-state actors that develop, obtain, construct, transfer, or use chemical weapons.

Non-state actors come in a variety of forms, with some controlling territory and establishing administrative institutions parallel to or in place of those of the state, while others have loose command structures and little control over their members. Some operate in rural areas and engage in guerrilla warfare, while others are predominantly urban in nature. Some focus exclusively on military targets, while others deliberately target people. Men, women, and children may be non-state actors. Female members make up a sizable proportion of combatants and other members in some groups. Members may be recruited by coercion or freely join. Certain non-state actors have established structures to deliver sophisticated services that cater to their members' demands⁹³. Three issues that contribute to the understanding and differentiation of non-state actors are discussed in greater depth below: territory, identity/resources, and connection to a larger civilization⁹⁴.

2.2.2.1 Territory

While some non-state actors participate openly in international fora and maintain representation in multiple countries, others operate covertly. The ability of non-state

⁹³Bryden, A. and Hänggi, H. (Geneva: DCAF, 2005), p. 48

actors to operate internationally and nationally is heavily influenced by the community of states, most notably the concerned and neighbouring states. Apart from political reasons, the manner in which non-state actors are approached by external actors (including humanitarian actors) is also contingent upon their territorial ties. Indeed, numerous non-state entities exert significant control over or influence activities within a region, thereby affecting the lives of thousands of people. The Moro Islamic Liberation Front in the Philippines, the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, the Sudan People's Liberation Movement/Army in South Sudan, and the Communist Party of Nepal-Maoists are notable current and former examples of non-state actors in a position of territorial control.

2.2.2.2 Identity and Resources

Another approach of understanding and differentiating non-state actors is to consider the extent to which they organize and mobilize their members through the use of identity and resources. Even territory can be viewed as a form of (expensive) resource that non-state actors may possess or battle for, allowing them access to more resources. Non-state actors' daily material resources include weapons, money, uniforms, modes of transportation/communication, and other types of equipment. Along with material products, non-state actors provide services such as justice, land reform, and health promotion initiatives. These services can be supplied to members and supporters, as well as to those controlled or influenced by non-state actors⁹⁵.

⁹⁵Sjöberg, A. K. *Challengers without Responsibility? Exploring Reasons for Armed Non-State Actor Use and Restraint on the Use of Violence against Civilians*, Geneva: University of Geneva, Ph.D. Thesis, 2010

2.2.2.3 Relationship to Wider Society

Apart from internal dynamics, non-state entities are linked to and interact with a variety of different organizations and players. Thus, a third factor that can be used to understand non-state actors is their degree of marginalisation and overall relationship to larger society, particularly civilian groups. It has been suggested that factors like as security concerns and secrecy, the fact of facing a shared adversary, and the development of their own cognitive processes⁹⁶ all contribute to the strengthening of non-state actors' group solidarity, while simultaneously separating them from greater society. This is frequently the case with so-called 'terrorist organisations' and some criminal gangs⁹⁷.

2.2.3 Defining the Concept of Terrorist Groups

The definition of terrorism and terrorist organisations has been a source of contention and criticism throughout the world, and the primary issue is whether terrorism should be defined in terms of group purpose or specific conduct. It is a misconception to believe that simply labeling a group or entity as terrorist establishes its legal competence. The customary method for resolving this issue has been to first comprehend its nature, which includes its definition.

Unfortunately, terrorism lacks a universally acceptable definition in international law, owing to the fact that efforts to define terrorism have fallen short of adopting a definition that is universally acceptable to the international community. Numerous

⁹⁶Donatella della Porta, *Social Movements, Political Violence, and the State: A Comparative Analysis of Italy and Germany* (Cambridge: Cambridge University Press, 1995) p. 177

⁹⁷*ibid*, p. 178

expressions, however amusing, have been concocted by writers and commentators to reflect the impossibility of agreeing on a definition of terrorism⁹⁸.

While there is no universally accepted definition of terrorism, it can be broadly defined as a form of coercion that uses or threatens to use violence in order to sow fear and achieve political or ideological goals. The classic terrorist "triangle" distinguishes contemporary terrorist violence from "regular" violence in law: A attacks B in order to persuade or coerce C into changing its position on an action or policy desired by A. Fear is spread as a result of the attack's unexpected targeting of innocent victims, which puts pressure on third parties such as governments to alter their policy or position. Contemporary terrorists employ a variety of methods of violence and target civilians, military facilities, and government officials, among others⁹⁹.

Professor Blakesley defines terrorism as "violence committed by any means that results in death, great bodily harm, or serious property damage to innocent individuals; with the intent to cause those consequences or with reckless disregard for those consequences; and for the purpose of coercing or intimidating a specific group or government, or for any other perceived political, military, religious, or other philosophical benefit." This is a neutral definition that encompasses terrorism perpetrated by both state and non-state actors¹⁰⁰.

⁹⁸Levitt, G., "Is 'Terrorism' Worth Defining?" 13 OHIO N.U.L. REV. 97, 1986, p. 97

⁹⁹United Nations Office On Drugs And Crime, Education For Justice: Introduction to International Terrorism; University Module Series, 2018, p. 1

¹⁰⁰Christopher Blakesley, Terror and Anti-Terrorism: A Normative and Practical Assessment, 31 (2006)

Among the UN treaties that may shed light on a definition of terrorism are those relating to nuclear materials and plastic explosives. The United Nations General Assembly adopted the International Convention to Suppress Terrorist Bombings in 1997. Without defining terrorism, Article 2 of the Convention states that a person commits an offense if he or she unlawfully and intentionally delivers, places, discharges, or detonates an explosive or other lethal device into, into, or against a place of public use, a State or government facility, a public transportation system, or an infrastructure facility with the intent to cause death or serious bodily injury or with the intent to cause death or serious bodily injury¹⁰¹.

In any case, many terrorist acts committed after 1945 have had little to do with self-determination disputes. Rather than that, the reasons of terrorism have spanned the full spectrum of human discontent, including economic, political, social, psychological, and ideological, with short- or long-term objectives, both objective and subjective, being the target of violence. As a result, some members of the international community, particularly academics, have sought to categorize terrorist organisations according to their motivational aims or beliefs, rather than due to their criminal activities, as the United Nations system does. As a result, students may encounter the terms "revolutionary," "separatist," "ethnocentric," "nationalist," or "religious" in scholarship¹⁰².

Terrorists' use of violence and force also varies widely, from personnel with military training and experience to what Whittaker refers to as "throw away" agents, who are

¹⁰¹International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, S. Treaty Doc. No. 106-6, 37 I.L.M. p. 251

¹⁰²Whittaker, D. *The Terrorism Reader*. London: Routledge, 2003, p. 33

basically sent on suicide missions unprepared. Their use of violence also demonstrates the gradual evolution of terrorist methods and strategies, which include traditional assassination, bombings, arson, hostage taking, hijacking, kidnapping, sabotage, and the perpetration of hoaxes, to name a few¹⁰³.

Recent tactics may include unconventional forms of terrorism, such as nuclear terrorism (for example, constructing a dirty bomb or attacking a nuclear reactor), high-tech terrorism involving cyber-attacks, ecological terrorism (for example, the threat of environmental destruction), and terrorist attacks aimed at destroying cultural heritage, such as those perpetrated by ISIL¹⁰⁴. Notable is the fact that these challenges and discussions have affected the international community's attitude to its universal anti-terrorism agreements, which are now structured around terrorist acts as grave international crimes regardless of their motivation. Anti-terrorism instruments were mostly adopted in three phases.

From laws addressing aviation and maritime safety in the 1960s through the early 1990s, the early instruments addressed specific categories of terrorist offenses. Notably, acts committed during "liberation conflicts" were expressly excluded from the definition of terrorist crimes, for example, in the 1979 Hostages Convention¹⁰⁵, as they were to be dealt with under other areas of international law, such as international humanitarian law. The most recent phase represents the reclassification of terrorist groups and "causes" to include groups such as the Taliban, Al-Qaida, and

¹⁰³For example, Global Terrorism Index, 2017

¹⁰⁴Article 1 of the Executive Committee of the Commonwealth of Independent States, 1999

¹⁰⁵Hostages Convention: Treaty Series, vol. 1316, p. 205, adopted 17 December 1979, entered into force 3 June 1983

ISIL, and so reflects the contemporary terrorist danger to the world community¹⁰⁶.

2.2.4-Armed Conflict Zones

An armed conflict zone is an area that is the scene of an armed conflict war or battlefield¹⁰⁷. An armed conflict zone is an area that encompasses a disputed issue over government and/or territory and in which the use of armed force by two parties, at least one of whom is the government of a state, results in at least 25 battle-related deaths in a calendar year. For the first time, the Geneva Conventions addressed scenarios involving non-international armed conflicts¹⁰⁸. The types vary considerably and include territories or zones that encompass classic civil wars or internal armed conflicts that spill over into neighbouring States, as well as internal conflicts in which third-party states or multinational troops intervene alongside the government.

Armed conflict zones can be triggered by specific government incompatibilities, such as a change in the type of political system, the replacement of the central government, or a change in the composition of the central government. An incompatibility between governments involves the form or distribution of authority. Incompatibility with regard to territory: the status of a particular territory, such as the change of the state in charge (interstate conflict), secession or autonomy (intrastate conflict), or who is to make authoritative decisions over the population in a

¹⁰⁶The Taliban and Al-Qaida, which have been designated “terrorist” organizations by the Security Council. In 1999, following the refusal of the Taliban to surrender Osama Bin Laden and his associates for their roles in the August 1988 attacks on United States Embassies in Kenya and the United Republic of Tanzania, under its resolution 1267 (1999)

¹⁰⁷ICRC, How is the term "Armed Conflict" defined in international humanitarian law? from <https://www.icrc.org/en/doc/resources/documents/article/other/armed-conflict-article-170308.htm>

¹⁰⁸Article 3 of the Geneva Conventions, 1949 and all its Protocols

particular territory. Separating the most destructive forms of conflict from the routine use of armed force enables the compilation of exhaustive and reliable lists of armed conflicts, as the use of armed force is typically widely reported when it is associated with organized parties and incompatibilities concerning government and/or territory.

As stated previously, armed conflict zones are defined as areas or zones characterized by the use of armed force by two or more organized armed organizations, either governmental or non-governmental. There are sections on interstate, intrastate, and non-state armed confrontations. The armed conflict zone should have a specified number of fatalities, which should include combat-related casualties (military and civilian), as well as people deliberately targeted by the armed conflict's parties. Only deaths directly caused by violence are included in the current and previous years; extra deaths caused indirectly by starvation, disease, or disruption of services are included in the cumulative fatality figure alongside violent deaths where possible¹⁰⁹.

An armed conflict zone must have a cumulative death toll of at least 100 and at least one death in the current or previous calendar year, however fatality totals may be erroneous or unavailable due to a lack of data. A territorial dispute or a protest movement that has not been subjected to deliberate and systemic killings as a result of official or paramilitary brutality is not regarded an armed conflict zone¹¹⁰.

¹⁰⁹How is the Term "Armed Conflict" Defined in International Humanitarian Law? International Committee of the Red Cross, 2008, copied from <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>

¹¹⁰ibid

2.2.5 A Child in Armed Conflict

Throughout the world, tens of thousands of youngsters are recruited and deployed as soldiers in military conflicts. Regardless of how children are recruited or what roles they play, child soldiers are victims whose involvement in conflict has a significant impact on their physical and emotional well-being. They are frequently abused, and the majority of children witness cases of death, murder, and sexual violence. Numerous individuals are coerced into committing violent acts, and some suffer from severe long-term psychological problems as a result. Therefore, reintegration of these youngsters into civilian life is a critical component of the process to reconstruct the lives of child soldiers.

The African Charter on the Rights and Welfare of Children defines a child as any human being under the age of 18¹¹¹, while the Convention on the Rights of the Child defines a child as any human being under the age of eighteen (18) years, unless the child reaches majority earlier under the applicable law¹¹². For statistical purposes, the United Nations defines 'youth' as people between the ages of 15 and 24, without prejudice to other Member States' definitions. This concept was developed during the 1985 International Youth Year preparations and was accepted by the United Nations General Assembly. All United Nations data on youth are based on this concept, as evidenced by the annual yearbooks of statistics on demographics, education, employment, and health produced by the United Nations system¹¹³. Numerous countries also draw a limit on childhood at the age at which an individual

¹¹¹Article 2 of the African Charter on the Rights and Welfare of the Child, 1990

¹¹²Article 1 of the Convention on the Rights of the Child, 1989

¹¹³A/36/215 and resolution 36/28, 198, from <https://www.un.org/development/desa/youth/what-we-do/faq.html>

receives equal legal protection, frequently referred to as the "age of majority." This age is frequently 18 in many nations, and everyone who reaches this age is considered an adult. However, the operational definition and subtleties of the term 'youth' frequently differ by country, based on the country's unique sociocultural, institutional, economic, and political circumstances.

Numerous conflicts involve direct participation of children. Their duty, however, has not been restricted to combat. Both girls and boys are also employed in support roles that involve significant risk and suffering. Child soldiers, regardless of the role they play, are exposed to high levels of violence as bystanders, direct victims, and/or coerced participants. Many of these individuals are damaged and live with disabilities for the remainder of their life. A child associated with an armed force or armed group is defined as any individual under the age of 18 who is or has been recruited or used in any capacity by an armed force or armed group, including but not limited to children, boys and girls, who are used as fighters, cooks, porters, spies, or for sexual purposes¹¹⁴.

Children enjoy the same fundamental human rights as adults, as well as additional rights that acknowledge their unique needs. Children are neither their parents' property nor aidless objects of charity. They are human beings with inherent rights. The Convention on the Rights of the Child outlines the rights that children must have in order to reach their full potential. The Convention depicts the child as an individual and as a part of his or her family and community, with rights and

¹¹⁴Paris Principles on the Involvement of Children in Armed Conflict 2007

obligations commensurate with his or her age and stage of development. By explicitly recognizing children's rights in this manner, the Convention places a strong emphasis on the complete child.

2.2.5.1 Rights of Children in Conflict

Right of Non-Discrimination: The Convention on the Rights of the Child pertains to all children, regardless of their ethnicity, religion, or talents; regardless of what they believe or say; and regardless of the type of household from which they originate. It makes no difference where children live, what language they speak, what their parents do, whether they are males or girls, what culture they belong to, whether they have a disability or are wealthy or impoverished¹¹⁵. No child should be treated in an unjust manner for any reason. Additionally, the kid is protected against practices that promote racial, religious, or any other type of discrimination. He shall be raised in an atmosphere of understanding, tolerance, people-to-people friendliness, peace, and worldwide brotherhood, and with a clear knowledge that his energy and abilities should be directed toward the service of his fellow men¹¹⁶.

Right to Best Interests of the Child: Children's best interests must always take precedence above all other considerations when choices affecting them are made. All adults should act in the best interests of children. When adults make decisions, they should consider the impact on children. This is especially true for budget, policy, and legislative decision-makers¹¹⁷. The child's best interests shall be paramount in all

¹¹⁵Article 2 of the Convention on the Rights to Child, *supra*

¹¹⁶Principle 10 of the Declaration of the Rights of the Child (1959) (*Proclaimed by the General Assembly, resolution 1386 (XIV), A/RES/14/1386, 20 November 1959*)

¹¹⁷Article 3 of the Convention on the Rights of a Child, *ibid*

activities involving children, whether conducted by public or private social welfare organizations, courts of law, administrative authorities, or legislative bodies. Assessing a kid's best interests entails weighing and balancing "all the factors necessary to make a judgment in a particular situation for a particular individual child or group of children.

Right to Protection of all Rights of a Child: Governments are responsible for taking all necessary steps to ensure the respect, protection, and fulfilment of children's rights. When countries ratify the Convention, they commit to revising their child protection legislation. This includes a review of their social services, legal, health, and educational systems, as well as the extent to which these services are funded. Governments are subsequently required to take all necessary actions to ensure that the Convention's minimum criteria in these areas are met. They must assist families in safeguarding children's rights and fostering an atmosphere conducive to growth and development. This may require amending existing laws or enacting new ones in some circumstances. These legal changes are not enforced, but occur in the same way that any other law is produced or amended inside a country.

Right to Parental Guidance: Governments should respect families' rights and obligations to direct and guide their children so that they learn to exercise their rights correctly as they develop. Educating children about their rights should not entail pressuring them to make decisions with repercussions they are unable to handle. It urges parents to approach rights issues "in a way that is consistent with the child's maturing capacities." The Convention does neither absolve parents of responsibility for their children or provide governments with increased authority. It does lay a

responsibility on governments to preserve and help families in fulfilling their critical role as child nurturers¹¹⁸.

Right to Education, Survival and Development: Children have an inalienable right to life. Governments should safeguard children's survival and healthy development. The kid is entitled to free and compulsory education, at the very least in the basic stages. He shall receive an education that advances his general culture and enables him, on an equal opportunity basis, to develop his abilities, independent judgment, and sense of moral and social responsibility, as well as to develop into a productive member of society¹¹⁹.

2.2.6 The Concept of Child Development

Child development is the process by which a child grows and changes over time. This is the progression of a child's physical, language, cognitive, and emotional development from birth to the onset of adulthood. It encompasses the entire period from conception to the development of an individual into a fully functioning adult. It's a journey from total reliance to complete self-sufficiency. A child progresses through this process from dependence on parents/guardians to increasing independence. Genetic factors (genes inherited from their parents) and prenatal events have a strong influence on a child's development. Additionally, it is influenced by environmental facts and the child's capacity for learning¹²⁰. Physical development, as well as intellectual, language, emotional, and social development, are all components of child development. While these factors are frequently

¹¹⁸Article 5 of the Convention on the Rights of a Child, *supra*

¹¹⁹Principle 7 of the Declaration of the Rights of the Child, *supra*

¹²⁰https://www.nottingham.ac.uk/helmopen/rlos/child/foundation/page_one.html

considered independently, each has an effect on the others. For instance, as the brain physically develops, intellectual abilities increase. This enables a child to more fully explore their social world, develop emotional responses to it, and the language necessary to describe it, but it also has a direct effect on further physical brain development¹²¹.

Numerous variables influence the trajectory and progression of a child's development within an individual. These factors include the child's inherent or biological makeup, as well as external factors such as family, society, economics, health, and culture. Thus, growth and development are intrinsically linked to a child's nutrition, wealth, parenting styles, education, and peer interaction. Child development can be actively aided by targeted therapeutic intervention and 'just-right' home-based practice, as recommended by occupational therapists and speech therapists¹²².

2.2.6.1 Child Protection as a Component of Child Development

The majority of international legal instruments governing child development emphasize the importance of monitoring and observing child development as a means of ensuring that children meet their 'developmental milestones.' The child shall be afforded special protection and opportunities and facilities, both legally and otherwise, to enable him to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner and in conditions of liberty and dignity. When enacting legislation for this purpose, the child's best interests must take

¹²¹https://www.nottingham.ac.uk/helmopen/rlos/child/foundation/page_one.html

¹²²<https://childdevelopment.com.au/areas-of-concern/what-is-child-development/>

precedence¹²³. Meanwhile, states parties must commit to providing the child with the protection and care necessary for his or her well-being, taking into account the rights and responsibilities of the child's parents, legal guardians, or other legally responsible individuals, and shall take all necessary legislative and administrative measures to accomplish this¹²⁴.

2.2.6.2 Best Interest of a Child as a Component of Child Development

In promoting child development, and in all actions involving children, whether by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the child's best interests must take precedence." Assessing a child's best interests entails weighing and balancing "all the factors necessary to make a decision in a particular situation for a particular individual child or group of children." The child has the right to grow and develop in good health; to that end, he and his mother will receive special care and protection, including adequate pre- and post-natal care. The child has the right to adequate nutrition, housing, recreational opportunities, and medical care¹²⁵.

2.2.6.3 Parental Care as a Component of Child Development

To ensure proper child development, states are required to ensure that institutions, services, and facilities charged with the care or protection of children adhere to the standards established by competent authorities, particularly in the areas of safety and health, staffing levels and qualifications, and competent supervision. States Parties shall take all necessary legislative, administrative, and other measures to ensure the

¹²³Principle 2 of the Declaration on the Right of a Child, supra

¹²⁴Article 2 of the Convention on the Rights of a child, supra

¹²⁵Principle 4, supra

effective implementation of the rights recognized in this Convention. States Parties shall implement economic, social, and cultural rights measures to the extent possible within their available resources and, where necessary, within the framework of international cooperation¹²⁶.

To develop fully and harmoniously, the child requires love and understanding. He shall grow up, whenever possible, in the care and responsibility of his parents and, in any case, in an atmosphere of affection and moral and material security; a child of tender years shall not be separated from his mother, except in exceptional circumstances. Society and public authorities have a responsibility to provide special care for children who lack a family and those who lack adequate means of support. It is desirable that the state and other sources of assistance contribute to the maintenance of children from large families¹²⁷.

Additionally, states Parties shall ensure that no child is separated from his or her parents against their will, except when competent authorities subject to judicial review determine that such separation is necessary for the child's best interests, in accordance with applicable law and procedures. Such a determination may be necessary in a particular case, such as one involving parental abuse or neglect of the child, or one in which the parents live separately and a decision regarding the child's residence must be made¹²⁸. All interested parties shall be given an opportunity to participate in and express their views in any proceeding brought pursuant to the preceding. States Parties shall respect a child who has been separated from one or

¹²⁶Article 4 of the Convention on the Rights of a child, op.cit

¹²⁷Article 6, ibid

¹²⁸Article 9, ibid

both parents' right to maintain personal relations and direct contact with both parents on a regular basis, unless doing so would be detrimental to the child's best interests. Where such separation occurs as a result of a State Party's action, such as the detention, imprisonment, exile, deportation, or death of one or both parents or the child (including death as a result of any cause while the person is in the custody of the State), that State Party shall, upon request, provide the parents, the child, or, if appropriate, another member of the family with essential information regarding the whereabouts of the absent member(s) of the family. Additionally, States Parties shall ensure that the submission of such a request has no adverse consequences for the individual(s) concerned¹²⁹.

2.2.8 Understanding the context of Children in Armed Conflict

A child associated with an armed force or armed group is defined as any individual under the age of 18 who is or has been recruited or used in any capacity by an armed force or armed group, including but not limited to children, boys and girls, who are used as fighters, cooks, porters, spies, or for sexual purposes¹³⁰. Throughout the world, tens of thousands of children are recruited and used as soldiers in armed conflicts. Children can become associated with armed forces and groups in a variety of ways. Some children are abducted and beaten into submission, while others join military groups in order to escape poverty, defend their communities, seek revenge, or for other reasons.

Numerous conflicts involve direct involvement of children. Their role, however, is not limited to combat. Numerous girls and boys are also employed in support roles

¹²⁹Article 2 of the Convention on the Rights of a child, op.cit

¹³⁰Paris Principles on the Involvement of Children in Armed Conflict, supra

that involve significant risk and hardship. Their duties vary significantly, ranging from combatants to cooks, spies, messengers, and even sex slaves. Additionally, the use of children in terrorist acts, including as suicide bombers, has emerged as a modern warfare phenomenon. The UN receives reports each year of children as young as 8 or 9 years old being associated with armed groups¹³¹.

Child soldiers, regardless of their role, are exposed to high levels of violence as witnesses, direct victims, and coerced participants. Certain individuals are injured and must live with disabilities for the remainder of their lives. Girls are also recruited and utilized by armed forces and terrorist organizations. They face unique vulnerabilities due to their gender and social status, and as a result, they face unique consequences such as rape and sexual violence, pregnancy and pregnancy-related complications, stigma and rejection from families and communities¹³².

While international attention has been focused on and widespread condemnation of the recruitment and use of children by armed forces and armed groups, children continue to be involved in adult wars, becoming disabled or dying as a result of such conflicts. While many of these children have been assisted in their release and reintegration into civilian life through interventions and programs designed to assist them, others have returned home on their own, frequently facing an uncertain future and a new battle for acceptance from their family and community. Girls in particular are likely to face stigma and even rejection from their community if it is discovered that they have been used by an armed force or armed group, and their children may

¹³¹<https://childrenandarmedconflict.un.org/six-grave-violations/child-soldiers>

¹³²<https://childrenandarmedconflict.un.org/six-grave-violations/child-soldie>

face an even harsher rejection. Other children are encouraged to participate in armed conflict by their families and communities, despite the danger and harm involved. Regardless of their circumstances, such children are resilient and can contribute constructively to efforts at reconstruction and reconciliation if provided with the necessary assistance, support, and encouragement.

2.2.8.1 Prohibition under International Law

Human rights law establishes an age limit of 18 for recruiting and using children in hostilities. Recruiting and using children under the age of 15 as soldiers is prohibited by treaty and custom under international humanitarian law and is defined as a war crime by the International Criminal Court¹³³. Additionally, the "Paris Commitments" include detailed guidelines for preventing child recruitment and assisting those already affiliated with armed groups or forces. They supplement the existing political and legal mechanisms in place at the United Nations Security Council, the International Criminal Court, and other bodies devoted to protecting children from exploitation and violence¹³⁴.

Based on international law and standards, as well as the original Cape Town Principles, this document incorporates knowledge and lessons learned, emphasizing in particular the informal ways in which boys and girls join and depart from armed forces or armed groups. By adopting a child rights-based approach to the issue of children associated with armed forces or armed groups, the principles emphasize the

¹³³The Rome Statute, 1998

¹³⁴UN Children's Fund (UNICEF), *The Paris Principles. Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*, February 2007, available at: <https://www.refworld.org/docid/465198442.html> [accessed 8 September 2021]

humanitarian imperative to seek the unconditional release of children from armed forces or armed groups at all times, including during and after conflict.

The principles recognize that in times of armed conflict, states and armed groups are the primary actors responsible for the protection of civilians under their effective control, and that if they are unable or unwilling to meet all of their humanitarian responsibilities directly, they are charged with enabling impartial actors to provide humanitarian assistance. The principles are based on the following lessons learned from implementing programmatic interventions to prevent recruitment, protect children, assist their release from armed forces or armed groups, and reintegrate them into civilian life on a global scale¹³⁵.

2.2.9 Origins and Development of the Concept of Human Rights

The term "Human Rights" refers to all of the rights that are inherent in human beings and without which we cannot exist as humans. Human Rights, as an inalienable part of human nature, are critical for the development of an individual's personality and human qualities, such as intelligence, talent, and conscience, as well as for their ability to meet spiritual and other higher demands. Human Rights are derived from the Natural Law principle. They are not derived from the social order nor are they bestowed by society on an individual. Human rights are the rights that a human being possesses as a result of his or her uniquely and universally human characteristics¹³⁶. The belief that everyone is entitled to certain human rights by virtue of their humanity is hardly novel. Its origins, however, are found in earlier

¹³⁵Principle 1.5 – 1.7 of the Paris Principles, *supra*

¹³⁶<https://www.srdlawnotes.com/2017/12/origin-and-development-of-human-rights.html>

tradition and documents from numerous cultures; it was World War II that catapulted human rights onto the global stage and into the global conscience.

Throughout much of history, individuals acquired rights and responsibilities as members of a group, whether it was a family, indigenous nation, religion, class, community, or state. Most societies have had traditions along the lines of the "golden rule," which states, "Do unto others as you would have them do unto you." Five of the earliest written sources on human duties, rights, and responsibilities are the Hindu Vedas, the Babylonian Code of Hammurabi, the Bible, the Quran (Koran), and Confucius' Analects¹³⁷.

Human rights can thus be traced back to documents asserting individual rights, such as the Magna Carta (1215), the English Bill of Rights (1689), the French Declaration on the Rights of Man and Citizen (1789), and the US Constitution and Bill of Rights (1791). These written precursors to many contemporary human rights documents include the Magna Carta (1215), the English Bill of Rights (1689), the French Declaration on the Rights of Man and Citizen (1789), and the US Constitution and Bill of Rights (1791). Nevertheless, many of these documents, when translated into policy, excluded women, people of colour, and members of specific social, religious, economic, and political groups.

Nonetheless, oppressed peoples around the world have used the principles expressed in these documents to mobilize in support of revolutions asserting the right to self-

¹³⁷Gordon, L. P., "Philosophical Visions: Human Nature, Natural Law, and Natural Rights". *The Evolution of International Human Rights: Visions Seen*. Philadelphia: University of Pennsylvania Press, 2003, p. 3, from ISBN 0-8122-1854-X

determination¹³⁸.

International human rights law and the United Nations (UN) have significant historical precedents. Efforts in the nineteenth century to abolish slavery and limit the atrocities of war are prime examples. Countries founded the International Labour Organization (ILO) in 1919 to oversee treaties protecting workers' rights, including health and safety. At the conclusion of World War I, the League of Nations expressed concern about the protection of certain minority groups.

After World War II, the concept of human rights gained traction. The world was horrified by Nazi Germany's extermination of over six million Jews, Sinti and Romani (gypsies), homosexuals, and persons with disabilities. Following World War II, trials were held in Nuremberg and Tokyo, and officials from defeated countries were prosecuted for war crimes, "crimes against peace," and "crimes against humanity." Governments then committed to establishing the United Nations with the primary objective of promoting international peace and conflict prevention. People desired to ensure that no one would ever again be denied life, liberty, food, shelter, or nationality in an unjust manner¹³⁹.

President Franklin Delano Roosevelt captured the essence of these emerging human rights principles in his 1941 State of the Union Address, when he spoke of a world founded on four fundamental freedoms: freedom of expression and religion, as well as freedom from want and fear. Globally, citizens have been calling for human rights

¹³⁸Gordon, L. P., *supra*

¹³⁹Moyn, S. *The Last Utopia: Human Rights in History* (Harvard University Press, 2010)

standards to protect them from government abuses, standards against which nations can be held accountable for how they treat those living within their borders. These voices were instrumental in the 1945 San Francisco meeting that resulted in the United Nations Charter being drafted¹⁴⁰.

The United Nations' member states committed to promoting universal respect for human rights. To accomplish this goal, the UN established a Commission on Human Rights and charged it with the responsibility of drafting a document elucidating the meaning of the Charter's fundamental rights and freedoms. The Commission, under the able leadership of Eleanor Roosevelt, captured the world's attention. On December 10, 1948, the United Nations' 56 member states adopted the Universal Declaration of Human Rights (UDHR). Although eight nations chose to abstain, the vote was unanimous¹⁴¹.

The UDHR, colloquially known as the international Magna Carta, extended the revolution in international law ushered in by the United Nations Charter, namely that how a government treats its own citizens is now a legitimate international concern, rather than a domestic one. It asserts that all rights are inextricably linked and indivisible. Its Preamble states emphatically that: Recognizing the inherent dignity and equal and inalienable rights of all members of the human family is the bedrock of global freedom, justice, and peace. The UDHR has had a sizable impact. Its principles have been incorporated into the constitutions of the majority of the United Nations' more than 185 member states. While a declaration is not a legally binding

¹⁴⁰Moyn, S. *The Last Utopia: Human Rights in History*, supra

¹⁴¹ibid, p. 54

document, the Universal Declaration has acquired the status of customary international law due to the widespread acceptance of it as a "common standard of achievement for all people and all nations."¹⁴²

The UN Commission on Human Rights proceeded to draft two treaties with the goal of establishing mechanisms for enforcing the UDHR: the International Covenant on Civil and Political Rights (ICCPR) and its optional Protocol, and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). They are collectively referred to as the International Bill of Human Rights, along with the Universal Declaration. The ICCPR is concerned with issues such as the right to life, freedom of expression, religion, and the right to vote. The ICESCR is concerned with issues such as food, education, health, and housing. Both covenants emphasize the universality of rights and prohibit discrimination¹⁴³.

Regional documents for the protection and promotion of human rights extend the International Bill of Human Rights in Europe, the Americas, and Africa. African states, for example, established their own Charter of Human and People's Rights in 1981, while Muslim states established the Cairo Declaration on Human Rights in Islam (1990). Since 1989, the dramatic changes in Eastern Europe, Africa, and Latin America have amply demonstrated a surge in demand for human rights respect. China, Korea, and other Asian countries' popular movements demonstrate a similar commitment to these principles.

¹⁴²Gordon, L. P, *supra*

¹⁴³Freeman, M. *Human Rights: An Interdisciplinary Approach*, 2002, pp. 15–17

2.2.10 Understanding a Human Rights Treaty

Human rights treaties are agreements between states that grant specific rights to individuals who are not signatories to the instruments but are subject to the instruments' correlative obligations. Each State party is required to take steps to ensure that the treaty's rights are available to all citizens. The treaty body assists them in this endeavour by monitoring implementation and making recommendations for additional action. Although each treaty is a distinct legal instrument that States may or may not accept, and each treaty body is an independent committee of experts¹⁴⁴.

The extent to which treaties and treaty bodies can function as a system is determined by two factors: first, States must systematically accept and implement all core international human rights treaties (universal and effective ratification); and second, treaty bodies must coordinate their activities in order to present a consistent and systematic approach to monitoring human rights implementation at the national level.

2.2.10.1 The Treaties and their Optional Protocols

Human rights protection became a priority for the international community in the early twentieth century. The League of Nations, founded at the conclusion of World War I, attempted to develop an international legal framework and monitoring mechanisms to protect minorities. The atrocities committed during World War II galvanized the international community to ensure that such atrocities never occurred again, and served as the impetus for the modern movement to establish an

¹⁴⁴<https://www.ohchr.org/documents/publications/factsheet30rev1.pdf>

international system of legally binding human rights protection.¹⁴⁵ These treaties include the following:

The International Convention on the Elimination of All Forms of Discrimination Against Women; The International Covenant on Economic, Social, and Cultural Rights; The International Covenant on Civil and Political Rights; The Convention on the Elimination of All Forms of Discrimination Against Women; The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; The Convention on the Rights of the Child; The International Covenant on Economic, Social, and Cultural Rights; The International Covenant on Civil and Political Rights;

To fully comprehend a state's obligations under these treaties, it is necessary to read all of the human rights treaties to which it has become a party in their entirety. Although distinct and self-contained, the treaties also complement one another, as they are linked by a number of principles. Each establishes, explicitly or implicitly, fundamental principles of non-discrimination and equality, effective protection against violations, special protection for the most vulnerable, and a view of the human being as an active and informed participant in the public life of the State in which he or she resides and in decisions affecting him or her, rather than as a passive object of the authorities' decisions¹⁴⁶.

Similarly, all treaties based on these common principles are interdependent, interconnected, and mutually reinforcing, such that no right can be fully realized in

¹⁴⁵ibid

¹⁴⁶United Nations, UN Human Rights Treaty System: Office of the High Commissioner, 2012, p.12

isolation, but is contingent upon the full realization of all other rights. This interdependence is one of the reasons why the human rights treaty bodies are developing a more coordinated approach to their work, particularly by encouraging States parties to view the implementation of all these treaties' provisions as a single objective.

These treaties make no claim to be a comprehensive list of a State's human rights obligations. Numerous States, in addition to their membership in the United Nations human rights treaty system, are also signatories to regional human rights instruments, which may enlarge the protection available to individuals within their jurisdiction. Additionally, other treaties, such as the Convention relating to the Status of Refugees and ILO conventions, such as ILO Conventions No. 138 concerning the Minimum Age for Admission to Employment and No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, among others¹⁴⁷.

2.2.10.2 Development of the United Nations Human Rights Treaty System

Although the Universal Declaration of Human Rights was adopted more than 60 years ago and the International Bill of Human Rights (the Universal Declaration plus the two Covenants) was completed in 1966, the international human rights treaty system has continued to expand through the adoption of new instruments and the establishment of new treaty bodies. While the proliferation of instruments and bodies has increased the promotion and protection of human rights in a variety of specific areas of concern to the international community, it has also posed a significant

¹⁴⁷United Nations, UN Human Rights Treaty System: Office of the High Commissioner, *supra*, p. 18

challenge to the system: how to ensure that the various components of the expanding system work effectively together.

Since 2004, the human rights treaty body system has nearly doubled in size, with the establishment of four new bodies and three new optional protocols for individual complaints, one of which is already in force. Since the beginning of 2010, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families has seen an increase in membership, as has the Committee on the Rights of Persons with Disabilities and its Subcommittee on the Prevention of Torture¹⁴⁸.

2.2.11 Violations Children's Rights

The Convention on the Rights of the Child gives human rights a whole new dimension, and thus to new concepts that incorporate human rights, such as human security, sustainable human development, and good governance. To some extent, these new concepts revitalize and globalize older ones, such as democracy and the rule of law, collective security, and the four freedoms (liberty from fear, freedom from want, freedom of expression, and freedom of belief). All of these concepts, as well as the national, international, and universal values they represent, will be impacted by the expanded scope of children's rights¹⁴⁹.

The World Health Organization's original definition of child abuse is as follows:
'Child abuse or maltreatment encompasses all forms of physical and/or emotional ill

¹⁴⁸ibid, p. 40

¹⁴⁹Williams, J. The Convention on the Rights of the Child: Orientation and Conceptualization of Children's Rights Trias Pedagogica versus Transism JAN C. M. WILLEMS, 2007, p.1

treatment, sexual abuse, neglect or negligent treatment, as well as commercial or other exploitation, that result in actual or potential harm to the child's health, survival, development, or dignity in the context of a relationship of responsibility, trust, or power.' A more recent WHO definition reads as follows: 'Child maltreatment, also known as child abuse and neglect, encompasses all forms of physical and emotional abuse, sexual abuse, neglect, and exploitation that endanger the child's health, development, or dignity. Five subtypes of abuse can be distinguished within this broad definition: physical abuse; sexual abuse; neglect and negligent treatment; emotional abuse; and exploitation¹⁵⁰.

Child abuse, neglect, and exploitation affect approximately one in every ten children in the developed world, and many more in the developing world (think only of child labour or sale of children, lack of education, genital mutilation of girls and other harmful and traumatizing traditional practices). Due to the complexities of subtype definitions and severity ratings, as well as a variety of other factors, precise data on the extent of child abuse and neglect in developed and developing countries are unavailable. However, an increasing number of studies are being conducted. The data that we do have indicates a significant underestimation of the problem of child abuse and neglect¹⁵¹.

Over a third of adolescents in the Netherlands appear to have been subjected to child abuse in the form of severe psychological aggression by parents, domestic violence, perceived physical conflicts between parents, sexual abuse, and/or severe neglect at

¹⁵⁰ibid, p. 4

¹⁵¹ENGLISH, D. J. & the LONGSCAN Investigators, Modified Maltreatment Classification System, (MMCS), 1997 available at www.iprc.unc.edu/longscan

some point in their lives. In comparison to other studies, one might conclude that adolescents who participated in Pupils on Abuse tended to understate rather than overstate facts. As a result, it is not ruled out that the degree of child abuse estimated is somewhat conservative¹⁵².

UNICEF's *The State of the World's Children* publication provides annual statistics on child exploitation in the developing world. Other adverse childhood experiences are likely to be even more prevalent, affecting the lives and personal development of many more children in both the developing and developed worlds. Child Abuse and Neglect, as well as other preventable crimes in the developed world alone, adverse childhood experiences may affect one in four or even one in three children). Individual consequences are determined by the relative importance of risk and protective factors in a child's life. Poverty, poor mental health, and parental ignorance all pose serious risks to children¹⁵³.

However, there may be a variety of risks and protective factors present in children, their families, communities, and societies. While the ICCPR contains an article on children, it says nothing about creating the conditions necessary for everyone to be raised and educated in order to exercise their (civil and political) rights¹⁵⁴. More precisely, it makes no reference to children's (participatory) preparation for (democratic) citizenship or (responsible) parenthood. Additionally, the ICCPR provides for the protection of the 'family' (which we will define for the purposes of

¹⁵²According to a Dutch Study *Scholieren Over Mishandling Pupils on Abuse*, VU University Amsterdam & PI Research, Amsterdam Duiwendrecht, 2007, www.pi-research.nlwww.wodc.nl

¹⁵³which underlines the enormous importance of Articles 11, 12 and 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and Articles 18, para 2; 24, para 2 sub e and f; 24, para 3; 27, para 3; 28-29 and 39 CRC, *supra*

¹⁵⁴Article 24 of ICCPR, *supra*

this chapter as any non-institutional group unit in which children are raised). However, neither this article nor any other in the ICCPR addresses the social and educational infrastructure necessary to empower families and (thus) ensure healthy child development as a prerequisite for the enjoyment of (civil and political) rights¹⁵⁵.

The Child Rights Convention requires states to prioritize, promote, and protect the child's best interests, thereby emancipating their citizens and other inhabitants from transgenerational discrimination¹⁵⁶. As previously stated, the 'best interests of the child' is a legal concept that focuses on a child's well-being and healthy holistic development, or personality development, which includes participation in family, school, community, and society. Both children's parents and the state bear responsibilities in this regard (children, of course, to the extent that their capacities develop)¹⁵⁷.

States are also required by the CRC to empower parents and parents-to-be (see the proviso 'before and after birth' in the ninth preamble paragraph of the CRC, as well as Article 24, paragraph 2 sub d. Given that many, if not all, children's rights imply parental responsibilities, states must also be assumed to be obligated to specify these responsibilities in their national legal systems. The state's obligation to define parental rights and its obligation to empower parents and soon-to-be parents, in my opinion, point to the emergence of a new human right based on children's rights and other human rights.

¹⁵⁵Article 23, *ibid*

¹⁵⁶Article 3, para 1 CRC

¹⁵⁷Articles 18, para 2; 24, para 2, sub e and f; 27, para 3, *supra*

2.2.12 Origins of Children's Rights

Children's rights have evolved over time in response to changes in society, as well as advances in science and technology. One could argue that in the early twentieth century industrialized countries, there were no child protection standards. They were frequently forced to work alongside adults in unsanitary and dangerous conditions. Growing awareness of the injustices of their situation, fuelled by a better understanding of children's developmental needs, sparked a movement to improve their protection.

Following World War I, the protection-provision perspective on children's rights expanded into the international arena. It was not until 1924 that Jebb convinced the League of Nations to adopt the Geneva Declaration on the Rights of the Child¹⁵⁸. This declaration is brief, containing only five statements, but it establishes the notion that children should have certain types of "rights." They were not individual rights to "do" or "act" independently. Rather than that, they were "receiving" rights in the form of things that should be done for the child.

The Declaration establishes that all people owe children the right to development opportunities; special assistance in times of need; priority for relief; economic liberty and protection from exploitation; and an upbringing that instils social consciousness and responsibility. Five points summarized children's fundamental needs. The document addressed children's well-being and affirmed their right to development,

¹⁵⁸Eglantyne Jebb was a British social reformer who founded the Save the Children organisation at the end of the First World War to relieve the effects of famine in Austria-Hungary and Germany. She drafted the document that became the Declaration of the Rights of the Child, 1924

assistance, relief, and protection. Despite the fact that the document addressed certain fundamental rights, it lacked legal force¹⁵⁹.

After witnessing atrocities of war in which many children died, the Second World War sparked a new wave of interest in children's well-being. The United Nations General Assembly establishes UNICEF, the International Children's Emergency Fund, in 1946, with a focus on children worldwide. The United Nations General Assembly adopts the Universal Declaration of Human Rights, which provides for 'special care and assistance' and 'social protection' for mothers and children¹⁶⁰.

The United Nations General Assembly adopted the Declaration of the Rights of the Child in 1959, affirming that every child has the right to a "happy childhood." This declaration is also characterized by a provisional-protective view of children's rights predicated on the assumption of childhood dependency and vulnerability. Its language reflects the prevailing view of children at the time as "objects" in need of "services"; in other words, it made no reference to or support the child's individual right to participation¹⁶¹. Among other rights, the Declaration recognized children's rights to education, play, a supportive environment, and health care.

1966 The International Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights commit United Nations Member States to ensuring equal rights for all children, including education and protection. Concerned about women

¹⁵⁹<https://www.humanium.org/en/geneva-declaration/>

¹⁶⁰Article 25 of the Universal Declaration of Human Rights, 1948

¹⁶¹Cohen, C. P. United Nations Convention on the Rights of the Child: Developing international norms to create a new world for children. In K. Alaimo & B. Klug (Eds.), *Children as equals: Exploring the rights of the child*, 2002, pp. 49–72

and children's vulnerability in times of emergency and conflict, the General Assembly calls on Member States to adhere to the Declaration on the Protection of Women and Children in Times of Emergency and Armed Conflict. The Declaration prohibits attacks on or detention of civilian women and children and upholds the inviolability of women and children's rights during armed conflict.

The United Nations designated 1979 as the International Year of the Child in commemoration of the 1959 declaration's twentieth anniversary. As part of the celebration, a proposal was made to draft a new treaty on children's rights. Although the convention's drafting began that year, it was not completed until 1989, ten years later. The United Nations adopted some Standard Minimum Rules for the Administration of Juvenile Justice in 1985, outlining the principles underlying a justice system that prioritizes the child's best interests, including education and social services, as well as proportionate treatment of child detainees¹⁶².

In 1989, the United Nations General Assembly adopted the UN Convention on the Rights of the Child (CRC). The Convention has been widely hailed as a watershed moment in human rights history, recognizing children as social, economic, political, civil, and cultural actors. The Convention ensures and establishes minimum standards for the protection of children's rights in all capacities. UNICEF, which assisted in the Convention's drafting, is cited as a source of expertise in the document. Despite possible negative reactions, a large majority of the world's nations have now ratified the CRC, indicating their commitment to and defense of

¹⁶²<https://www.unicef.org/child-rights-convention/history-child-rights>

children's rights¹⁶³.

The CRC is the most comprehensive international convention, outlining children's political, civil, social, and economic rights¹⁶⁴. It places a premium on children's rights when it comes to decision-making processes that affect their lives. The CRC has broken records in every sense of the word, as evidenced by its unique characteristics: To begin, the Convention was signed by the largest number of signatories ever on the day of its signing ceremony in 1990. Second, the convention entered into force more quickly than any previous treaty on human rights. Third, it was universally ratified by 1997, making it the most ratified human rights treaty of all time. Finally, it is the only human rights instrument that encompasses civil/political, economic, social, cultural, and humanitarian rights.

Not only does the CRC affirm the child's right to be protected from harm and abuse, but also the child's right to childhood, to develop into an autonomous adult, and to have a voice in matters affecting and concerning the individual child. The CRC emphasizes that a child is a human being who has the right to be respected as a unique individual with his or her own perspective and personal intentions by other human beings as well as by the state, its institutions, and other organizations¹⁶⁵.

2.2.13 Scope of Children's Rights Violation

When the International Community adopted the United Nations Convention on the Rights of the Child in 1989, the majority of its members reached a consensus. The

¹⁶³Hart, R. A. Children's Participation: From Tokenism to Citizenship, *Innocenti Essays*, 4. Florence: UNICEF, 1992, p. 66

¹⁶⁴Ben-Arieh, A., Casas, F., Frønes, I., & Korbin, J. E. (Eds.). *Handbook of child well-being: Theories, methods and policies in global perspective*. Springer, 2014, p. 34

¹⁶⁵Krapmann, L. The weight of the child's view (Article 12 of the Convention on the Rights of the Child). *International Journal of Children's Rights*, 2010, pp. 501–513

pledge was to protect children regardless of their age, sex, religion, or nationality, and in any situation (status) (war or peace). Since that time, the child has been recognized as a person with rights. Children are a population segment that is more susceptible to aggressions provoked, in the majority of cases, by adults. As children, they are disproportionately affected by physical and psychological violence. They are defenseless victims who are subjected to abuse in their own homes, communities, and countries. Frequently, this violence is justified by cultural, ethnic, or religious conflicts.

Forcing a child to carry a weapon and kill, requiring him to work in extreme and hazardous conditions, attempting to undermine his physical and emotional integrity, or denying him the ability to express himself and denying him a freedom of choice, constitute grave violations of the child's rights and imply depriving him of a portion of his own life and opportunities to grow as a human being. Many of these children have been denied access to basic education and have suffered physical and psychological trauma, leaving them with irreversible scars for the rest of their lives¹⁶⁶.

Civilians made up 5% of the casualties in the First World War. This figure increased to 48% during World War II. Since 1990, 90% of conflict victims have been civilians, and 80% of those victims have been women and children. Over the last decade, 2 million children have been killed and 6 million have been seriously injured in armed conflicts¹⁶⁷. Children are the primary victims of bombs and mines in a

¹⁶⁶Save the Children Report on Protecting Children in Emergency, 2019, <https://resourcecentre.savethechildren.net/our-thematic-areas/child-protection>

¹⁶⁷United Nations Report on Children in Armed Conflicts, January 2008, p.7

conflict, accounting for nearly half of all victims of land mines and munitions. Living in a war zone puts children in a dangerous situation. Displacements result in uprooted children and, in many cases, complete separation from their families, further exposing them to all types of aggressions such as child trafficking, human trafficking, and kidnapping. It has been demonstrated that when a group of people is forced to flee their region or country, armed groups exploit the situation by recruiting children. This is demonstrated in the Sudanese Darfur region, Chad, and the Democratic Republic of the Congo¹⁶⁸.

It is difficult to estimate the global population of child soldiers¹⁶⁹. Children are recruited into armed forces (official or unofficial) in at least 86 countries and territories worldwide¹⁷⁰. Africa has the most child soldiers; however, this phenomenon also exists in Asia, the Middle East, Latin America (14,000 children fight in Colombia), and Europe. While the majority of child soldiers are between the ages of 14 and 18, many others are younger¹⁷¹.

It is critical to understand that when we refer to child soldiers, we also mean those recruited as cooks, doorkeepers, couriers, spies, or any other child who assists an armed group. As will be demonstrated later, girls are a particularly vulnerable group. They account for nearly half of all children involved in conflicts and are the primary targets of sexual exploitation. They suffer undesirable pregnancies, sexual transmission illnesses, psychological traumas, and rejection from their own families and communities as a result of their actions. Recruitment occurs either through

¹⁶⁸www.child-soldiers.org

¹⁶⁹2008 Child Soldier Global Report issued by the Coalition to Stop the Use of Child Soldiers

¹⁷⁰2008 Child Soldier Global Report issued by the Coalition to Stop the Use of Child Soldiers

¹⁷¹International Crisis Group, Five Priorities for a Peace building Strategy, 2009, p.78

coercion (children are threatened or kidnapped) or "voluntarily"; however, it is never voluntary. Numerous times, the child enlists simply to survive or to exact revenge on his family members who have been murdered during the conflict. To be recruited entails receiving protection, and in the majority of cases, the child has no other option. Children are forced to commit acts of violence against other children or even their own families over an extended period of time, such as initiation rites¹⁷².

They were raised with weapons in their hands and occasionally develop drug addictions. Due to the fact that they have spent their entire childhood fighting, many children find themselves completely lost when the conflict is over. Between April 2004 and October 2007, the following governments used child soldiers in armed conflicts: Chad, Democratic Republic of the Congo (DRC), Israel, Myanmar, Somalia, Sudan, Uganda, and Yemen. Apart from these countries, there are numerous others that engage in child recruitment, as has been the case in countries with guerrillas¹⁷³.

2.2.14 Right to Special Protection of Child

Children require extra protection because they are among society's most vulnerable members. They are reliant on others for care and protection, whether it is their parents and families or the state. As a result, state parties to the Convention on the Rights of the Child, as well as all states, must prioritize children's rights and have

¹⁷²Final Report of the Group of Experts on the DRC, UN Doc. S/2010/596, 29 November 2010, pp.56-60

¹⁷³2008 Child Soldier Global Report issued by the Coalition to Stop the Use of Child Soldiers. r Final Report of the Group of Experts on the DRC, UN Doc. S/2010/596, 29 November 2010. The Group of Experts on the DRC was established by Security Council Resolution 1533 in March 2004 to monitor implementation of sanctions imposed by the Security Council on the DRC in 2003. The sanctions regime (arms embargoes, travel bans and asset freezes) has since been regularly renewed and their applicability extended to include political and military leaders recruiting and using children and the targeting of women and children in armed conflict.

stated that the child's best interests must take precedence over all other considerations when it comes to any matter affecting him or her.

Children's rights have received special attention, as states have been required to ensure that every child has the right to: a name and nationality from birth; family care or parental care, or to appropriate alternative care when removed from the family environment; basic nutrition, shelter, health care, and social services; protection from maltreatment, neglect, abuse, or degradation; and protection from exploitative labour practices¹⁷⁴. Every child has a right to protection. Every child has the right to exist, to be safe, to belong, to be heard, to receive adequate care, and to grow up in a safe environment. A family is a child's first line of defence.

The primary responsibility for creating a protective and loving home rests with parents or other caregivers. Outside of the child's home, schools and communities are responsible for creating a safe and child-friendly environment. Regrettably, millions of children lack adequate protection. Every day, numerous children face violence, abuse, neglect, exploitation, exclusion, and/or discrimination. These types of violations jeopardize their ability to survive, thrive, and pursue their dreams¹⁷⁵.

Girls and boys alike should be encouraged and supported in their efforts to advocate for children's rights. Youth should take a proactive role in protecting themselves from abuse, violence, exploitation, and discrimination. Every child deserves the chance to grow up in a family. If a family is unable to care for the child, community authorities should address the underlying causes and make every effort to keep the

¹⁷⁴ Article 28 of the Convention on the Right of a Child, *supra*

¹⁷⁵ <https://www.unicef.org/child-rights-convention/child-rights-why-they-matter>

family intact.

There are multiple reasons for establishing a separate human rights convention for children's rights. Children are neither the parents' nor the state's property, nor are they merely developing individuals; they have equal status as members of the human family. Because of their vulnerability due to their inability to form rational judgments about their actions, they require protection from the law and society as they mature¹⁷⁶.

Children inherently rely on adults for the nurturing and guidance they require to develop into self-sufficient adults. While such nurture is best provided by adults in children's families, when primary adult caregivers are unable to meet children's needs, it is up to the State, as the primary duty bearer, to find a solution that is in the child's best interests. Government actions, or inactions, have a greater impact on children than on any other group in society. Almost every aspect of government policy – from education to public health – has an effect on children in some way. Policymaking that is short-sighted and fails to consider children has a negative effect on the future of all members of society¹⁷⁷.

C: A Need for Children's Views should be Heard and Considered in the Political Process

Children do not vote and have historically been excluded from political processes. Without paying special attention to children's opinions expressed at home and in school, in local communities, and even in government, children's perspectives on a

¹⁷⁶Article 10 of the Convention on the Rights of Child, *ibid*

¹⁷⁷Article 10 of the Convention on the Rights of Child, *op.cit*

variety of critical issues that affect them now or in the future go unheard. A myriad of societal changes has disproportionately negative impact on children. Some of them include globalization, climate change, digitalization, mass migration, shifting employment patterns, and a dwindling social safety net all have a significant impact on children in many countries. The consequences of these changes can be especially severe in times of armed conflict and other emergencies.

A child's healthy development is critical to a society's future well-being. Children are particularly vulnerable – more so than adults – to poor living conditions such as poverty, insufficient health care, nutrition, safe drinking water, and housing, as well as environmental pollution. Disease, malnutrition, and poverty all endanger children's futures and, by extension, the futures of the societies in which they live. In today's world, the costs of failing one's children are enormous. This is another reason why child protection should be prioritized as a vital right for children who represent the future generation. The findings of social research indicate that children's earliest experiences have a significant impact on their future development. Their developmental trajectory determines their lifetime contribution to, or cost to, society.

2.3 Theoretical Framework

2.3.1 The Biomedical Theory or Paradigm

Biomedical refers to the branch of medicine concerned with the application of biological sciences, particularly biochemistry, molecular biology, and genetics, to the diagnosis, treatment, and prevention of disease¹⁷⁸. The biomedical paradigm establishes fundamental assumptions about the context in which social workers

¹⁷⁸<https://www.thefreedictionary.com/biomedical>

practice in health care settings. Social work, health care, education, and youth work are all deeply entwined with the welfare, protection, and well-being of children.

Indeed, children have shaped the development of these occupations throughout history and cultural contexts. As social professions have become integrated into academic institutions, their knowledge base is based on a view of social advancement shaped by social and political policies aimed at preparing students for professional practice. The social professions have a multidisciplinary knowledge base; the critical disciplines of psychology and sociology underpin much of the professional knowledge about children and childhood represented in studies of child development and socialization¹⁷⁹.

Sociologists have developed novel approaches to our understanding of children and childhood in the last few decades. These new paradigms have called into question established representations and perspectives on children and childhood, recognizing children as autonomous social beings capable of comprehending and affecting their societies. This wave of scholarly activity examines the agency and social contexts of children's lives in contemporary society, as well as new cultural patterns of childhood¹⁸⁰.

The biomedical paradigm is fundamentally objectivist in its epistemology. Objectivism emphasizes the importance of reason and objectivity in the acquisition and production of knowledge. The biomedical paradigm's appeal stems from its assumption of rationalist moral neutrality, which emphasizes logic over values.

¹⁷⁹Van Ktwyk, T. & Ashcroft, R., *Social Work in Public Health*, 2016, VOL. 31, NO. 3, 140–152
<http://dx.doi.org/10.1080/19371918.2015.1087918>

¹⁸⁰Lock, M., & Nguyen, V. K. *An anthropology of biomedicine*. West Sussex, England: Wiley-Blackwell, 2010

Objectivism presupposes the existence of "meaning and meaningful reality independent of the operation of any consciousness. According to this perspective, truth is constantly being unearthed. Objectivity makes no allowance for unpredictability and is suspicious of subjectivity, which is assumed to have the ability to distort perceptions and obstruct the grasp of absolute truth¹⁸¹.

The biomedical paradigm, on the other hand, cannot be morally or socially neutral because the assumptions underlying the development of technologies and practices reflect prevalent social, political, and cultural values, biochemistry, molecular biology, and genetics to the understanding, treatment, and prevention of disease¹⁸². The biomedical paradigm reflects a binary view of health and illness, defining health in terms of disease presence or absence. It defines disease as "an identifiable, treatable, and curable entity."¹⁸³ Diseases are defined by naturalistic indicators such as blood pressure and heart rate, rather than by broader or subjective descriptors such as feeling healthy.

The biomedical paradigm establishes a well-defined scientific framework for comprehending disease processes and therapeutic mechanisms, and it excels at treating infectious diseases and acute or traumatic injuries. Biomedicine excels at emergency care... and is capable of curing a wide variety of conditions with single, identifiable causes¹⁸⁴. It takes a rational approach to health and illness, believing that

¹⁸¹Crotty, M. *The foundations of social research: Meaning and perspective in the research process*. Thousand Oaks, CA: Sage, 1998, p. 8

¹⁸²Lock, M., & Nguyen, V. K. *supra*

¹⁸³Longino, C., & Murphy, J. *The old age challenge to the biomedical model: Paradigm strain and health policy*. Amityville, NY: Baywood Publishing, 1995, p. 2

¹⁸⁴Cohen, M. *Complementary & alternative medicine: Legal boundaries and regulatory perspectives*. Baltimore, MD: Johns Hopkins University Press, 1999, p. 2

by doing everything correctly, sickness can be avoided¹⁸⁵. What qualifies as a disease or illness occurs "as a result of particular practices embedded in particular historical, political, social, and technological relationships."¹⁸⁶

The biomedical paradigm presupposes that illness has universal characteristics regardless of the individual. Thus, the concept of normalcy is critical in determining one's health status. If no physiological indicators exist, it is assumed that no disease exists. The biomedical paradigm addresses mental health issues insofar as it acknowledges physiological explanations for mental health problems, such as insufficient biochemical levels¹⁸⁷.

2.3.2 The Theory of Resilience in War-Affected Children and Adolescents

Armed conflict has resulted in the death of millions of soldiers and civilians worldwide. War has destroyed countries' political systems, social structures, and infrastructure, as well as having a detrimental effect on survivors' physical, socioemotional, and psychological functioning. Children, the most vulnerable group of survivors, have been harmed in a variety of ways, including through maiming, sexual assault, abduction, forced military recruitment, psychological trauma, and denial of humanitarian assistance. In 2006, the Office of the Secretary-Special General's Representative for Children and Armed Conflict reported that over 250,000 children had been exploited as soldiers. Children have been recruited, trained, and exploited throughout the world as combatants, suicide bombers, and/or spies in countries such as Afghanistan, Pakistan, Somalia, and the Central African

¹⁸⁵Kirmayer, L. Mind and body as metaphors: Hidden values in biomedicine. In M. Lock & D. Gordon (Eds.), *Biomedicine examined* (pp. 57–93). Dordrecht, The Netherlands: Kluwer Academic Publishers, 1988

¹⁸⁶Lock & Nguyen, *supra*, p. 33

¹⁸⁷Brunton, D. *Health and wellness in the 19th century*. Oxford, England: Greenwood, 2014

Republic, among others¹⁸⁸.

A traumatic stressor, according to the American Psychiatric Association, is a stressor that jeopardizes an individual's physical and/or psychological health and well-being. These stressors are frequently associated with adverse traumatic events (physical, sexual, or emotional), as well as subjective feelings of fear and powerlessness. Exposure to and participation in war are extremely traumatic experiences that may include sexual or physical abuse, torture, mass murder, the destruction of homes and other infrastructure, family loss, and economic insecurity¹⁸⁹. PTSD is a term that refers to the maladaptive psychological response to intense traumatic events. PTSD is defined by intrusive and distressing memories of the incident, as well as somatic symptoms such as sweating and increased heart rate, recurrent feelings of anger, and avoidance or withdrawal symptoms¹⁹⁰.

Studies examining the resilient outcomes of war-related adversity appear to address the aforementioned PTSD research inadequacies. Masten defines a resilient outcome as "the positive socio-emotional and psychological adjustment that occurs in the face of extreme environmental stressors."¹⁹¹ The research on resilience and resilient outcomes focuses on the protective and recovery mechanisms that underpin successful socioemotional adaptation following trauma exposure. Thus, advocates of resilience research appear to shift the focus away from the negative consequences of

¹⁸⁸United Nations Children of Armed Conflict, 2013, Retrieved from <http://childrenandarmedconflict.un.org/>.

¹⁸⁹Peltonen, K. and Punamaki, R-L. Preventive intervention among children exposed to trauma of armed conflict: A literature review. *Aggressive Behaviour* 36:, 2010, 95–116, DOI: <https://doi.org/10.1002/ab.20334>

¹⁹⁰Peltonen, L. & Punamaki, R. L., *ibid*

¹⁹¹Masten, A. S. Ordinary magic. Resilience processes in development. *American Psychologist* 56, 2001, pp. 227–238, DOI

war and toward positive health outcomes¹⁹².

Both theoretical and empirical research has been conducted on the construct of resilience. Recognizing the heterogeneity of resilience conceptualizations over time, we attempted to synthesize the most frequently cited antecedents, defining resilience's attributes and consequences. Adversity (disruptive and/or difficult life events or circumstances) is the primary factor that contributes to resilience. The defining or context-independent characteristics of resilience identified by Earvolino include the ability to recover or restore the individual's life prior to adversity, a strong belief in oneself, determination and positive expectations, adaptability to changing circumstances, and the presence of at least one positive relationship¹⁹³. Typically, a resilient outcome is defined as one that involves successful coping, recovery, and positive adaptation.

2.3.3 The Theory of Social Exclusion as a Cause of Violent Conflict

Social exclusion theory is concerned with the structural dimensions of poverty and social marginality: exclusion is the systematic process of being cut off from decision-makers and the resulting sense of powerlessness. The concept originated in Europe in the 1980s and provides a more comprehensive view of social disadvantage than the purely economic aspects of poverty. Exclusion can take the form of social, political, cultural, or emotional exclusion. These factors frequently interact: racial minorities are frequently economically disadvantaged in addition to being marginalized politically and culturally (which, of course, serves to maintain their

¹⁹²Laursen, K. E. Strength-based practice with children in trouble. *Reclaiming Children and Youth* 9(2), 2000, pp. 70–75

¹⁹³Earvolino-Ramirez, M. Resilience: Concept analysis. *Nursing Forum* 42(4), 2007, pp. 73–82

economic disadvantage)¹⁹⁴.

Social exclusion is inextricably linked to violent conflict and insecurity, both in terms of causes and consequences. There are now compelling arguments that certain forms of social exclusion contribute to the emergence of conflict. This may include civil unrest, armed conflict, and terrorist activity. Extremely disadvantaged groups with common characteristics (such as ethnic origin or religion) may resort to violent conflict to assert their rights and redress inequalities. Although group distinctions alone are insufficient to spark conflict, social exclusion and horizontal inequalities provide fertile ground for violent mobilization. As a result, the concept of social exclusion can aid in conflict resolution by elucidating several of the root causes of conflict.

By examining why some societies with severe horizontal inequalities experience conflict while others do not, it has become clear that conflict most frequently occurs when socioeconomic and political horizontal inequalities are combined. Acknowledging exclusion and inequality, then, can be a critical first step for international development practitioners interested in preventing and resolving conflict in fragile states.

The socially excluded are typically economically impoverished and lack political power. Due to their economic circumstances, they appear to have little to gain by engaging in violent action; indeed, some may gain employment in rebel armies, while others are likely to be sanctioned for looting and other illicit gains. However,

¹⁹⁴Social Aspect off Epidemiology,
http://www.med.uottawa.ca/courses/epi6181/course_outline/Sociology_Social_Exclusion.htm

these gains are easily exaggerated. Many suffer losses as a result of the insecurity that affects their families and communities, the economic disruptions that result, the loss of the few services they did have access to, and so forth. Indeed, we know from country studies and econometric analysis that, on balance, society suffers from conflict, with the poor typically suffering proportionately or more than proportionately¹⁹⁵.

In Aceh, Mindanao, Southern Thailand, East Timor, Northern Ireland, Sri Lanka, Sierra Leone, and the Sudan, the aggregate costs of war are high in the short run for the poor and excluded, despite well-documented benefits for some. However, there may be enough individuals, particularly among young men, who anticipate gains in respect and status in addition to material gain to welcome conflict solely for this reason. More importantly, to the extent that those who are socially excluded associate with a cultural or religious group, which they frequently do, this group affinity can serve as a powerful source of mobilization in situations where members of the group face significant multiple disadvantages¹⁹⁶.

While peaceful mobilization through marches, strikes, and demonstrations may be the first step, if this has no effect or if governments violently respond to such protests, groups may resort to violence. Cultural differences alone are insufficient to cause conflict, as evidenced by the numerous peaceful multicultural societies that exist today and throughout history. However, when combined with severe group

¹⁹⁵Keen, D. Sierra Leone: war and its functions. In F. Stewart & V. Fitzgerald (Eds.), *War and Under development*, Vol. 1. Oxford: OUP, 2001

¹⁹⁶Keen, D. 2014. *ibid*

deprivation, cultural ties can be a powerful mobilizing force¹⁹⁷. As Cohen stated, men can and do make fun of or mock the strange and bizarre customs of men from other ethnic groups, simply because these customs are different from their own. They do not, however, fight over such disparities.

2.3.4 A Social Constructionist Theory or Approach

Social constructionism is a school of thought that asserts that characteristics previously believed to be immutable and solely biological, such as gender, race, class, ability, and sexuality, are the result of human definition and interpretation shaped by cultural and historical contexts. As such, social constructionism elucidates how cultural categories such as "men," "women," "black," and "white" are constructed, altered, and reproduced over time within institutions and culture¹⁹⁸.

This is not to say that bodily variation exists between individuals, but rather that we create categories based on certain bodily characteristics, assign meaning to these categories, and then classify individuals based on their bodies or bodily characteristics. Individuals with any African ancestor, regardless of appearance, are considered black under the one-drop rule. By contrast, in Brazil, where many people of African ancestry are considered white, racial conceptualization and thus racial categories are different. This demonstrates how identity categories are constructed not solely on the basis of biological characteristics, but also on the basis of assumed social perceptions and meanings¹⁹⁹. Categories are not "natural" or unchanging, and

¹⁹⁷Fearon, J. and D. Laitin, 'Explaining interethnic cooperation', *The American Political Science Review*, 90, 4, 1996, pp. 715-735

¹⁹⁸McNamee, S., & Gergen, K. J. *Therapy as social construction*, London, Sage, 1992, p. 8, retrieved from t: <https://www.researchgate.net/publication/283547838>

¹⁹⁹McNamee, S. & Gergen, K. J., *ibid*

the boundaries that surround them are constantly shifting; they are contested and redefined throughout history and across societies. Thus, the social constructionist perspective is concerned with the meaning that is constructed through the definition and categorization of groups of people, experiences, and reality in cultural contexts²⁰⁰.

Social constructionist perspectives on the world cast doubt on the essentialist or biological determinist understandings that typically underpin the author's "common sense" views on race, gender, and sexuality. Essentialism is the belief that the characteristics of individuals or groups are strongly influenced by biological factors and, as a result, are largely consistent across human cultures and historical periods²⁰¹.

Essentialism's central premise is that "a given truth is a necessary natural component of the individual and object in question." In other words, an essentialist view of sexuality would argue that not only do all people have sexual orientations, but that sexual orientations do not vary across time or space. In this instance, "sexual orientation" is a "truth" that is assumed to be inherent, biologically determined, and essential to an individual's being. Essentialism, on the other hand, is frequently based on a biological determinist theory of identity. Biological determinism is a broad theory that asserts that a group's social, political, and economic destiny is determined by its biological or genetic makeup. For instance, "sex" is frequently regarded as a biological "fact," in which bodies are classified as male or female. These bodies are

²⁰⁰ibid

²⁰¹Gergen, K.J. An invitation to social constructionism. London: Sage, 1999, p. 23, retrieved from: <https://www.researchgate.net/publication/283547838>

presumed to have "sex"-specific chromosomes, reproductive systems, hormone levels, and sex characteristics²⁰².

However, the term "sex" has been defined in a variety of ways, depending on the context. For instance, in the late nineteenth and early twentieth centuries, "when reproductive function was regarded as an essential characteristic of women," the medical community determined that the presence or absence of ovaries was the ultimate criterion of sex²⁰³. Thus, sexual differentiation was fostered by the hetero normative premise that women are defined by their ability to bear children. Rather than classifying individuals as male or female based on the presence or absence of ovaries, medical practitioners in the contemporary United States typically classify individuals as male or female based on the appearance of genitalia²⁰⁴.

2.3.5 Choice of Concepts and Theories

The theoretical and conceptual framework elucidates the research's path and firmly grounds it in theoretical constructs. The two frameworks' overall goal is to increase the meaning of research findings, to make them more acceptable to the theoretical constructs in the research field, and to ensure generalizability. They contribute to research stimulation while ensuring knowledge expansion by providing both direction and impetus to the research inquiry. Additionally, they contribute to the empiricism and rigor of a study. Thus, it is not hyperbole to assert that both the theoretical and conceptual frameworks of a study give it life²⁰⁵.

²⁰²Gergen, K. K., *ibid*

²⁰³Greenberg, J. E. Gross EA. Multiple punctate pits in a 27-year-old woman. *Arch Dermatol*, PMID: 12437461, 2002

²⁰⁴Greenberg, J. *ibid*, from t: <https://www.researchgate.net/publication/283547838>

²⁰⁵Imenda, S. Is There a Conceptual Difference Between Conceptual and Theoretical Frameworks? *Journal of Social Science*, 38(2):185-195, 2014

The theoretical framework is a critical component of the research process, but it is frequently overlooked in doctoral coursework. Iqbal referred to the struggle to define and prepare the dissertation's theoretical framework as "the most difficult but not impossible part of the proposal." As professors and members of dissertation committees for doctoral students in education, policy, leadership, curriculum and instruction, and social work, we have heard students' express confusion, a lack of knowledge, and frustration with the difficulty of selecting a theoretical framework and understanding how to apply it throughout the dissertation²⁰⁶.

Theories are developed to explain, predict, and comprehend phenomena, and frequently to challenge and extend existing knowledge within the constraints of critical bounding assumptions. The theoretical framework is the framework within which a research study's theory can be contained or supported. The theoretical framework introduces and describes the theory that accounts for the existence of the research problem²⁰⁷. The theoretical framework presented above is made up of concepts and, along with their definitions and references to pertinent scholarly literature, existing theory on child protection in armed conflict zones. The theoretical framework demonstrates an understanding of relevant theories and concepts to the study's subject and to the broader areas of knowledge discussed. The theoretical framework was developed by reviewing course readings and pertinent research studies for relevant theories and analytic models to the research problem that guided this study. The appropriateness, ease of application, and explanatory power of a

²⁰⁶Iqbal, J. Learning from a doctoral research project: Structure and content of a research proposal. *The Electronic Journal of Business Research Methods*, 5(1),11–20, 2007, p. 17

²⁰⁷Gabriel, A., The Meaning of Theory." *Sociological Theory* 26, 2008, pp. 173–199

theory have all been factors in its selection.

The selection of a theoretical framework necessitated a thorough understanding of the preceding study's problem, purpose, significance, and research questions. This is critical because when the selection is done incorrectly, it is as if the researcher is using the incorrect bolt to forcefully fix the incorrect nut. According to Grant and Osanloo, the chosen theoretical framework should emphasize the study dissertation's purpose and significance²⁰⁸. To choose an appropriate theoretical context, the researcher considers the study's guiding principles and situates the problem within them. The study's research questions and purpose entail significant aspects of the theoretical framework and corroborate the assertions made by the selected theory's theorists.

The author of this study was guided by Grant and Osanloo's questions designed to assist researchers in identifying a suitable theoretical framework for their research inquiry. These include the following: what discipline will the theory be applied to? ; does the theory agree with the methodology plan for the study? ; is the theory to be chosen well developed with numerous theoretical constructs? ; have specific concepts or theoretical principles been chosen to meet the study's objectives? ; does the study's problem, purpose, and significance correlate with the theoretical framework? Can the theory be used in conjunction with the study's research questions? Is the literature review informed by the theoretical framework? Is the data analysis strategy consistent with the theoretical framework chosen? Does the

²⁰⁸Grant, C. & Osanloo, A. Understanding, Selecting, and Integrating a Theoretical Framework in Dissertation Research: Creating the Blueprint for 'House'. *Administrative Issues Journal: Connecting Education, Practice and Research*, Pp. 12-22 DOI: 10.5929/2014, p.29

theoretical framework underpin the data-driven conclusions and recommendations?²⁰⁹

2.4 Conclusion

This Chapter has discussed in detail the theoretical and conceptual frameworks underlying child protection in armed conflict zones. It has provided sufficient justifications for why their inclusion in this study is necessary because they contribute to the study's quality. Additionally, it has thoroughly explained the meanings of the two frameworks, the distinct roles they play in the research process, their differences, how they are constructed, and the locations in this thesis where they must be presented. Because protection of anything requires legislation to strengthen it, this chapter presentation enables the author to discuss some international and African regional legal frameworks governing the protection of children's rights during armed conflicts in the following chapter.

²⁰⁹Grant, C. & Osanloo, A., *ibid*

CHAPTER THREE

INTERNATIONAL AND REGIONAL LEGAL FRAMEWORKS FOR PROTECTION OF CHILDREN'S RIGHTS IN ARMED CONFLICTS

3.1 Introduction

Worldwide, child abuse and exploitation have become a growing concern. Child involvement in war in areas of armed conflict jeopardizes children's protection and infringes on their rights to survival, development, and participation. Given children's unique vulnerability, numerous international UN and regional instruments²¹⁰ establish a series of rules providing them with special protection. Children who are directly involved in hostilities retain their special protection. This chapter discusses international and regional legal instruments and action plans designed to safeguard child victims of armed conflict.

3.2 International Legal Frameworks

Children are on the frontlines of conflicts throughout the world, where they suffer a horribly diminished life as a result of war's impact. Some are targeted due to their ethnic origin, while others are targeted due to their religion; young girls are raped or abducted by armed groups. International law, developed over decades, demonstrates that the international community understands the critical nature of child protection in times of conflict.

3.2.1 Protection of Children in Armed Conflicts

Children's protection in armed conflict has always been a top priority on the international political agenda. The legal and policy frameworks governing child

²¹⁰the Geneva Conventions of 1949 (hereafter GCIII and GCIV) and their Additional Protocols of 1977 (API and APII)

rights protection are best understood by internalizing the extent to which international law, international humanitarian law, international human rights instruments, regional instruments, and municipal instruments governing children's rights worldwide complement one another. It was erroneous to assume that international law could be relied upon to combat and resolve hostilities that engulf children worldwide. To more effectively protect children's rights during armed conflicts, it was necessary to abandon Napoleon's approach to international law, which stated, 'I will conquer first, and then let the lawyers find an excuse.'

International law should be able to adapt to the changing nature of these conflicts in the modern era. Thus, international humanitarian law encompassed two areas: protection of those who were not or were no longer engaged in combat; and restrictions on the means of warfare – specifically, weapons – and methods of warfare, such as military tactics. By disguising combatants as members of the general population, modern war tactics sought to obscure the distinction between those who fight and those who do not. On the other hand, the majority of internal armed conflicts in various states were conducted on a tribal or zonal basis, as in the DRC, with anyone outside that tribe or zone considered an enemy. As a result, the percentage of civilian casualties in armed conflicts has been steadily increasing since World War I.

Only about 5% of all casualties in World War I were civilians. This figure increased to approximately 50% during World War II. Around 80% of casualties in the Vietnam War were estimated to be civilians. Between 1945 and 1982, the majority

of the 20 million people killed in 150 armed conflicts were women and children²¹¹. They participate in hostilities in two ways: indirectly by transporting food and ammunition, or directly by becoming members of the opposing forces. International humanitarian law regulates armed conflicts and is divided into two categories: international armed conflict and non-international armed conflict. These were examined in detail to ascertain the extent to which international humanitarian law's protection of children's rights had been applied in various types of armed conflicts worldwide, and in the DRC in particular.

International law pertaining to children's rights was derived from a variety of instruments, some of which have universal application, regional instruments, and national legal frameworks that all complement one another in promoting and protecting child entitlements. The international legal framework discussed in this chapter primarily focused on principles applicable to children and those that were universally applicable to all segments of the global community. The text examined children's international status and the rights associated with it in general and during armed conflict, whether international or internal in nature.

As discussed in other sections of this chapter, the Security Council had a special working group that annually focused on the most serious violations of children's rights in armed conflict: recruitment and use of children by armed forces or armed groups, child killing and maiming, rape and sexual violence, abduction, attacks on

²¹¹UNICEF, 'Children in situations of Armed Conflict' Unpolished Paper for the Executive Board 16-170 (1986). See, Krill, F. (1986). The United Nations Convention on the Rights of the Child and his protection in armed conflict. *Mennesker og Rettigheter*, 4, 39.; Singer, S. (1986). The protection of children during armed conflict situations. *International Review of the Red Cross Archive*, 26(252), 133-168.; UNICEF., United Nations. Office of the Special Representative of the Secretary-General for Children, & Armed Conflict. (2009). *Machel study 10-year strategic review: Children and conflict in a changing world*. UNICEF

schools and hospitals, and parties to armed conflict denying humanitarian access²¹².

In comparison to the development of international law governing international armed conflict, the regulation of internal armed conflicts lags behind, despite the fact that the issue of protecting civilians in internal armed conflicts was raised for the first time in 1758. De Vattel (1758) proposed that the sovereign was obligated to follow the laws of war when engaging in combat with subjects who had taken up arms against him²¹³. However, it was not until the mid-twentieth century that states recognized the possibility of using international instruments to resolve non-international conflicts.

This section discussed in detail all pertinent documents within the international legal framework for the protection of children in armed conflict. These were summarized as follows: 'Geneva Convention on the Protection of Civilian Persons During Times of War, Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts²¹⁴, Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts, Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflict²¹⁵

²¹²Security Council, *Resolution 1988 (2011)*, UN document S/RES/1988 (2011), 12 July 2011

²¹³De Vattel, *Le Droit des Gens ou Principes du Droit naturel*, 1785 (Edition Carnegie 1916) in 1900 the Institute of International law drafted a code regulating civil war (See De Vattel, *Le Droit des Gens ou Principes du Droit naturel*, 1785 (Edition Carnegie 1916) in 1900 the Institute of International law drafted a code regulating civil war)

²¹⁴(Geneva Convention IV), adopted in 1949 (see. International Committee of the Red Cross. (1949). *The Geneva Conventions of August 12, 1949*. International committee of the Red Cross)

²¹⁵(Protocol I), adopted in 1977 (See Protocol, I. (1977). Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts. *Opened for signature on, 12.*)

The Convention on the Rights of the Child (CRC), adopted in 1989, the African Charter on the Rights and Welfare of the Child (ACRWC)²¹⁶, adopted in 1990, the Rome Statute of the International Criminal Court²¹⁷, the Convention on the Prohibition and Immediate Elimination of the Worst Forms of Child Labour²¹⁸, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC), adopted in 2000, and the Principles and Guidelines on the Rights and Welfare of Children

International law governing children's rights is primarily concerned with two branches of public international law: International Human Rights Law and International Humanitarian Law. Historically, international public law made a distinction between international humanitarian law and international human rights law when it came to war and armed conflict. This distinction was made for substantive reasons: international humanitarian law applied only during times of war or armed conflict, whereas international human rights law applied prior to, during, and after a war or armed conflict.

While the distinction was useful for practical purposes, it should not be construed as implying that international humanitarian law excludes human rights. On the contrary, a substantial portion of international humanitarian law incorporated fundamental human rights, and specific international humanitarian law treaties emphasized the fact that these human rights applied during war or armed conflict.

²¹⁶(Protocol II), adopted in 1977 (See Protocol, II. (1977). to the Geneva Conventions International Committee of the Red Cross (ICRC). Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (*Protocol II*), 8.)

²¹⁷(Rome Statute), adopted in 1998 (See Hwang, P. (1998). Defining crimes against humanity in the Rome Statute of the International Criminal Court. *Fordham Int'l LJ*, 22, 457.)

²¹⁸(ILO Convention 182), adopted in 1999 (See ILO, N. (1999). Observation (CEACR)-adopted 2011, published 101st ILC session (2012). In *Worst Forms of Child Labour Convention* (No. 182)

We could make a distinction between two categories of human rights: those that are applicable in general, that is, during times of war and peace, and those that contain provisions that are specifically applicable during times of war or armed conflict.

However, in presenting the international legal framework for the protection of children in armed conflict, the study followed the traditional sequence of analysing international humanitarian law first, followed by international human rights law, where the study discussed the role and significance of the CRC and the OPAC, as well as some references to the ACRWC and ILO Convention 182, to emphasize and drive home the point that 'Everyone—including every child—whose right to life is at stake'

Despite numerous international human rights and humanitarian provisions protecting children in armed conflict, the sobering and frequently shocking reality was that these children were still far too frequently the victims of grave human rights violations. The Secretary-General's 2011 global report contains a sobering overview of ongoing and new violations of children's rights. For example, in 15 of the report's 22 areas of armed conflict, schools have been targeted by armed forces and armed groups, including through forced recruitment and closure. Afghan warlords employ so-called "baccha baazi" (dancing boys) who were coerced into dancing at parties and subjected to sexual abuse. Al-Qaida in Iraq used children known as "birds of paradise" to carry out suicide attacks²¹⁹. According to other reports, children frequently face disproportionately high levels of victimization at the hands of armed

²¹⁹General Assembly/Security Council, *Children and armed conflict: Report of the Secretary-General*, UN document A/65/820-S/2011/250, 23 April 2011 (See, Doek, J. (2011). The international legal framework for the protection of children in armed conflict. *Legal Opinion Paper*.)

forces and armed groups²²⁰. The shocking reality is that atrocities against children committed during armed conflict far exceed our wildest imagination. From 1998 to the time of the study, the Eastern province of the DRC was not immune to these heinous atrocities and violations of children's rights.

3.2.2 Instruments on International Humanitarian Law

International humanitarian law was formerly referred to as the law of war or armed conflict. To better understand international humanitarian law, it was necessary to provide a more detailed definition of this concept. International humanitarian law was a set of rules aimed at mitigating the effects of armed conflict for humanitarian reasons. It safeguarded individuals who were not or were no longer engaged in hostilities and regulated the means and methods of warfare. International humanitarian law was a subset of international law, which was the collection of rules that governed States' relations²²¹.

International law was contained in treaties or conventions between states, in customary rules, which were considered legally binding by states, and in general principles. Armed conflicts are governed by international humanitarian law. It did not regulate whether a State could actually use force; that was governed by a significant but separate body of international law codified in the United Nations Charter.

²²⁰Human Rights Council, Human rights in Palestine and other occupied Arab territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN document A/HRC/12/48, 25 September 2009 (see, Goldstone, R. (2009). Human rights in Palestine and other occupied Arab territories: Report of the United Nations fact finding mission on the Gaza conflict.)

²²¹ICRC, Legal Protection of Children in Armed Conflict, ICRC Publications, 2003

The four 1949 Geneva Conventions contained a significant portion of international humanitarian law. Almost every State on the planet had agreed to abide by them²²². The Conventions had been developed and supplemented by two additional agreements: the 1977 Additional Protocols on the protection of victims of armed conflict. Other accords prohibited the use of specific weapons and military tactics and provided protection for specific groups of people and goods. These agreements included the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict, as well as its two protocols; the 1972 Biological Weapons Convention; the 1980 Conventional Weapons Convention and its five protocols; the 1993 Chemical Weapons Convention; the 1997 Ottawa Convention on anti-personnel mines; and the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict²²³.

Numerous provisions of international humanitarian law were now accepted as customary law, that is, as universally binding rules on all States. International humanitarian law was limited to armed conflict; it did not apply to internal tensions or disturbances, such as isolated acts of violence. The law took effect only after a conflict began, and then applied equally to all parties regardless of who initiated the conflict. International humanitarian law established a distinction between international and intra-state armed conflict. International armed conflicts were defined as those involving at least two states. They were governed by a variety of rules, including those contained in the four Geneva Conventions and Additional Protocol I. Non-international armed conflicts were those confined to a single State's

²²²Article 27 – 34 of the Geneva Convention, 1949 (GCIV)

²²³ICRC, *supra*

territory, involving either regular armed forces battling groups of armed dissidents or armed groups battling one another²²⁴.

Internal armed conflicts are governed by a more limited set of rules, which were incorporated into the four Geneva Conventions and Additional Protocol II²²⁵. It was critical to distinguish international humanitarian law from human rights law. While some of their rules overlapped, these two bodies of law developed independently and were incorporated into distinct treaties. Unlike international humanitarian law, human rights law applies in peacetime, and many of its provisions should be suspended during armed conflict.

International humanitarian law protects those who were not directly involved in the fighting, such as civilians, medical personnel, and religious personnel. Additionally, it protected those who had ceased participation, including wounded, shipwrecked, and sick combatants, as well as prisoners of war. These categories of people are entitled to be treated with dignity and to have their physical and mental integrity protected. Additionally, they benefited from legal protections. They should be protected and treated humanely in all circumstances. More precisely, it was forbidden to kill or wound an enemy who surrendered or was rendered incapable of fighting; the sick and wounded should be collected and cared for by the party in power. Protect medical personnel, supplies, hospitals, and ambulances²²⁶.

²²⁴Gasser, H. P., *International Humanitarian Law and Protection of war Victims*, Geneva/Paul Haupt Publishers, Bern, 1998

²²⁵Article 3 of the Geneva Convention, *ibid*

²²⁶Gasser, H.P., *Ibid*

Additionally, there were detailed rules governing the detention of prisoners of war and the treatment of civilians while under the authority of an enemy power. This included food, shelter, and medical care, as well as the right to communicate with their families. The law established a number of easily identifiable symbols that could be used to identify protected individuals, places, and things. The Red Cross, the Red Crescent, and symbols identifying cultural property and civil defence facilities were the primary emblems.

International humanitarian law prohibits all means and methods of warfare that: failed to distinguish between combatants and non-combatants, such as civilians, with the objective of protecting the civilian population, individual civilians, and civilian property; caused unnecessary injury or suffering; or caused severe or long-term environmental damage. As a result of this, humanitarian law prohibited the use of a variety of weapons, including exploding bullets, chemical and biological weapons, blinding laser weapons, and anti-personnel mines.

Whether or not international humanitarian law was actually adhered to on a global scale remains a matter of fact and law. Regrettably, there were numerous instances of violations of international humanitarian law in the Democratic Republic of the Congo and several other war-torn regions of the world. Civilians are increasingly becoming the victims of war. However, there were significant instances where international humanitarian law played a role in protecting civilians, detainees, the sick, and the wounded, as well as in limiting the use of barbaric weapons. Given that this body of law is applicable during times of extreme violence, enforcing it would always be a difficult task. Having said that, achieving effective compliance remains

as critical as ever.

3.2.3 Provisions of the Geneva Convention IV

Geneva Convention IV was the first international instrument to explicitly provide for the protection of children during armed conflict following World War II. Parties to a conflict are required to "take all necessary measures to ensure that children under the age of fifteen who are orphaned or separated from their families as a result of war are not left to fend for themselves" and to "facilitate their reception in a neutral country for the duration of the conflict." Additionally, children younger than 12 should "be identified by the wearing of identity discs."²²⁷

A similar provision exists in the convention relating to children in occupied territories, with the explicit prohibition of altering the child's personal status or enlisting them in the occupying power's organizations. Families, particularly parents and children, should remain together during internment²²⁸, and "expectant and nursing mothers, as well as children under the age of fifteen, should be provided with additional food."²²⁹ However, no child-specific provisions were included in the articles dealing with the implementation of penal laws in occupied territories or in Chapter IX, dealing with penal and disciplinary sanctions²³⁰.

It should be noted that the Geneva Convention IV's provisions on child protection apply only to international armed conflict. According to Article 2, "the present

²²⁷Article 24 of the Geneva Convention IV, *supra*

²²⁸Article 50 of the GCIV, *ibid*

²²⁹Article 89, *ibid*

²³⁰Articles 117–126, See also, Doek, J. The international legal framework for the protection of children in armed conflict. *Legal Opinion Paper*, 2011, Diaz, S. J. Failing the Refugee Child: Gaps in the Refugee Convention relating to Children. *Geo. J. Gender & L.*, 20, 2018, p. 605.

Convention shall apply to all instances of declared war or other armed conflict between two or more of the High Contracting Parties." Although Article 3 contained some fundamental provisions for non-international armed conflict, it lacked child protection provisions.

3.2.3.1 General Protection

In the event of an international armed conflict, children who are not combatants are protected under GCIV's civilian protection provisions and Additional Protocols²³¹. They are protected by the fundamental guarantees contained in these treaties, including the right to life, the prohibitions on coercion, corporal punishment, torture, collective punishment, and retaliation²³², as well as the rules of Additional Protocol I on hostilities, which include both the principle of distinguishing civilians from combatants and the prohibition on attacks against civilians²³³. Children are also protected by the fundamental guarantees for persons not directly involved in hostilities in non-international armed conflict²³⁴. Additionally, they are protected by the principle that «the civilian population as a whole, as well as specific civilians, shall not be attacked²³⁵.

3.2.3.2 Special Protection

Although the Geneva Convention - IV provides for special protection of children, it is AP-I that establishes the principle of special protection: Children shall be treated with particular regard and shall be protected from all forms of indecent assault. They

²³¹ Additional Protocols I & II of 1977

²³² Article 27-34 GCIV and Art. 75 Additional Protocol I

²³³ Article 48 and 51 of the Additional Protocol I, *ibid*

²³⁴ Article 3 common to the GC and Article 4 Additional Protocol II of 1977

²³⁵ Article 13 AP-II, *ibid*

shall receive the care and assistance they require, whether due to their age or for any other reason²³⁶. This principle also applies to armed conflict on a non-international scale²³⁷. The provisions establishing this protection are as follows: In times of peace, the High Contracting Parties and, if necessary, the Parties thereto, may establish hospital and safety zones and localities organized to protect wounded, sick, and elderly persons, children under the age of fifteen, expectant mothers, and mothers of children under the age of seven from the effects of war on their own territory and, if necessary, in occupied areas. Following the outbreak of hostilities and throughout their duration, the Parties concerned may reach agreements on mutual recognition of the zones and localities they have established. They may do so by implementing the provisions of the Draft Agreement annexed to this Convention, subject to any amendments they deem necessary²³⁸.

Children whose parents died prior to the outbreak of hostilities may be assumed to be already protected by other family members or, if they have also died, by the State. Similarly, where children are separated from their families not as a result of the war but for other reasons, such as a civil or criminal law decision, they will be cared for under the social welfare measures established in accordance with the State's general laws²³⁹. Where children lose their natural protectors as a result of a war event, the Convention requires the country in which they reside to take the necessary measures to facilitate their maintenance, education, and religious exercise in all circumstances.

²³⁶Article 77 of the Geneva Convention – IV, *ibid*

²³⁷Article 4, para 3 of the Additional Protocol – II, *supra* (AP-II)

²³⁸Art. 24-26 of the GCIV, *supra*

²³⁹*ibid*

The Convention does not specify the measures to be taken, and as a result, the Parties to the conflict will have considerable discretion; they will take whatever measures seem most appropriate in light of the circumstances prevailing in their territory. Maintenance of the children in question entails their feeding, clothing, and housing, as well as health care and, when necessary, medical and hospital treatment²⁴⁰.

Additionally, all protected persons under the age of eighteen are exempt from compulsory labour. It is applicable to all types of work authorized by the Convention and should be included in the list of preferential measures in favour of children and protected persons who are minors, as young people must be protected by permanently prohibiting such regrettable actions as forcible enlistment of children and adolescents and their compulsory employment in jobs that are frequently beyond their physical capacity and, in any case, separate them from their parents. Protected persons may be compelled to work only to the extent that they are nationals of the conflicting party whose territory they are on²⁴¹.

With the cooperation of national and local authorities, the Occupying Power shall facilitate the proper functioning of all institutions dedicated to the care and education of children. The Occupying Power shall take all necessary measures to facilitate child identification and parentage registration. It may not alter their personal status in any way, nor may it enlist them in formations or organizations subordinate to it. If local institutions are insufficient for this purpose, the Occupying Power shall arrange

²⁴⁰ Article 49, para 3, also Article 50 and 82 of the GCIV, *ibid*

²⁴¹ Article 51, para 2, of the GCIV, *ibid*

for the maintenance and education, if possible, of children who have been orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a close relative or friend²⁴².

3.2.3.3 Protection Regarding Participation in Hostilities

Children are involved in armed hostilities far too frequently. This involvement can range from assisting combatants (delivering weapons and munitions, conducting reconnaissance missions, etc.) to recruiting children as combatants in national armed forces and other armed groups. The Additional Protocols of 1977 were the first international treaties to address such issues. Thus, API requires States to take all reasonably practicable measures to prevent children under the age of 15 from directly participating in hostilities. It expressly prohibits their recruitment into the armed forces and encourages Parties to give priority to the oldest when recruiting those aged 15 to 18²⁴³.

AP-II goes further by prohibiting both the recruitment and participation – direct or indirect – of children under the age of 15 in hostilities²⁴⁴. Despite the foregoing, children who directly participate in international armed conflict are recognized as combatants and are entitled to prisoner-of-war status under GC-III in the event of their capture. The Additional Protocols provide for privileged treatment of child combatants under the age of 15, ensuring that they continue to benefit from the special protection accorded to children under international humanitarian law²⁴⁵.

²⁴²Article 76, para, 5, *ibid*

²⁴³Article 77, *ibid*

²⁴⁴Article 4, para, 3c, *ibid*

²⁴⁵Art. 77, para. 3; API and Art. 4, para. 3d of the AP-II

3.2.4 The Paris Principles, 2007

The principles were developed by and for a broad range of actors, including states (both affected and donor governments), human rights actors, humanitarian actors, development actors, military and security actors (state and non-state), associated organizations such as UN agencies, other intergovernmental actors, national and international organizations, and community-based organizations. While some of these actors had a specific mandate or role in relation to children, they all had a role to play and shared accountability for the rights and well-being of children associated with armed forces²⁴⁶.

The Paris Principles were a seminal document in the field of child protection during armed conflict²⁴⁷. Chapter 1 could be viewed as a discussion of international humanitarian law. Chapter six focused on preventing the unlawful recruitment or use of children, while chapter seven addressed the release and reintegration of child soldiers and children involved in armed conflict in general. UNICEF launched a global review of the "Cape Town Principles and Best Practices on the Prevention of Child Recruitment into Armed Forces and on the Demobilization and Social Reintegration of Child Soldiers in Africa" nearly a decade after they were adopted²⁴⁸.

²⁴⁶<https://www.unicef.org/mali/media/1561/file/ParisPrinciples.pdf>, visited October 16th 2021

²⁴⁷The Paris Principles can be considered as an update of the Cape Town Principles on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa, which was adopted in 1997. See, UNICEF. (1997). Cape Town Principles and Best Practices Adopted at the Symposium on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa (Cape Town, 27–30 April 1997).

²⁴⁸The Cape Town Principles, were adopted in 1997 as the result of a symposium organised by UNICEF and the NGO Working Group on the Convention on the Rights on the Child to develop strategies for preventing recruitment of children, demobilising child soldiers and helping them to reintegrate into society. <http://www.nuhanovicfoundation.org/en/legal-instruments/cape-town-principles-and-best-practices/>

The principles gained widespread acceptance beyond this initial group, becoming a critical instrument for informing the development of international standards and policy shifts at the national, regional, and international levels. The document was adopted at a 2007 conference in Paris²⁴⁹ and had been endorsed by 95 states as of September 2010. It was questioned why the energy and time invested in this document had not been used to secure the UN General Assembly's adoption of the Paris Principles. The resulting document would be more authoritative and morally binding than one adopted at a conference and endorsed by less than half of UN member states.

According to these principles, it is critical to prioritize the release of children from armed forces or armed groups, their reintegration, and the prevention of recruitment and re-recruitment. Actions in this area must not be conditional or contingent on the progress of peace processes in any way. All measures aimed at ensuring the release of children, their protection, and the prevention of child recruitment shall be guided by the children's best interests²⁵⁰. Additionally, the principles establish that recruitment prevention, release, protection, and reintegration are all interdependent and indivisible. Efforts to find long-term solutions to child recruitment or use by armed forces or armed groups, as well as to prevent future occurrences, should include all children affected by armed conflict and address other egregious violations of children's rights under applicable international law or national law of the countries affected.

²⁴⁹Government of France and UNICEF, "Conférence internationale consacrée aux enfants associés aux groupes et forces armés: Libérons les enfants de la guerre", Paris, 5–6 February 2007. (See, Doek, J. (2011). The international legal framework for the protection of children in armed conflict. *Legal Opinion Paper*.)

²⁵⁰Principle 3 of the Paris Principle, 2007

Concerning the treatment of those accused of violating children's rights, the principles have established procedures for their prosecution. It is stipulated that all individuals suspected of committing crimes against children under international law should be given special consideration in post-conflict or transitional justice mechanisms. No amnesty should be granted for violations of international law, including those committed against children, in any peace or cease-fire agreement²⁵¹.

Children charged with international crimes allegedly committed while associated with armed forces or armed groups should be viewed as victims of international law violations, not as perpetrators. They must be treated in accordance with international law within a framework of restorative justice and social rehabilitation, in accordance with international law's numerous agreements and principles that provide special protection for children. Alternatives to judicial proceedings must be sought whenever possible, in accordance with the Child Rights Convention and other international standards for juvenile justice²⁵². Children's rights are violated when they are recruited or used illegally; consequently, preventive activities must be conducted on a continuous basis. The release, protection, and reintegration of children who have been recruited or used unlawfully must always be sought unconditionally and must not be contingent on any concurrent release or demobilisation process for adults. Where formal disarmament, demobilization, and reintegration (DDR) processes are taking place, special consideration should be given to children.

²⁵¹Principle 3, *ibid*

²⁵²1967 International Covenant on Civil and Political Rights, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") GA Res. 40/33 (1985); United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines") U.N. Doc. A/45/49 (1990)

However, the absence of a formal DDR process should not preclude efforts to secure the release of children held captive by armed forces or armed groups. These actions may necessitate or involve separate negotiations with armed forces or armed groups that are unrelated to the broader agenda engendered by security reform or other formal negotiation processes²⁵³. As a result, where armed forces or armed groups have illegally recruited or used children, advocacy efforts carried out in accordance with respective mandates should guard against securing benefits from such unlawful recruitment or use during peace negotiations and security sector reforms.

3.2.5 The Convention on the Rights of the Child, 1989

The Child Rights Convention (CRC) was adopted in 1989 and has been ratified by all states except the United States of America and Somalia. The CRC was considered a core UN Human Rights Convention because it guaranteed children's fundamental rights and freedoms while also taking into account their vulnerability and the need for special assistance and protection. The CRC may be regarded as the bedrock of the international framework for the protection of all children affected by armed conflict.

Article 38 of the CRC, which prohibits the recruitment and use of children in armed conflicts, bears a direct relationship to this protection. The OPAC had upgraded the standards in this section. According to the Convention, "States Parties shall respect and ensure the rights set forth in this Convention to each child within their jurisdiction without regard for any form of discrimination."²⁵⁴ A provision similar to

²⁵³ Principle 3.12 of the Paris Principle, *supra*

²⁵⁴ Article 2, of the CRC, *supra*

this one can be found in the African Charter on the Rights and Welfare of Children (ACRWC)²⁵⁵.

In war-torn countries and regions, children who were or were actively involved as child soldiers or in disarmament, demobilization, and reintegration programs received considerable attention. However, the CRC was much more than a child protection human rights convention. The recognition of the child as a human rights holder was reflected in provisions such as the one requiring a child to exercise their rights in accordance with their "evolving capacities."²⁵⁶ Additionally, States Parties shall ensure that any child capable of forming his or her own views has the right to freely express those views in all matters affecting the child, with the child's views given due weight in accordance with the child's age and maturity²⁵⁷.

In Geneva, the United Nations Committee on the Rights of the Child was composed of 18 independent experts. All states that ratified the Convention were required to submit periodic reports to the Committee on its implementation. Initial reports were due two years after the CRC was ratified, and progress reports were due every five years. The Optional Protocols used a similar system of reporting. The initial reports on the OP's were due two years after ratification, but ,thereafter, information on their implementation was to be included in periodic CRC reports – except for States that had not ratified the CRC, which would then report on the OP every five years (USA

²⁵⁵ Article 3 of the African Charter on the Rights and Welfare of the Child (ACRWC), 2012

²⁵⁶ See Article 5 of CRC, see, Kamchedzera, G. A Commentary on the United Nations Convention on the Rights of the Child, Article 5: The Child's Right to Appropriate Direction and Guidance. Martinus Nijhoff Publishers, 2012

²⁵⁷ Article 12 of the CRC, *supra*

had ratified the two OP) CSOs and children themselves had the option of submitting supplementary reports to the Committee, supplementing the state's information.

The Committee on the Rights of the Child had issued detailed guidance on how these rights should be implemented. All children, including those affected by armed conflict, should be provided with "meaningful" opportunities to exercise their right to freedom of expression, which "relates to the right to hold and express opinions, as well as the right to seek and receive information through any media,"²⁵⁸ as well as their right to freedom of association and peaceful assembly, such as through the formation of student organizations. Children should be viewed not only as objects of protection, but also as individuals capable of effecting change through their exercise of human rights. Their participation in truth and reconciliation commissions in Liberia, Sierra Leone, and South Africa are examples of this²⁵⁹.

Other rights, such as the right to have a birth registered and given a name, the right to acquire a nationality, and the right to know and be cared for by one's parents, were also critical for the protection of children affected by armed conflicts²⁶⁰. While birth registration may appear to be a minor administrative matter, it was critical for child protection. Children without birth certificates were particularly vulnerable to recruitment by armed forces or armed groups that appear to understand the value of birth registration, as evidenced by their attacks on or paralysis of the civil

²⁵⁸UN. (2009). Committee on the Rights of the Child: General Comment No 12: The Right of the Child to be Heard (CRC/C/GC/12).19.

²⁵⁹For further information see Parmar, S., Roseman, M. J., Siegrist, S., & Sowa, T. (Eds.). (2010). *Children and transitional justice: truth-telling, accountability and reconciliation* (Vol. 2). *Harvard University Press*.

²⁶⁰Article 7 of the CRC, *ibid*

registration system and destruction of birth records²⁶¹.

The first human rights imperative for protecting children in armed conflict was to prohibit their recruitment or use in armed forces or armed groups completely and effectively. Recovery and reintegration of children affected by armed conflict was a critical component of the provisions for their protection. However, it should be noted that international humanitarian law lacks specific provisions for the recovery and reintegration of children. This reflects its applicability during armed conflict, although attention should and could also be paid to recovery and reintegration during such conflicts.

The CRC omitted specific provisions on the recovery and reintegration of children affected by armed conflicts, instead requiring states parties to "respect and ensure respect for the rules of international humanitarian law applicable to them in armed conflicts involving children" and "take all feasible measures to ensure that persons under the age of fifteen years do not take a direct part in hostilities."²⁶² Nonetheless, recovery and reintegration are a human rights imperative as a result of states parties' obligation to "ensure to the maximum extent possible the child's survival and development."²⁶³

It was crystal clear what states parties were required to do: ensure that all children were effectively protected against all forms of physical, sexual, or other forms of

²⁶¹Ziemele, I. (2007). Article 7: the right to birth registration, name and nationality and the right to know and be cared for by parents (Vol. 7). *Martinus Nijhoff Publishers*.

²⁶²Article 38 of the CRC, *ibid*

²⁶³Article 6 of the CRC, *ibid*

violence, abuse, or exploitation²⁶⁴ in all circumstances, including armed conflict; and implement critical rights for children's survival and development, such as the right to the highest attainable standard of health²⁶⁵, the right to social security²⁶⁶, and the right to an adequate standard of living²⁶⁷ the right to education²⁶⁸ and the right to rest and leisure and to engage in play and in recreational and cultural activities²⁶⁹. While the obligations are clear, meeting them has not been easy. This was especially true in states that were experiencing or recovering from armed conflict.

The Committee on the Rights of the Child made repeated recommendations to states parties to develop and implement a comprehensive national policy or plan for the CRC's implementation²⁷⁰. Implementing this recommendation may be impossible in states embroiled in armed conflict, such as the DRC. However, as part of the process of recovery from armed conflict, it was critical to design and implement a national plan that included as many children as possible and took a child rights-based approach to addressing the numerous problems faced by children affected by armed conflict.

This national recovery and reintegration plan should include the following components: 'Restoration of access to high-quality education and health care

²⁶⁴Specific attention to violence against children in armed conflict was not given in UN report on violence against children. See: Pinheiro, P. S. World report on violence against children. United Nations, 2006; Nduwimana, F. , United Nations Security Council Resolution 1325 (2000) on Women, Peace and Security

²⁶⁵Article 24 of the CRC, *ibid*

²⁶⁶Article 26, *ibid*

²⁶⁷Article 27, *ibid*

²⁶⁸Article 28, *ibid*

²⁶⁹Article 31, *ibid*

²⁷⁰Shackel, R. (2003). The United Nations Convention on the Rights of the Child-A Review of Its Successes and Future Directions. *Austl. Int'l LJ*, 21.); Comment, C. G. 5, 'General measures of implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6)', *UN doc. CRC/GC/2003/5*, para 29.; and Shackel, R. (2003). The United Nations Convention on the Rights of the Child-A Review of Its Successes and Future Directions. *Austl. Int'l LJ*, 21.

services, as well as measures to promote family reunification; programs for the recovery and reintegration of not only children associated with armed forces or armed groups, but also all children affected by armed conflict, with a particular emphasis on girls, disabled children, and displaced children; and an effective process of (translated)

3.2.6 The Optional Protocol to the Convention on the Rights of the Child

The Optional Protocol to the United Nations Convention on the Rights of the Child on the Involvement of Children in Armed Conflict was adopted in 2000 and came into force in 2002. The Optional Protocol to the Convention on the Rights of the Child on the Commercialization of Children, Child Prostitution, and Child Pornography was adopted in 2000 and came into force in 2002. While the CRC establishes a strong foundation for the recovery and reintegration of children affected by armed conflicts, certain provisions of the optional protocol involve children in armed conflict to a greater extent.

States parties must provide, as necessary, "all appropriate assistance for their physical and psychological recovery and social reintegration"²⁷¹ for children recruited or used in hostilities in violation of the OPAC. Notably, this obligation did not apply to all children affected by armed conflict; however, as argued in the preceding section, this was covered by the CRC's obligations. The protocol includes critical provisions relating to international cooperation and solidarity²⁷².

²⁷¹ Article 6 of the Optional Protocol to the Convention on the Right of a Child, *supra*

²⁷² Article 7, *ibid*

To begin, it anticipated states parties cooperating in the recovery and reintegration of children referred to in Article 6, including through technical assistance and financial assistance. Assistance and cooperation would be provided in consultation with the relevant States Parties and international organizations.

States Parties that are able to do so should provide assistance through existing multilateral, bilateral, or other programs, or through a voluntary fund established in accordance with the General Assembly's rules. Whatever the rules, there was no evidence of any attempt to establish a voluntary fund of this type. However, such a fund could provide additional resources for supporting communities in creating conditions for the recovery and social reintegration of all children affected by armed conflict, as well as for individual support, particularly for children who are mentally or physically disabled as a result of armed conflict²⁷³.

3.2.7 The Standards on Recruitment and use of Children

Preventing child recruitment and use in armed conflict was the primary objective of international efforts to protect children²⁷⁴. There was a substantial body of reports, books, and articles containing information about child recruitment practices, the trauma experienced by children involved in armed conflict, whether as child soldiers or in other capacities, and efforts to demobilize and reintegrate these children. International law contains a variety of standards governing the recruitment and use of children in armed conflicts, and for the purposes of this study, we will discuss the five most important ones in the following order:

²⁷³Coomaraswamy, R. The optional protocol to the convention on the rights of the child on the involvement of children in armed conflict—towards universal ratification. *The International Journal of Children's Rights*, 18(4), 2010, pp. 535-549

²⁷⁴<https://childrenandarmedconflict.un.org/six-grave-violations/child-soldiers/>

The prohibition on recruiting children under the age of 15 and their direct involvement in hostilities, which is applicable to all states parties to the Protocols²⁷⁵; The prohibition and elimination of forced or compulsory recruitment of children (all persons under the age of 18) for use in armed conflict, which is applicable to all states parties to the ILO Convention²⁷⁶; The prohibition of children participating directly in hostilities and their compulsory recruitment into armed forces or armed groups, which is applicable to all states parties to the OPAC. Additionally, the prohibition on voluntary recruitment of children by armed groups and children under the age of 16 for armed forces, which is applicable to all state parties to the OPAC; and the prohibition on children's direct participation in hostilities and recruitment, which is applicable to states parties to the ACRWC.

3.2.7.1 The First Standard

This was implemented in 1977 and 1989, following the adoption of the Convention on the Rights of the Child²⁷⁷. Attempts to strengthen Standard 1 during the CRC's drafting process failed²⁷⁸. However, upon the CRC's entry into force and the establishment of the Committee on the Rights of the Child, it devoted its first day of general discussion to children involved in armed conflict. This discussion had a far-reaching effect. The United Nations undertook a global study in response to the Committee on the Rights of the Child's recommendation, which resulted in the Graça

²⁷⁵Protocols I and II and the CRC

²⁷⁶ILO Convention, No. 182

²⁷⁷Article 77 of Protocol I and Article 4 of Protocol II of 1977 and incorporated in Article 38 of the CRC

²⁷⁸Detrick, S., et al., *The United Nations Convention on the Rights of the Child: a guide to the "travaux préparatoires"*. Martinus Nijhoff Publishers.; and *Legislative History II. Legislative History of the Convention on the Rights of the Child, Volume II, 2007*, pp. 775–99

Machel report in 1996²⁷⁹ and the appointment of the Special Representative of the Secretary-General for Children and Armed Conflict.

Additionally, the United Nations Commission on Human Rights established an open-ended working group in 1994 (resolution 1994/91)²⁸⁰ to draft an optional protocol to the CRC on the involvement of children in armed conflict. The Committee on the Rights of the Child presented this group with a draft text for this protocol²⁸¹. The General Assembly adopted the final text of the OPAC on 25 May 2000, and it entered into force on 12 February 2002.

3.2.7.2 The Second Standard

This could be viewed as the initial international step toward bolstering Standard 1. Almost every state that was a party to ILO Convention 182 was also a party to the CRC. They had committed "themselves to the prohibition and abolition of forced and compulsory recruitment of all" individuals under the age of 18, without making a distinction between armed forces and armed groups.

3.2.7.3 The Third and Fourth Standards

These were critical components of the international legal framework applicable to the OPAC's 132 member states. The Committee on the Rights of the Child monitors the OPAC's implementation using reports from states parties and information obtained from other sources. It had issued guidelines directing states parties to

²⁷⁹Machel, G. Impact of Armed Conflict on Children. Report of the expert of the Secretary-General, Ms. Graça Machel, submitted pursuant to General Assembly resolution 48/157, 1996, from. gopher.un.org

²⁸⁰Helle, D. Optional Protocol on the involvement of children in armed conflict to the Convention on the Rights of the Child. *International Review of the Red Cross*, 82(839), 2000, pp. 797-823

²⁸¹McSweeney, K. A. The potential for enforcement of the United Nations Convention on the Rights of the Child: The need to improve the information base. *BC Int'l & Comp. L. Rev.*, 16, 1993, p. 467

submit information to the Committee on the Rights of the Child²⁸². The phrase "direct participation in hostilities," which was to be found in Article 1 of the OPAC, should be interpreted broadly to include other military activities and functions such as spying, sabotage, acting as decoys, couriers, and porters, and assisting military checkpoints.

There were two distinct standards for recruitment: one for armed groups and another for the armed forces. Armed groups were prohibited from recruiting children in any form²⁸³. Compulsory recruitment into the armed forces was also prohibited, but voluntary recruitment is permitted under certain conditions. The minimum age for voluntary recruitment was set at 16, with the expectation that states parties would raise it further²⁸⁴. When reviewing the OPAC's implementation, the Committee on the Rights of the Child expressed concern that the recruitment or use of children in violation of the OPAC's provisions was frequently limited to a provision in military law, without these violations being explicitly criminalized.

As a result, and in accordance with the provisions of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography (OPSC), the Committee recommended that states parties: 'Include in their legislation that violations of the rules governing recruitment and use of children in armed conflicts constitute crimes, along with appropriate severe penalties, in order to establish extraterritorial jurisdiction for these crimes—at the

²⁸²Coomaraswamy, R. The optional protocol to the convention on the rights of the child on the involvement of children in armed conflict—towards universal ratification. *The International Journal of Children's Rights*, 18(4), 2010, pp. 535-549

²⁸³Article 4 OPAC, supra

²⁸⁴Article 3 OPAC, ibid

very least in cases where they occur²⁸⁵.

3.2.7.4 The Fifth Standard

This standard was applicable only to African states, but it was the most radical because it prohibited the recruitment (voluntary or compulsory) or use of children in armed conflict without exception. It should be noted that the ACRWC defines a child as "any human being under the age of 18 years"²⁸⁶ and without the exception found in the CRC²⁸⁷, "unless the child reaches majority earlier under the applicable law." It was, in a nutshell, the highest standard and was also referred to as the "straight-18 standard." It was remarkable and encouraging that this standard applied to a continent that had endured and continues to endure armed conflict.

3.2.8 The Third Optional Protocol (OP3) to the Convention on the Rights of the Child

A significant new development in terms of the right to an effective remedy was the drafting of the Third Optional Protocol to the CRC, which established a communications procedure or, in more child-friendly language, a protocol for submitting complaints to the Committee on the Rights of the Child. The General Assembly adopted and opened for signature, ratification, and accession this protocol²⁸⁸ in 2011, and it entered into force on 14 April 2014. The Third Optional Protocol establishes a mechanism for children affected by war to lodge complaints regarding their right to recovery and reintegration.

²⁸⁵ *Article 5 of the OPSC*

²⁸⁶ *Article 2 of the ACRWC, supra*

²⁸⁷ *Article 1 of the CRC, supra*

²⁸⁸ *General Assembly resolution A/RES/66/138 of 19 December 2011*

Additionally, complaints may be filed regarding the recruitment and use of children aged 15 or older in violation of the OPAC's provisions, thus filling a gap in the Rome Statute, albeit in a very limited way. The Third Optional Protocol was a critical addition to the remedy toolkit because it allows the Committee on the Rights of the Child to consider a complaint even if all domestic remedies had not been exhausted and the application of remedies (at the national level) was unreasonably prolonged or unlikely to result in effective reparation²⁸⁹.

The Third Optional Protocol establishes a Communications Procedure to provide a mechanism for children to lodge complaints about violations of their rights on an international level. This means that children whose rights have been violated may approach the Committee on the Rights of the Child with complaints. The Committee will then conduct an investigation into the complaint, determine whether a violation occurred, and make specific recommendations to the State Party. These recommendations may include monetary restitution, rehabilitative measures, or criminal prosecution of the perpetrators²⁹⁰.

Along with responding to complaints from individual children or their representatives, OP3 empowers the Committee to conduct proactive investigations into States. Any individual or non-governmental organization may submit to the Committee information about systematic violations of children's rights in a country that has ratified the Protocol. The Committee may then conduct an analysis of the

²⁸⁹Article 7 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 2014

²⁹⁰Article 8 of the OP3, *ibid*

information and initiate an investigation into the State, which may include an extraordinary visit (however, only on allowance of the State). Once again, the Committee will be limited to making recommendations for resolving the violations²⁹¹.

3.3 International Legal Frameworks of Protection of Children's Rights in Armed Conflicts

The trend toward the development of regional standards began with the adoption of the European Convention on Human Rights in 1950; the American Convention on Human Rights in 1967; and the African Charter on Human and Peoples' Rights in 1981. The current study is limited to describing their salient characteristics in terms of protecting children's rights during armed conflict. Regional protection of the child's rights has thus far played a critical role in supplementing other global human rights instruments.

3.3.1 Treaties on Human Rights

A treaty is a formally signed and validated agreement between states that establishes specific rules for how the state will conduct its affairs on a specific subject. Individual states sign and agree on treaties on an ad hoc basis. The following are some of the most significant international human rights treaties²⁹².

3.3.1.1 The Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights was the first comprehensive statement of the fundamental rights and liberties to which all human beings are entitled. The

²⁹¹Article 13, *ibid*

²⁹²<https://www.humanrightscommission.ky/human-rights-treaties>

Universal Declaration of Human Rights (UDHR) is a watershed moment in human rights history. The Declaration, which was drafted by representatives from all regions of the world with varying legal and cultural backgrounds, was proclaimed by the United Nations General Assembly in Paris in 1948 as a universal standard of achievement for all peoples and nations²⁹³.

It establishes for the first time universal protection for fundamental human rights and has been translated into over 500 languages. The UDHR is widely credited with inspiring and paving the way for the adoption of over seventy human rights treaties that are still in force on a permanent basis at the global and regional levels today (all containing references to it in their preambles). The General Assembly proclaimed the Universal Declaration of Human Rights as a universal standard of achievement for all peoples and nations, with the intent that every individual and every organ of society, with this Declaration constantly in mind, shall strive through teaching and education to promote respect for these rights and freedoms, and through progressive national and international measures to ensure their universal and effective recognition and observance, both among themselves and among future generations²⁹⁴.

3.3.1.2 The Genocide Convention, 1948

The United Nations adopted the Convention on the Prevention and Punishment of Genocide in an effort to prevent atrocities such as the Holocaust from occurring again. The Convention defines genocide as a crime. After considering the United

²⁹³The General Assembly resolution Number 217 A, 1948

²⁹⁴Preamble to the Universal Declaration of Human Rights, *supra*

Nations General Assembly's declaration²⁹⁵ that genocide is a crime under international law, contrary to the United Nations' spirit and purposes, and condemned by the civilized world, the Contracting Parties confirm that genocide, whether committed in times of peace or war, is a crime under international law that they undertake to prevent and punish²⁹⁶.

In the present Convention, genocide is defined as any of the following acts committed with the intent of completely or partially destroying a national, ethnic, racial, or religious group: (a) Murdering members of the group; (b) Inflicting serious bodily or mental harm on members of the group; (c) Inflicting on the group conditions of life calculated to result in its physical destruction in whole or in part; (d) Imposing measures designed to prevent births within the group; and (e) Forcibly transferring children of the group to another group²⁹⁷.

3.3.1.3 The Refugee Convention, 1951

The Convention Relating to the Status of Refugees safeguards the rights of individuals who are compelled to flee their home country due to fear of persecution for specified reasons. The 1951 Refugee Convention and its 1967 Protocol are the foundational legal documents that govern the world's treatment of refugees. They define the term 'refugee' and outline the rights of refugees, as well as the legal obligations of States to protect them. They have 149 State parties to either or both²⁹⁸. The Convention is a status-based and rights-based instrument that is founded on a

²⁹⁵in its resolution 96 (I) dated 11 December 1946

²⁹⁶Article I of the Genocide Convention, 1951

²⁹⁷Article II of the Genocide Convention, *ibid*

²⁹⁸Article 1 of the Refugee Convention, 1951

number of fundamental principles, most notably non-discrimination, non-penalization, and non-refoulement. For example, convention provisions must be applied without regard for race, religion, or country of origin. International human rights law developments also reinforce the principle that the Convention must be applied without regard for sex, age, disability, sexual orientation, or any other prohibited ground of discrimination²⁹⁹.

3.3.1.4 Discrimination in Employment Convention, 1960

The International Labour Organization's Discrimination (Employment and Occupation) Convention (No. 111) prohibits workplace discrimination on a variety of grounds, including race, gender, religion, political opinion, and social origin. The Convention requires signatories to establish and align national policies to ensure equal treatment and opportunity. This includes, but is not limited to, close collaboration with labour and employer organizations and the promotion of educational programs. The ILO's Committee of Experts monitors the Convention's implementation³⁰⁰.

3.3.1.5 The Racial Discrimination Convention, 1966

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) requires states to take measures to prohibit racial discrimination and foster inter-racial understanding. Under this convention, the term "racial discrimination" refers to any distinction, exclusion, restriction, or preference

²⁹⁹Article 3 of the Refugees Convention, *ibid*

³⁰⁰[https://gsphub.eu/conventions/Discrimination%20\(Employment%20and%20Occupation\)%20Convention,%201958%20\(No.%20111\)](https://gsphub.eu/conventions/Discrimination%20(Employment%20and%20Occupation)%20Convention,%201958%20(No.%20111))

based on race, colour, descent, or national or ethnic origin that has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise of human rights and fundamental freedoms on an equal footing in the political, economic, social, cultural, or other spheres of public life³⁰¹.

3.3.1.6 The Economic, Social and Cultural Rights Covenant, 1966

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) protects economic, social, and cultural rights such as the right to an adequate standard of living, education, work, healthcare, and social security. The ICESCR and ICCPR (described below) complement the Universal Declaration of Human Rights by imposing binding obligations on state parties. According to the convention, all peoples have the right to self-determination. They have the right to freely determine their political status and to pursue economic, social, and cultural development as a result of that right³⁰².

3.3.1.7 The Civil and Political Rights Covenant, 1966

The International Covenant on Civil and Political Rights (ICCPR) protects human rights such as the right to vote, the right to association, the right to a fair trial, the right to privacy, and the right to religious freedom. The ICCPR's First Optional Protocol establishes a mechanism for individuals to lodge complaints about alleged violations of their rights. The Second Optional Protocol addresses the death penalty's abolition³⁰³.

³⁰¹ Article 1 the Racial Discrimination Convention, 1966

³⁰² Article 1 The Economic, Social and Cultural Rights Covenant, 1966

³⁰³ <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

3.3.1.8 The Discrimination against Women Convention, 1979

Under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), states are required to take steps to end discrimination against women and to ensure that women have the same access to human rights as men in a variety of areas, including education, employment, health care, and family life. The Optional Protocol establishes a procedure for lodging grievances. The term "discrimination against women" refers to any distinction, exclusion, or restriction made on the basis of sex that has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, regardless of their marital status, on the basis of gender equality, of human rights and fundamental freedoms in the political, economic, social, cultural, or civil spheres³⁰⁴.

3.3.1.9 The Convention against Torture, 1984

The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) is a global treaty aimed at preventing torture. It obligates states to take measures to end torture within their borders. Additionally, it prohibits states from sending a person to a country where he or she would face torture. The term "torture" refers to any act that intentionally inflicts severe pain or suffering on a person, whether physical or mental, for the purpose of eliciting information or a confession from him or a third person, punishing him or a third person for an act he or a third person has committed or is suspected of having committed, intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is It excludes pain and suffering caused solely by,

³⁰⁴ Article 1 of the Discrimination against Women Convention, 1979

inherent in, or incidental to legal sanctions³⁰⁵.

3.3.1.10 The Convention on the Rights of a Child, 1989

According to the Convention on the Rights of the Child (CRC), children have the same human rights as adults. Additionally, it establishes special rights for children, recognizing their unique vulnerability, such as the right to freely express their opinions and the requirement that decisions affecting children take their best interests into account. Two Optional Protocols exist: one on child prostitution and pornography and another on children's involvement in armed conflict. This Convention has been thoroughly discussed in this chapter.

3.3.1.11 The Indigenous Peoples Convention, 1989

The Indigenous and Tribal Peoples Convention (No. 169) of the International Labour Organization aims to protect the rights of Indigenous and tribal peoples worldwide. It is founded on Indigenous peoples' right to maintain their own identities and to determine their own path forward in all areas of development, including land rights, customary law, health, and employment³⁰⁶.

3.3.1.12 The Convention on Migrant Workers, 1990

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families aims to ensure that all migrant workers, regardless of their legal status, are fully protected under international human rights law. The Convention establishes minimum standards for migrant workers and their families,

³⁰⁵ Article 1 of the Convention against Torture, 1984

³⁰⁶ https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

with a particular emphasis on eradicating worker exploitation during the migration process. The reporting cycle is critical for ensuring that rights are being upheld in accordance with international obligations under the core human rights conventions³⁰⁷.

3.3.1.13 The Convention on Persons with Disabilities, 2006

The Convention on the Rights of Persons with Disabilities aims to promote, protect, and ensure that persons with disabilities have full and equal access to all human rights. It encompasses the rights to health, education, employment, access, and dispassionate. The Optional Protocol establishes a mechanism for individual complaints³⁰⁸.

3.3.1.14 The Declaration on the Rights of Indigenous Peoples, 2007

This Declaration establishes minimum standards for Indigenous peoples' enjoyment of their individual and collective rights. These include the right to participate effectively in decision-making on issues affecting them and the right to pursue their own economic, social, and cultural development priorities.

3.3.2 Instruments on Child rights protection in Armed Conflict

Numerous regional human rights instruments have been ratified by various international organizations. There are several of these organizations, including the African Union (AU), the Association of Southeast Asian Nations (ASEAN), the

³⁰⁷<https://www.culturalsurvival.org/publications/cultural-survival-quarterly/convention-protection-rights-all-migrant-workers-and-their#:~:text=The%20International%20Convention%20on%20the,vote%20on%20December%2018%2C%201990.>

³⁰⁸<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html#:~:text=The%20Convention%20on%20the%20Rights,signature%20on%2030%20March%202007.&text=This%20is%20the%20highest%20number,Convention%20on%20its%20opening%20day.>

Organization of American States (OAS), and the Council of Europe.

3.3. 4 The African Unity/Organisation of African Unity

African Unity was the first regional organization to adopt a legally binding instrument devoted entirely to children's rights: the African Charter on the Rights and Welfare of the Child³⁰⁹. The African Charter on Human and Peoples Rights, adopted by the OAU in 1981, was one of the most recent regional general treaties to enter into force. This Charter, colloquially referred to as the Banjul Charter, enshrines civil and political rights, as well as economic, social, and cultural rights. In 1981, with the adoption of the African Charter on Human and Peoples' Rights, a new era in the field of human rights in Africa began³¹⁰.

The Charter's emphasis on children, reflecting African Customary Law, was on the family's rights and obligations toward the family, rather than on the rights and obligations of individual family members. The Banjul Charter made no reference to additional specific child rights, relying instead on existing international protection for children's rights³¹¹. It appears as though the term 'Conventions' applies to both women and children. This raises the question of whether an African State that was a signatory to the African Charter but not to the Convention on the Rights of the Child

³⁰⁹The Charter was adopted in 1990 and came into force in 1999. See: Viljoen, F. (1999). Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa. *Journal of African Law*, 43(1), 1-17

³¹⁰Provost, R. (1995). " La Charte Africaine des" Droits de l'homme et des Peuples: Une Approche Juridique des Droits de l'homme Entre Tradition et" Modernite", by Fatsah Ouguergouz (Book Review). *Human Rights Quarterly*, 17(4), 807

³¹¹Art. 18 of Banjul Charter states "The State shall ensure the elimination of every form of discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions". See: Van Bueren, G. (1998). The international law on the rights of the child (Vol. 35). *Martinus Nijhoff Publishers*.

was still obligated to implement the Convention's provisions³¹².

Neither Asia, which is home to the majority of the world's children, nor the Pacific Region possessed a comparable child rights instrument. However, the most recent development in this regional bloc in relation to the subject of human rights was the establishment of the ASEAN Women's and Children's Rights Mechanism. In 2009, ASEAN established the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). The ACWC sought to advance women's and children's well-being, development, empowerment, and participation in the ASEAN community. It raised public awareness and educated the public about human rights. Among the critical issues on the agenda of the ACWC were child trafficking, abuse, and forced labor, which are virtually universal in the ten ASEAN member states.

3.4.2 The African Charter on the Rights and Welfare of the Child, 1990 (ACRWC)

The Organization of African Unity was the first regional organization to adopt regional instruments on child rights. The African Charter on the Rights and Welfare of the Child (ACRWC) was the world's only regional instrument addressing child rights. Adopted in 1990, the Charter entered into force in 1999. The African Children's Charter is based on the same principles as the UN Convention on the Rights of the Child, but with an emphasis on the African context. The two instruments work in tandem and complement one another. A significant distinction

³¹²Article 18 of the African Charter on Human and Peoples Rights, *supra*

was that the Charter established not only child rights but also child responsibilities toward family and society, whereas the CRC establishes only child rights.

According to the African Charter on the Rights and Welfare of the Child, a child is defined as any human being under the age of 18 years³¹³, and all actions involving the child should be guided by the child's best interests³¹⁴. The African Charter on the Rights and Welfare of the Child³¹⁵ enumerated numerous children's rights and established an African Committee of Experts on the Rights and Welfare of the Child. The States Parties "recognize the rights, freedoms, and obligations enshrined in [the] Charter and undertake to take the necessary steps, consistent with their constitutional processes and the Charter's provisions, to adopt such legislative or other measures as may be necessary to give effect to its provisions³¹⁶." Notably, "any custom, tradition, cultural or religious practice that is inconsistent with the Charter's rights, duties, and obligations shall be discouraged to the extent of such inconsistency."

Additionally, the ACRWC guaranteed the following rights and principles: non-discrimination; the right to survival and development, including the right to life and prohibition of the death penalty; the right to a name and nationality; the right to freedom of expression; the right to association and peaceful assembly; the right to freedom of thought, conscience, and religion; and the right to privacy, family, and

³¹³Art.2. See: Lloyd, A. (2002). Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet. *The International Journal of Children's Rights*, 10(2), 179-198

³¹⁴Art. 4(1): See: Boerefijn, I., Coomans, F., Goldschmidt, J., Wolleswinkel, R., & Holtmaat, R. (Eds.). (2003). Temporary Special Measures: Accelerating de facto equality of women under article 4 (1) UN Convention on the Elimination of All Forms of Discrimination Against Women (Vol. 1). *Intersentia nv*.

³¹⁵OAU doc. CAB/LEG/24.9/49. See: ORGANISATION, O. A. U. (1999). African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November

³¹⁶Art.1(1). See: ORGANISATION, O. A. U. (1999). African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November

home.

According to reports, the ACRWC was the only regional human rights treaty protecting children that specifically addressed armed conflicts. It pioneered by broadening the scope of international humanitarian law's application to children. Additionally, the Charter (ACRWC) included provisions on armed conflicts; refugee children; adoption; separation from parents; protection against apartheid and discrimination (Article 26); sexual exploitation; drug abuse; the sale, trafficking, and abduction of children; and children of imprisoned mothers. All of these interconnected rights were at risk of being violated during armed conflict.

Not only did the ACRW apply to children caught up in international and domestic armed conflicts, but also to lower levels of violence associated with 'tension and strife.' Thus, the charter recognized that it should be the child's best interests, not the form of the conflict that should take precedence in international law. Additionally, the charter appeared to be much clearer in terms of age at first glance. Indeed, the charter made reference to children, not individuals. By reference to article 2 of the charter, the term "child" was defined as "every human being under the age of 18 years." As a result, the African charter's potential protection was more comprehensive and coherent. Additionally, the African charter prohibits anyone under the age of 18 from directly participating in hostilities. This did not, however, preclude children from participating indirectly.

Further, the African Commission on Human and Peoples' Rights, established in 1986, promotes human and peoples' rights monitoring and the implementation of the

African Charter on Human and Peoples' Rights (ACHPR). The Commission met in Banjul, Gambia, or at the invitation of other countries. It examined the ACHPR's mandatory state reports. The Commission reports to the AU Assembly of Heads of State and Government at the AU summit on an annual basis. There was no Special Rapporteur on Children's Rights, but children's rights complaints could be directed to other special rapporteurs as appropriate.

Around 400 civil society organizations (CSOs) with observer status contributed significantly to the African Commission's work. They submitted Alternative Human Rights Reports in addition to the State Report, communicated with the Commission, proposed agenda items, and presented resolutions. Each Commission session was preceded by an NGO Forum, which served as a strategic platform for civil society organizations. The NGO Forum's outcome was publicly presented to the African Commission during its inaugural session. Since 2007, child rights organizations have been actively participating in the Forum, gradually increasing children's rights visibility regionally.

Additionally, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) served as the ACRWC's monitoring body, with a mandate to examine state and civil society reports on children's situations, to collect data on children, to make recommendations to governments, and to investigate child rights violations. Its primary function was to monitor how states implemented the Charter through the examination of state reports. The Committee held thematic hearings on critical issues affecting children's rights, such as children and armed conflict. It established the theme for the annual Day of the African Child (16 June), which is

observed throughout the continent.

3.4.3 The Association of Southeast Asian Nations, or ASEAN

ASEAN, or the Association of Southeast Asian Nations, was founded in 1967. In September 2009, the ASEAN Intergovernmental Commission on Human Rights (AICHR) was established as a consultative body. ASEAN and its member states have partnered with UNICEF to highlight ten strategies for addressing child rights across the region. The ten recommendations are intended to galvanize efforts within and across the region to ensure that all children have access to the rights enshrined in the CRC and its Optional Protocols.

It was agreed that ASEAN should continue to strengthen regional systems and cross-border collaboration in order to realize children's rights, such as by protecting children from trafficking, forced/arranged child marriage, and female genital mutilation/cutting; by promoting the rights of children affected by migration and displacement; and by responding regionally to climate crises and disaster events. This includes enhancing collaboration and partnerships with civil society in order to broaden children's opportunities.

That ASEAN member states prioritize the fulfilment of all children's rights and pay special attention to groups that are routinely excluded. Children from extremely impoverished households, remote rural areas, urban informal settlements, ethnolinguistic minority groups, indigenous peoples, unaccompanied or separated children, migrants, refugees, undocumented and stateless populations, children with disabilities, LGBTI children, and those affected by and/or prone to humanitarian

situations are included.

To operationalize policies, action plans, and commitments related to gender equality and women's and girls' empowerment, ASEAN member states are encouraged to ensure transparent costing, budgeting, and resource allocation, as well as to conduct impact assessments of investments. There is no evidence that the region's economic growth resulted in an equal increase in child social investment. ASEAN member states are urged to reaffirm their commitment to increasing social investment, which is necessary to alleviate child poverty and address the lingering problem of multiple child deprivation.

Additionally, ASEAN member states should continue developing and implementing risk-based multi-sectoral action plans to ensure equal access to high-quality services. While access to services has increased dramatically over the last three decades, significant disparities in service quality persist. ASEAN member states are encouraged to promote child rights legislative and policy frameworks, including mechanisms for fully implementing and enforcing international child rights law. ASEAN member states are urged to reconsider any reservations or declarations they may have made regarding the CRC and its optional protocols.

3.4.4 Inter-American Human Rights/ Children's Rights Mechanisms (IACHR)

The Inter-American system of human rights was established within the Organization of American States (OAS). The OAS was composed of 35 member states, including the United States. The Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights were the two primary bodies that held

member states accountable for human rights violations (IACTHR). The OAS Charter and the American Declaration on Human Rights laid the groundwork for the Inter-American system.

The declaration reflected the State's commitment to human rights as a priority. Article 19 guaranteed the protection of all minor children. With the adoption of the American Convention on Human Rights (ACHR) in 1969 and its entry into force in 1978, the hemisphere gained its first human rights treaty. It strengthened the Commission's authority and established the Inter-American Court on Human Rights. For state parties, the Convention was legally binding. The United States of America and Cuba were the only member states that had not ratified. The Commission was competent to receive petitions alleging violations of the American Declaration on the Rights and Duties of Man from OAS Member States that had not yet ratified the American Convention on Human Rights.

There was no single American instrument devoted exclusively to the protection of children's rights. Children had a right to special protection from the state under the American Convention, but the article did not specify what rights children were entitled to. The American Convention's Additional Protocol guaranteed every child the right to parental protection and primary education. Annual Reports were published by the Commission. Children's issues were addressed, for example, prosecuting, detaining, and recruiting children; malnutrition; children of the disappeared under Argentina's dictatorship; economic, cultural, and social rights; and a first report on children in the hemisphere. The OAS General Assembly received the annual report. It was a critical tool for monitoring human rights, as states

mentioned in the report may face pressure from other states to comply with the Commission's recommendations. Additionally, the commission submitted cases to the Inter-American Court and may seek advisory opinions from the court regarding the interpretation of the American Convention.

The Inter-American Commission established a number of rapporteurships on specific children's rights issues. In 1998, the United Nations established a special rapporteurship on children's rights. The rapporteur conducted studies on critical child rights issues in the region, visited states on-site, requested precautionary measures in serious cases of child rights violations, advised the Commission on individual cases, and prepares the Child Rights sections of the Commission's annual report as well as country reports. Additionally, he/she engaged in a variety of child rights promotion activities. This may be the most effective regional mechanism and have the greatest impact on child rights.

It issued advisory opinions on the Convention's legal interpretation. In 2002, the Court issued its first advisory opinion on a broader interpretation of children's rights, addressing "the scope of special measures of protection for children in relation to the Convention's legal and judicial safeguards." In 2009, in response to a request from SCS and the Andean Commission of Jurists to the Commission, the Court issued an opinion stating that Member States of the OAS State Parties' human rights obligations should prohibit and eliminate all forms of corporal punishment of children. The Court's first child rights case involved the 1990 murder of five street children by police officers. In 2001, the court ordered Guatemala's government to pay financial reparations and amend its domestic laws to strengthen the protection of

children under national law.

3.3.5 Legal Instruments for Protection of Child Rights in the European Union

The European Union and the Council of Europe have developed the majority of European children's rights legislation to date. Apart from the United Nations, other international organizations, such as the Hague Conference on Private International Law, have adopted significant instruments that continue to shape the development of European law. Although these international frameworks have historically operated independently of one another, links between them are increasingly being established. Between the CoE and the EU, interinstitutional cooperation is particularly strong.

(i) The EU Charter of Fundamental Rights of the European Union, 2012

Historically, children's rights in the EU were developed piecemeal. Historically, European child law has been primarily concerned with addressing child-related aspects of broader economic and political initiatives, such as consumer protection and free movement of persons. Children's rights have been addressed more recently as part of a more coordinated EU agenda, based on the adoption of the European Union's Charter of Fundamental Rights, among other things.

The EU Charter of Fundamental Rights contains the first detailed references to children's rights at the EU constitutional level, including recognition of children's right to free compulsory education; a prohibition of age-based discrimination; and a prohibition of exploitative child labor. Notably, the Charter includes a specific section on children's rights. This document articulates three critical children's rights principles: the right for children to express themselves freely in accordance with

their age and maturity; the right for their best interests to be prioritized in all actions affecting them; and the right for children to maintain a personal relationship and direct contact with both parents on a regular basis.

(ii) EU Treaty of Lisbon, 2007

The second significant milestone occurred on 1 December 2009, when the Lisbon Treaty entered into force. By amending the Treaty of European Union and the former European Community Treaty (now known as the Treaty on the Functioning of the European Union), this instrument made significant institutional, procedural, and constitutional changes to the EU (TFEU). These changes strengthened the EU's capacity to advance children's rights, not least by establishing "protection of the child's rights" as a general stated objective and a critical component of the EU's foreign policy. Additionally, the TFEU contains more specific references to children, enabling the EU to enact legislative measures aimed at combating sexual exploitation and human trafficking.

This resulted in the adoption of directives on preventing and combating child sexual abuse, child sexual exploitation, and child pornography, as well as on preventing and combating human trafficking and protecting its victims, all of which include provisions addressing the unique needs of child victims. Similarly, the more recent directive establishing minimum standards for the rights, assistance, and protection of crime victims devotes a significant portion of its provisions to children.

(iii) The Council of the European Union 2007

The third significant milestone occurred at a more strategic, policy level, initially in relation to the EU's agenda for external cooperation and then in relation to internal

issues. The European Council adopted the 'EU Guidelines for the Promotion and Protection of the Child', and the European Commission adopted its Communication on A Special Place for Children in EU External Action to mainstream children's rights in all EU activities with non-EU Member States. Similarly, the European Commission adopted the EU Agenda for Children's Rights in 2011, establishing key priorities for the development of children's rights law and policy in the EU Member States. Additionally, the agenda included a focus on child protection-related legislative processes, such as the aforementioned adoption of the directive on victim's rights.

Recently, the Commission adopted a comprehensive strategy to assist Member States in addressing poverty and social exclusion through a variety of early years interventions (for children in pre- and primary school). While neither this initiative nor the agenda is legally binding, both lay the groundwork for the EU's normative and methodological approach to children's rights law, one that is firmly anchored in the CRC and grounded in an ethic of child protection, participation, and non-discrimination.

(iv) The European Convention on Human Rights 1950 (ECHR)

In 1953, the European Convention on Human Rights (ECHR) became law. It was ratified by the Council of Europe's 47 member states. A number of civil and political rights were enshrined in the Convention. Numerous additional protocols, including those on the right to education and parental rights, had been adopted. The Convention's State Parties committed to ensuring these rights for everyone within their jurisdiction. The European Court of Human Rights was established by the

ECHR.

Children's rights were protected as human rights under the ECHR's articles, but there were no specific children's rights provisions. However, in child-related judgments, the CRC was frequently cited and the ECHR frequently interpreted in light of the CRC. The Court had heard cases involving children's rights, including the prohibition of corporal punishment (in the home, 1998 decision), child custody, and the right to an education, including discrimination against Roma children. When the Court issued a decision, the state was required to implement requested legal changes, but the timeframe for implementation varied significantly between countries.

Another significant organ in Europe's regional rights arena was the European Social Charter and the European Committee of Social Rights. The European Social Charter, which guaranteed social and economic rights, was a complement to the ECHR. It was adopted in 1961 and re-adopted in 1996 in a revised form. It established the European Committee of Social Rights as a mechanism for supervising State Parties. The Charter had been ratified by 43 out of the Council of Europe's 47 member states. The Charter's guarantees applied to all individuals within a member state. They included the rights to housing, health, education, and employment, as well as social and legal protection, freedom of movement, and non-discrimination. Numerous articles addressed the rights of children, particularly in the areas of education, employment, and legal and social protection.

Concerning children's rights, the collective complaints procedure allowed access to European CSOs and had been frequently used by CSOs, including national CSOs. It had proven to be an effective tool for CSOs advocating for child rights. Portuguese

civil society organizations brought the issue of corporal punishment to the Committee, which determined that it violated the Charter. As a result, the Portuguese government amended the law and established a complete legal prohibition of corporal punishment.

The Grand Chamber of the European Court of Human Rights stated that: The Convention on the Rights of the Child establishes the human rights of children and the standards to which all governments must aspire in order to realize these rights for all children.. The Convention outlines the fundamental human rights that all children – without exception – have: the right to survival; the right to optimal development; the right to protection from harmful influences, abuse, and exploitation; and the right to full participation in family, cultural, and social life. It also safeguards children's rights through the establishment of standards in health care, education, and legal, civil, and social services.

States parties to the convention are required to plan and implement all actions and policies with the child's best interests in mind. Additionally, States parties must ensure that a child is not separated from his or her parents against their will, unless such separation is necessary for the child's best interests, and must respect a child who is separated from one or both parents' right to maintain personal relations and direct contact with both parents on a regular basis, unless doing so would be detrimental to the child's best interests.

3.4 Instruments on Child Health and Development

In the context of global legal instruments, the Child Health and Development goal is to eliminate preventable child deaths and to promote the healthy growth and

development of all children during their first decade of life. Numerous legal instruments exist to promote and protect the health and development of children.

3.4.1 General comment No. 4 (2003) on the Convention of the Rights of a Child

In addition to articles 6 and 24, the general comment states that other provisions and principles of the Convention are critical in ensuring adolescents' full enjoyment of their right to health and development. States parties are required to ensure that all human beings under the age of 18 enjoy all of the Convention's provisions without regard for "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

Adolescents' sexual orientation and health status (including HIV/AIDS and mental health) are also covered under these grounds. Discriminated adolescents are more vulnerable to abuse, other forms of violence, and exploitation, and their health and development are jeopardized. As a result, they deserve special consideration and protection from all segments of society. The Convention recognizes the responsibilities, rights, and obligations of parents (or other persons legally responsible for the child) "to provide appropriate direction and guidance in the exercise of the child's Convention-recognized rights in a manner consistent with the child's evolving capacities." The Committee believes that parents or other legally responsible persons for the child must exercise their right and responsibility to direct and guide their adolescent children in the exercise of their rights with due diligence.

They owe it to adolescents to consider their perspectives in light of their age and maturity, and to provide a safe and supportive environment in which the adolescent

can develop. Adolescents must be recognized as active rights holders with the capacity to develop into fully responsible citizens when provided with the necessary guidance and direction.

In the context of adolescents' rights to health and development, States parties must ensure that specific legal provisions are guaranteed under domestic law, including the establishment of a minimum age for sexual consent, marriage, and the ability to receive medical treatment without parental consent. These minimum ages should be identical for boys and girls and should closely reflect the recognition of human beings under the age of 18 as rights holders, in accordance with their developing capacity, age, and maturity. Additionally, adolescents must have easy access to individual complaint mechanisms as well as appropriate judicial and non-judicial redress mechanisms that ensure fair and due process, with a particular emphasis on the right to privacy.

To further promote the health and development of adolescents, States Parties are urged to uphold their right to privacy and confidentiality, including when seeking medical advice or counselling. Health-care providers are required to maintain the confidentiality of medical information about adolescents in accordance with the Convention's fundamental principles. Such information may be disclosed only with the adolescent's consent or in the same circumstances as a violation of an adult's confidentiality. Adolescents who are considered mature enough to receive counselling without the presence of a parent or another adult have the right to confidentiality and may request confidential services, including treatment.

States parties must take effective measures to protect adolescents from all forms of violence, abuse, neglect, and exploitation (Articles 19, 32–36, and 38), with a particular emphasis on the forms of abuse, neglect, violence, and exploitation that affect this age group. They should take special measures to protect the physical, sexual, and mental well-being of adolescents with disabilities, who are disproportionately vulnerable to abuse and neglect. Additionally, states parties should ensure that poverty-stricken adolescents who are socially marginalized are not criminalized. This requires allocating financial and human resources to support research that will inform the adoption of effective local and national laws, policies, and programs.

Adolescents' health and development are strongly influenced by their environments. Creating a safe and supportive environment requires addressing the attitudes and behaviours of both the adolescent's immediate environment - family, peers, schools, and services - and the broader environment created by, among others, community and religious leaders, the media, and national and local policies and legislation. Promoting and enforcing the Convention's provisions and principles is critical to ensuring adolescents' right to health and development.

States parties should take measures to increase awareness and stimulate and/or regulate action through the formulation of policy or the adoption of legislation, as well as the implementation of youth-specific programs. The Committee emphasizes the importance of the family environment, which includes extended family and community members, as well as other legally responsible individuals for the child or adolescent. While the majority of adolescents grow up in healthy family

environments, for some, the family is not a safe and supportive environment.

To ensure that adolescents' rights to health and development are respected, both individual behaviours and environmental factors that increase their vulnerability and risk should be considered. Environmental factors such as armed conflict or social exclusion make adolescents more vulnerable to abuse, other forms of violence, and exploitation, severely limiting adolescents' ability to make healthy behavioural choices on their own. For instance, adolescents' risk of illness increases when they engage in unsafe sex.

3.4.2 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2002

This is another instrument that promotes a child's health and development. According to this protocol, states Parties are required to take all reasonable measures to ensure that members of their armed forces under the age of 18 do not directly participate in hostilities. States Parties shall ensure that persons under the age of 18 are not compelled to join their armed forces. The protocol requires additional states parties to raise the minimum age for voluntary recruitment into their national armed forces above the age specified in article 38, paragraph 3 of the Convention on the Rights of the Child, taking into account the principles set forth in that article and acknowledging that persons under the age of 18 years are entitled to special protection under the Convention.

Upon ratification or accession to the present Protocol, each State Party shall deposit a binding declaration setting forth the minimum age at which it will permit voluntary

recruitment into its national armed forces and a description of the safeguards it has implemented to ensure that such recruitment is not forced or coerced. This protocol includes several safeguards for the child's health and development. Additionally, the protocol requires that armed groups distinct from a State's armed forces never recruit or use persons under the age of 18 in hostilities. States Parties agree to make the present Protocol's principles and provisions widely known and promoted to adults and children alike through appropriate means.

3.4.3 Forms of Child Labour Convention, 1999 (No. 182)

This is another instrument for the protection of child health and development, and each Member State that ratifies it is required to take immediate and effective measures to ensure the prohibition and elimination of the most heinous forms of child labour. The term "child" refers to anyone under the age of 18. The term "worst forms of child labour" refers to the following: (a) all forms of slavery or practices resembling slavery, such as the sale and trafficking of children, debt bondage and serfdom, and forced or compulsory labour, including the forced or compulsory recruitment of children for use in armed conflict; (b) the use, procurement, or offering of a child for prostitution, pornographic production, or pornographic performances; and (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.³¹⁷

³¹⁷ Article 3 of the Worst Forms of Child Labour Convention, 1999 (No. 182)

3.4 Conclusion

The preceding presentation on International and African Regional Legal Frameworks for the Protection of Children's Rights in Armed Conflicts demonstrates that protecting children in armed conflict must be a global priority. If a global agenda is not established, these fragmented legal frameworks become difficult to implement. Even though there appears to be a failure to protect children adequately in the face of ongoing atrocities against children, the preceding study introduces readers to Uganda's legal framework for Child Protection in Armed Conflict as the next Chapter.

CHAPTER FOUR
LEGAL FRAMEWORK FOR PROTECTION OF CHILDREN IN ARMED
CONFLICT IN UGANDA

4.1 Introduction

Following the conclusion of the unfinished war, particularly in northern Uganda Local government and law enforcement's ability to address the region's numerous child welfare issues is being questioned. Uganda's legal framework governing child protection is fragmented and ineffective, with a poorly coordinated referral system, limited services for survivors, children lacking the ability to speak out and report abuse, and traditional beliefs frequently perpetuating certain forms of violence. It is critical, therefore, to address the flaws in these legal issues. This chapter examines Uganda's legal framework governing children's protection during armed conflict.

4.2. Uganda Treaty Practice in International Law

The Uganda Constitution imposes a broad obligation on the state to bring domestic laws into compliance with international obligations. However, international law's rules and obligations are not binding on Uganda until they are ratified and translated into national law, but courts can make judgments based on ratified provisions through judicial activism. The Ugandan Constitution empowers the parliament to enact legislation governing the ratification of treaties, conventions, agreements, and other international commitments.

The international community has established certain standards that all signatory governments are expected to adhere to through various international instruments such as the Universal Declaration of Human Rights and the International Covenant

on Civil and Political Rights (ICCPR). Uganda became an unreserved signatory to the International Covenant on Civil and Political Rights (ICCPR). Uganda's government is obligated to respect and protect the internationally recognized human rights contained in the constitution. Uganda's compliance with international treaties must be evaluated in light of the country's political system and associated human rights practices.

Additionally, Uganda's government is committed to promoting and protecting human rights, including economic, social, and cultural rights. To this end, it has extensively provided for economic, social, and cultural rights in the Constitution, as well as in its National Objectives and Principles of State Policy, which serve as a guide for constitutional interpretation. The Government's commitment to promoting Covenant rights is reflected in the establishment of numerous institutions, including the judiciary, parliament, line ministries, the Amnesty International, the Equal Opportunities Commission, and the Uganda National Human Rights Commission, whose mandate includes human rights sensitization. The Commission has conducted public awareness campaigns targeting the police, army, government agencies, and civil society.

Uganda is a signatory to the International Covenant on Economic, Social, and Cultural Rights. Uganda has yet to sign and ratify the Economic, Social, and Cultural Rights Optional Protocol. As a result, the Covenant on ESCR is not directly enforceable in Uganda. Additionally, the Ugandan Constitution provides and recognizes enforceable economic, social, and cultural rights in Chapter IV, and the judiciary has been enforcing the covenant's rights through judicial activism.

4.2.1 Meaning of Treaty Practice in International Law

Under International Law, treaty practice refers to the procedures and practices used by States and International Organizations in the formation and administration of treaties and treaty-related acts. This includes treaty drafting, adoption, signature, and ratification; making reservations and declarations; withdrawing from or winding up a treaty; managing treaty records and publications; managing domestic constitutional and parliamentary procedures; providing the public with official treaty status information; implementing treaty obligations in domestic law; and depositary functions.

Barrett argues that treaty practice has both outward- and inward-facing dimensions. A treaty action may be outward-looking in nature, in that it is addressed to another State. Numerous treaty practices are inward-looking in nature, with one set of officials addressing another or ministers within the same government. From different perspectives, the same treaty action can be both outward- and inward-facing. For instance, a treaty official submitting a document to the legislature may regard it as an external communication because it is being sent outside the government, but the international community may regard it as an internal communication because it is being sent within the same State.

Treaty practice is limited to the administration of treaties and excludes the administration of other types of international documents such as declarations, understandings, and arrangements. However, it is not always straightforward to distinguish between treaties and certain other treaty-like documents that may be handled concurrently with treaties by the same personnel. Distinguishing between

treaties and treaty-like documents, as well as the manner in which the latter are handled, is a critical component of this study. Treaty-like documents may include instruments between States, between IOs, or between States and International Organizations that are governed by domestic law rather than international law (eg contracts) or are not legally binding at all (eg arrangements, declarations, understandings, so-called Gentlemen's agreements).

Despite the critical role of treaties in underpinning international relations, States and International Organizations' treaty-handling practices can be opaque, obscure, and inconsistent. Even in governments with a long history of treaty practice, procedures and precedents are not always documented in a systematic manner, even for internal purposes. Typically, a new Treaty Officer must begin learning on the job. Without systematic treaty record-keeping or consistent treaty procedures, errors can be made and go unnoticed within government until a treaty obligation-related international dispute arises. For those who are not affiliated with a State's foreign ministry or Treaty Office, obtaining information about that State's practice is frequently even more difficult. This creates significant difficulties for domestic and international stakeholders, and may impair a state's ability to manage its legal relationships with other States.

To advance the rule of international law and mitigate the risk of treaty text and instrument disputes, it is critical for States to employ and promote sound treaty practice at all stages of their treaty-making and treaty-handling processes. Additionally, it is critical that accurate information about in force treaties is accessible and reliable. This has a direct impact on the degree to which governments

and all those affected by them adhere to international obligations.

4.2.2 Status of Uganda: A Dualist or Monist Jurisdiction?

States approach the interaction of international and domestic law in two distinct ways. These two distinct legal traditions are referred to as monism and dualism. International law does not need to be translated into national law in states with a monist system. Ratification of an international treaty immediately incorporates that treaty's provisions into domestic law. As a result, the ICC Statute can be applied and adjudicated directly in national courts. On ratification, some constitutions provide for the direct incorporation of international obligations into domestic law. Direct incorporation occurs only in other States for self-executing treaties. International law is not directly applicable to States with a "dualist system." It must first be translated into national legislation before national courts can apply it.

Uganda is a dualist state, and as such, none of the international instruments she adopts or ratifies has direct application. The Treaty or other instrument must be domesticated following ratification under the Treaties Ratification Act. According to the Ugandan Judicature Act, international law is not expressly recognized as a source of law under the aforementioned provision, and that in order for a treaty to be applied in Ugandan courts, it must first be ratified in accordance with the Ratification of Treaties Act and then domesticated by an Act of the Ugandan parliament. The Ratification of Treaties Act empowers parliament to ratify treaties through a resolution if the treaty in question concerns armistice, neutrality, or peace; or if the Attorney-General certifies in writing that its implementation would require a constitutional amendment.

Cabinet may ratify all other treaties in accordance with the Act, provided they are laid before parliament 'as soon as possible' in accordance with section 4 of the Act. Additionally, it should be noted that the Constitution is the supreme law of the land and binds all authorities and individuals in Uganda. Where any other law conflicts with any provision of the Constitution, the Constitution takes precedence, and the incompatible law or custom is declared null and void to the extent of the inconsistency. International law is subordinated to the provisions of the Uganda Constitution to the extent that it is incorporated into the national legal order as written law.

Additionally, reference may be made to the Constitution, which states that no agreement, contract, treaty, convention, or other document, by whatever name referred to, to which the government is a party or in which the government has an interest, shall be concluded without the Attorney-General's The Constitutional Court noted, in the context of a contract between a government parastatal and a private entity, that failure to comply with this provision renders the contract void under article 2(2) of the Constitution.

The Constitution empowers the president or a person designated by him to enter into treaties, conventions, agreements, or other arrangements with any other country or with any other international organization or body on any subject. Parliament is tasked with the responsibility of enacting legislation governing the ratification of treaties, conventions, agreements, and other arrangements negotiated by the president. Additionally, the constitution provides that if Uganda or the government entered into or affirmed any treaty, agreement, or convention with any country or

international organization on or after 1962 and was still in force immediately prior to the Constitution's entry into force, or if Uganda or the government was otherwise a party to any such treaty, agreement, or convention immediately prior to the Constitution's entry into force, then such treaty, agreement, or convention More importantly, the National Objectives and Directive Principles of State Policy state that Uganda's foreign policy shall be guided by international law and treaty obligations, among other things. Thus, it appears as though there is a positive constitutional requirement for the executive branch of government to conduct foreign affairs in accordance with international law.

According to Killander, the provisions of principle 28(1)(b) do not constitute a basis for the application of international law in Uganda; rather, they establish a domestic legal framework for holding the executive accountable for violations of international law in the municipal sphere. To be sure, the court would have to inquire into the relevant 'international law and treaty obligations' alleged to have been violated, but only in the same way that it would inquire into the content of French law if the executive was required by the constitution to respect that law in conducting Uganda's foreign policy.

4.2.3 Uganda's Status on Ratification of International and Regional Treaties on Protection of Children

International conventions that have been ratified are not automatically effective in Ugandan law or enforceable by local courts. They are incorporated into law through the implementation of convention-compliant legislation or must be re-enacted through legislation. All laws and conventions in Uganda are subordinate to the

Ugandan Constitution: any law or custom that conflicts with a provision of the Constitution is declared null and void.

By virtue of the Children Act, the CRC and the Organization for African Unity's Charter on the Rights and Welfare of the African Child have been incorporated into Ugandan law. Uganda has ratified both the Optional Protocol on children's participation in armed conflict and the Optional Protocol on the sale of children, child prostitution, and child pornography, but neither protocol has been expressly incorporated into Ugandan law. The CRC does not supersede national law, and it expressly does not supersede the Constitution. The Children Act incorporates the CRC into Ugandan law. Notably, the Convention on the Rights of the Child and the Organization for African Unity's Charter on the Rights and Welfare of the African Child are only incorporated "with appropriate modifications to reflect Uganda's circumstances." While government policy generally aims to adhere to the principles and standards outlined in the CRC and its associated protocols, economic and practical constraints prevent the Ugandan government from fully and effectively protecting the rights of Ugandan children.

There is some criticism that the CRC's incorporation and ratification of its associated Protocols were not entirely successful. However, a number of proposals have been made to address this, and there is some indication that legislative reform is imminent, owing in part to pressure from non-governmental organizations (NGOs).

The CRC cannot be enforced directly by Ugandan courts. However, as part of Ugandan law, the Children Act can be enforced by the courts. This is equivalent to direct court enforcement of the CRC, as the Children Act effectively re-enacts the

CRC by explicitly stating that children have the right to enforce all CRC rights in addition to the Act's rights. Ugandan courts rarely refer to the CRC. Similarly, the African Child's Charter on the Rights and Welfare is rarely cited. The Children Act is more frequently cited as the authority for protecting children's rights. Although the Act re-enacts the CRC in its First Schedule, courts may not be referring to the CRC when citing the Act, as they may be referring to other provisions of the Act.

4.3. Constitution of Uganda on Protection of Children

The Republic of Uganda's 1995 Constitution (Constitution) recognizes children's rights and makes specific provisions for children's rights to health, education, and protection from exploitation. Additionally, the Constitution states that a child offender who is lawfully detained or in custody shall be kept apart from adult offenders. Children in Uganda are guaranteed the right to know and be cared for by their parents or those authorized by law to bring them up, subject to laws enacted in their best interests. The best interests of the child is a child rights principle derived from the UNCRC, which states that "in all actions involving children, whether by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the child's best interests shall take precedence." Assessing a child's best interests entails weighing and balancing "all the factors necessary to make a decision in a particular situation for a particular individual child or group of children."

A child in Uganda is entitled to a minimum level of education, which is the responsibility of both the state and the child's parents. This includes early childhood care and education, which provides programs and services for children from prenatal

to six years of age that address a child's needs across all domains of development, including physical, motor, language, cognitive, socio-emotional, and creative and aesthetic appreciation; and ensures synergy with health and nutrition. Additionally, it includes access to inclusive education, a process for addressing and responding to the diverse needs of all learners by increasing participation in learning, cultures, and communities, and decreasing exclusion from and within education." Child access to education also includes pre-primary education, which is a formalized form of early learning preceding primary school. Pre-primary schools can be integrated into primary schools or stand alone.

No child in Uganda shall be denied medical treatment, education, or any other social or economic benefit due to religious or other beliefs of any individual. Child protection systems are designed to address the full range of risks faced by children and their families, and they consist of a coordinated set of laws, policies, regulations, and services spanning all social sectors, most notably social welfare, education, health, security, and justice.

Children in Uganda have a right to protection from social and economic exploitation and shall not be employed or required to perform work that is hazardous, interferes with their education, or is detrimental to their health or physical, mental, spiritual, moral, or social development. Child protection systems are designed to address the full range of risks faced by children and their families, and they consist of a coordinated set of laws, policies, regulations, and services spanning all social sectors, most notably social welfare, education, health, security, and justice. Children's protection rights require that they be protected from all forms of abuse,

neglect, and exploitation. They address issues such as refugee children's special care, torture, criminal justice system abuses, involvement in armed conflict, child labour, drug abuse, and sexual exploitation.

In Uganda, a child offender who is held in lawful custody or detention must be kept apart from adult offenders. This is done to safeguard children's inherent fundamental rights and freedoms, which they possess simply by virtue of being human. Child rights are comprehensively defined in the United Nations Convention on the Rights of the Child, which is the most widely ratified human rights treaty in history and to which Uganda is a signatory. Orphans and other vulnerable children shall receive special protection under the law. In Uganda, special protection is provided when the child's own family is unable to provide adequate care for the child, even with appropriate support, or abandons or relinquishes the child. It can be informal or formal. Alternative care may take the form of kinship care, foster care, other forms of family-based or family-like care placements, residential care, or supervised independent living arrangements, depending on the environment in which it is provided.

Uganda's government has ratified a number of international and regional legal instruments aimed at protecting children. Following that, the government, in collaboration with development partners, has made significant efforts to improve children's overall protection and well-being. Among other things, the government has implemented legislative, policy, and program initiatives to safeguard the rights of all children, particularly vulnerable children, against abuse, neglect, and exploitation.

Despite these efforts, a sizable proportion of children in Uganda continue to live in situations of vulnerability, abuse, and deprivation, demonstrating a significant disconnect between our policy intentions and the reality of children's lives in Uganda. The Government recognizes that child protection interventions are critical to achieving our overall goal of child wellbeing in a sustainable manner. Regrettably, both the government and development partners' efforts to protect children have faced and continue to face significant challenges in terms of coverage, efficiency, and effectiveness.

Multiple constraints in terms of human, financial, and logistical constraints contribute to this subsector's overall underperformance. However, it is also true that the majority of child protection interventions, both by governments and development partners, have been limited in scope and coverage, with weak links between the various child protection actors. As a result, vulnerable children are unable to access the critical integrated and comprehensive package of preventive and rehabilitative services necessary to ensure the safety and well-being of all Ugandan children.

4.4 National Legislation on Protection of Children in Uganda

4.4.1 The Children Act, 1997 [Cap. 59]

Local Councils (LCs) are responsible for child protection under this Act. If these local government councils are unable to resolve a child protection case, the family and children court is consulted. The Act ensures that children have the right to "legal representation" in all proceedings before family and children courts. However, the Act contains no additional information about the legal representative's responsibilities or duties, and the family and children court is not funded by the

government. The Legal Aid Clinic at the Law Development Centre represents children in a variety of situations, but its primary focus is on children who are in conflict with the law. Representing abused or neglected children is primarily the state's responsibility, as these cases would be prosecuted as criminal cases. Thus, it appears as though the majority of child abuse and neglect cases are prosecuted criminally, whereas the majority of civil family law cases concern maintenance and custody proceedings.

The Act establishes a procedure in family and juvenile courts. It provides that the family and children court shall proceed in all matters in accordance with the rules of court adopted by the Rules Committee for that purpose, but subject to the following: (a) the court shall sit as frequently as necessary; (b) proceedings shall be conducted in camera; (c) proceedings shall be as informal as possible, utilizing inquiry rather than subjecting the child to adversarial procedures; and (d) parents or guardians of the child shall be present when the child is present. Apart from court members and officers, the following persons may attend any family and children court sitting at the court's discretion: (a) parties to the case before the court, their advocates, witnesses, and other persons directly involved in the case; (b) parents or guardians of the child before the court; (c) a probation and social welfare officer; and (d) any other person authorized by the court to be present.

Local councils are tasked with the responsibility of safeguarding children and promoting reconciliation between parents and children under the Act. Every local government council, from village to district level, has the general responsibility to: (a) safeguard and promote the welfare of children within its jurisdiction; and (b)

appoint one of its members as the person responsible for children's welfare; this person shall be referred to as the secretary for children's affairs. In carrying out his or her responsibilities for the welfare of children, the secretary for children's affairs shall be assisted by such officers of the local government council as the local government council may determine.

In particular, each local government council shall mediate any situation in which a child's rights are violated, particularly with regard to the child's protection, the child's right to succeed to his or her parents' property, and all other rights granted to a child in section 5. The authority granted to the local government council to protect a child's property shall not include any authority for the local government council to distribute the property. A local government council shall maintain a register of disabled children within its jurisdiction and assist them whenever possible in order to enable them to grow up in dignity among other children and to develop their potential and self-reliance.

Additionally, the Act establishes a duty to report violations of children's rights. The Act requires that any member of the community who has evidence that a child's rights are being violated or that a parent, guardian, or other person with custody of a child is capable of providing the child with adequate food, shelter, clothing, medical care, or education but refuses or neglects to do so shall report the matter to the area's local government council. The secretary for children's affairs may, upon receipt of the report, summon the person named in subsection (1) to discuss the matter; and the secretary for children's affairs shall make a decision in the child's best interests.

If the person named in the report fails to comply with the decision made under subsection (2), the secretary of children's affairs shall refer the matter to the village executive committee court, which shall adjudicate the matter and may: (a) grant any relief or order permitted by law; and (b) in the case of a parent, in addition to the reliefs or orders granted under paragraph (a), order the parent to execute a bond to exercise proper care and guardianship.

The Act establishes Family and Children's Courts. Each district and any other lower government unit designated by the Chief Justice by notice in the Gazette shall have a court to be known as the family and children court. The family and children court shall be presided over by a magistrate with at least the rank of magistrate grade II.

A family and children court has the authority to hear and decide on the following: (a) criminal charges brought against a child pursuant to sections 93 and 94; and (b) applications for child care and protection. Additionally, the court shall exercise any other authority delegated to it by this or any other written law.

4.4.2 National Council for Children Act, 1996

A National Council for Children Act provides for a structure and mechanism which ensures proper coordination, monitoring and evaluation of all policies and programmes relating to the survival, protection and development of the child in Uganda and for other connected matters. The objects of the council includes: (a) to act as a body through which the needs and problems of children can be communicated to the Government and other decision-making institutions and agencies in Uganda; (b) to coordinate and provide direction to all persons involved in child-based activities in Uganda in order to: (i) minimise duplication of effort

and wastage of resources; and (ii) maximise multi-sectoral and integrated approaches to meeting the needs of children and solving their problems;

(c) to promote the adoption and utilisation of the programme of action by the Government, nongovernmental organisations and external support agencies through participation in their planning and resource allocation exercises; (d) to support the development of district plans of action and the creation of district monitoring systems; (e) to monitor the achievement of the goals set in the programme of action and the activities planned and undertaken by the Government, nongovernmental organisations and other agencies to achieve those goals; (f) to maintain a database on the situation of children and activities relating to children in Uganda.³¹⁸

For the attainment of the above objectives the council have the following functions:

(a) to advise and promote policy and programmes regarding the survival, development and protection of children in Uganda; (b) to ensure proper planning and coordination of all child-based programmes within the broad guidelines of the programme of action; (c) to regularly review and identify obstacles to the implementation of the programme of action and to advise on feasible solutions to overcome them; (d) to monitor and evaluate programmes and activities of the programme of action; (e) to mobilise and evaluate programmes and activities of the programme of action; (f) to advise on programmes and budgets for the implementation of the programme of action; (g) to act as a clearinghouse for information and data on the situation of children and activities designed to benefit children in Uganda; (h) to disseminate research and development findings on the

³¹⁸ Section 3 of the National Council for Children Act, 1996

needs and problems of children through seminars, workshops, publications and other means of communication; (i) to work in close cooperation with and to coordinate the activities of all persons, institutions, sectors and organisations, involved in child-based activities.³¹⁹

4.4.3 The Children Act Amendment 2016

An Act to amend the Children Act, Cap. 59, to strengthen child protection; to strengthen guardianship provisions; to strengthen intercountry adoption conditions; to prohibit corporal punishment; to establish the National Children Authority; to repeal the National Council for Children Act, Cap. 60; and to provide for other related matters. The Act comprehensively protects a child's full rights. The previous Act limited children's rights to subsistence. The new Act establishes children's rights to: Express their opinions on matters affecting them; Birth registration; Privacy, legal representation in court, and access to information deemed necessary for the child's growth and well-being by a parent or guardian; Freedom of expression; Property inheritance; and be treated without discrimination.

The Act establishes safeguards for children against harmful customary practices (e.g., child marriage, FGM/C) and establishes penalties for violators. The Act safeguards children against hazardous employment. In conjunction with the Employment Act, 2006, the new Act prohibits harmful employment, including the most heinous forms of child labour/hazardous labour. This includes work that exposes a child to physical, psychological, or sexual abuse, as well as work underground, at dangerous heights, or with dangerous machinery. The Act conforms

³¹⁹ Section 4, *ibid*

to the Employment Act, 2006, by setting the minimum age for employment at sixteen years.

The Act safeguards children against violence and establishes a right to child protection services. Sexual abuse and exploitation; child marriage, child sacrifice, child labour, child trafficking, institutional abuse of children, female genital mutilation (FGM), and other forms of physical and emotional abuse are all addressed in the new Act. The Act establishes preventive and response services for child abuse and neglect victims. Additionally, it requires medical practitioners, teachers, and social workers / counsellors to report child abuse.

By establishing legal customary guardianship in accordance with customs, the Act clarifies guardianship. It grants guardianship only when no relatives are willing to care for the child or when all other options for care have been exhausted. The Act restricts guardianship to Ugandans only, while non-Ugandans can only adopt, which requires 12 months of foster care. The Act provides that guardianship terminates when a child reaches the age of 18 or when it is revoked. The Act requires individuals who adopt children to submit periodic reports on the child.

It establishes an adoption agency to process adoption applications. Intercountry adoption will be considered as a last resort after all other options for care have been exhausted. It clarifies the administrator's liability in relation to a child's estate in order to prevent the abuse of children's property. The Act prohibits the death penalty for individuals under the age of 18 and adults whose offense occurred while they were under the age of 18, while section 106A prohibits corporal punishment in

schools. The new Act imposes a maximum sentence of three years in prison or a fine of up to 100 currency points, or both, on child offenders. Each currency point is worth 20,000 Ugandan Shillings.

4.5 Case Law on Protection of Children

According to the Constitution, anyone who alleges that a fundamental or other right or freedom guaranteed by the Constitution has been violated or threatened may seek redress from the High Court via the procedure established by the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules. Additionally, the Constitution states that "any person alleging that an Act of Parliament or any other law, or anything contained in or done pursuant to any law, or any act or omission by any person or authority, is inconsistent with or in violation of a provision of the Constitution, may petition the Constitutional Court for a declaration to that effect, as well as for redress as appropriate."

Any person may bring a private prosecution in a magistrate's court, including a child and/or their representatives, if they have reasonable grounds to believe an offense has been committed. This action may be taken as a last resort if a report pursuant to Section 11 of the Children Act does not have the desired effect. In the case of infants and young children, the child's parent or legal guardian would typically file a lawsuit on the child's behalf as a next friend, as described in part II.B above. The CPRs and applicable legislation make no distinction between infants and young children and older children. In the matter of Clare Maureen Byrne's petition for Hassan Kaaya's adoption (Child). The High Court of Uganda in Jinja was put to the test in 2018

regarding the applicability of the child's best interest. The court cited Bromley's advice, which states that "...in applying the welfare principle, the Court must act in the child's best interests..."

The court decision was also based on a provision of the Ugandan Child Act, Cap. 59, which states that any decision based on this Act shall be guided by the welfare principles and children's rights set out in the First Schedule to this Act. That the child's best interests include the following: a) The child's discernible wishes and feelings, taken into account in light of his or her age or comprehension; b) The child's physical, emotional, and educational needs; c) The child's age, sex, background, and any other relevant circumstances; d) Any harm the child has suffered or is at risk of suffering; and e) Where applicable, the capacity of the child's parents, guardians, or other caregivers.

In this case, the applicant has established his or her ability to raise Kaaya. Her prior and ongoing work with children should have equipped her with the necessary skills for adoption. She has expressed a desire to live and work in Uganda for a long period of time and has made an effort to maintain contact with Sasira, who served as Kaaya's first parental figure. This demonstrates that the petitioner should have a firm grasp on Kaaya's history and culture. She has a confirmed address in Jinja, has enrolled Kaaya in an excellent school, and appears to be a positive influence on him.

Thus, the evidence presented established conclusively that Kaaya has no known biological parent or relative and that no one has come forward to claim him despite notifications of his existence and abandonment. As a result, he is a child who is

unable to exercise the rights guaranteed to him by the Constitution and the Act. As a minor, he requires alternative placement in order to survive. The court determined that Kaaya is an appropriate candidate for adoption.

In the case of Alice Ekisa and Jamil Bizigo (Family Cause No. 053/2016),

The High Court of Uganda applied a similar jurisprudence in a case where an applicant for adoption of a child from the Federal State of the United States of America failed to produce evidence, a child maintenance report was missing, and attempts to obtain confirmation from the United States of America Government were not properly brought into evidence. In that case, the judge's decision to waive this requirement was heavily influenced by the fact that the respondent presented positively strong recommendations from the Ugandan government and other civilian and neutral sources endorsing their candidacy. I emphasized then, as I do now, that an assessment from the petitioner's home country is critical and should be overlooked only in very limited circumstances.

In Re: Namugaya (Child) Immaculate (Family Cause 129 of 2009) UGHC 68 [2009] (14 October 2009)

The applicant files this Notice of Motion pursuant to Article 139(1) of the Republic of Uganda's 1995 Constitution, sections 14, 33, and 39 of the Judicature Act, Cap 13, and section 3 of the Children Act, Cap 59, seeking orders appointing them legal guardians Namugaya Immaculate. The child's mother and great grandmother are peasants who are unable to provide for her; the child's father's whereabouts are unknown; the child is paralyzed and requires specialized medical treatment; the applicants wish to provide the child with a home, parental love, and care; and the

application is for the child's welfare and benefit. The court must satisfy itself on the following points: is the grant for the child's welfare and best interests? and whether the applicants are capable of being the child's guardians?

The court determined that the applicants are suitable guardians for the child and granted the application on the following terms and conditions: - the applicants are appointed legal guardians of the child, Immaculate Namugaya, with full parental rights and responsibilities; the applicants are directed to register the order with the Registrar of Documents, Uganda Registration Service Bureau, Ministry of Justice and Constitutional Affairs, Kampala; and the applicants appoint Finally, the applicants are directed to register the order with the authority responsible for children and family welfare in Columbus, Ohio, USA, and to submit an annual report to the Registrar, Family Division, High Court of Uganda regarding the child's welfare, until the child reaches the age of 18 years or until otherwise directed.

4.6 Challenges of Implementation of Protection of the Child Rights in Uganda

Uganda is confronted with two critical issues when it comes to implementing the provisions of The Children Act, specifically Section 16. To begin, Uganda lacks the institutional and financial resources necessary to fully implement the Act's provisions. According to its own initial report to the United Nations Committee on the Rights of the Child, "in the case of child abuse, for example, the probation officer cannot do much under the current circumstances." The officer is unable to provide a suitable location for the child. Existing children's institutions are insufficient, and formal fostering has not been developed sufficiently due to cultural and economic constraints. The greater issue is that probation and welfare officers lack resources,

are understaffed, and thus are incapable of adequately resolving the child's family and child's problems." [3].

Additionally, three of the five issues raised in the NGO report to the United Nations Committee on the Rights of the Child concern a lack of funding and other resources. [4] Second, customary law is a powerful force in Uganda, and it occasionally conflicts with specific CRC provisions. Two common elements of Ugandan customary law are the extended family acting as a support network and the emphasis on village resolution through the LC's. Both of these factors may preclude the referral of particularly complex or difficult cases to the family and children court rather than being resolved by the LC's.

However, it is critical to note that the Ugandan government and various NGOs have provided extensive training to the LCs on children's rights to legal protection. Children and their representatives can bring cases against violations of children's rights in Ugandan courts. All relevant Ugandan statutes define a child as "a person under the age of 18 years." The Civil Procedure Rules (CPRs) require that any action brought by a child be brought on the child's behalf by a "next friend." In practice, the child's next friend will almost always be a parent or other guardian. The subsequent friend must be of "sound mind [who] has attained majority" and have no conflicting interests with those of the child. The following friend has a moral obligation to ensure that the child's interests are fully and properly protected in the lawsuit.

In the case of infants and young children, the child's parent or legal guardian would typically file a lawsuit on the child's behalf as a next friend, as described in part II.B

above. The CPRs and applicable legislation make no distinction between infants and young children and older children. Parents (or, if the parents are deceased, a relative, the warden of an approved home, or a foster parent with a care order) have "parental responsibility" under the Children Act. "Parental responsibility" encompasses all of the rights, obligations, powers, responsibilities, and authority that a parent of a child has under applicable law in relation to the child. It is likely that, if the right to pursue legal claims against the child is ever contested, these "rights, duties, and powers" will be interpreted to include the right to pursue legal claims against the child. This is true of English law, which has numerous parallels with Ugandan law in the area of child rights and is frequently cited by Ugandan courts.

Numerous statutes specify the circumstances under which the Ugandan State may technically provide legal aid. The Constitution guarantees any person charged with an offense punishable by death or life imprisonment the right to legal representation at the expense of the State. The Poor Persons Defence Act establishes a right to legal aid "where it appears, for any reason, that it is desirable, in the interests of justice, that a prisoner receive legal aid in preparing and conducting his or her defence at his or her trial and that the prisoner's means are insufficient to obtain such aid." There is no statutory right to legal aid in civil or family law cases, although Section 16 of the Children Act provides a child with a right to legal representation in any case before the Family and Children Court.

Lady Justice Hellen Obura, a senior Ugandan judge, has expressed concern that these legal aid rights are not actually enforceable. According to her, "this is because providing legal aid services requires significant funding, and the Government of

Uganda, as the primary duty bearer, has not committed any meaningful funds to implement these laws." The lack of a legal aid policy and a national body to guide and coordinate legal aid provision exacerbates the situation. Additionally, she noted that "state actors are constrained by insufficient funding, allegations of corruption, a lack of staff and capacity, limited geographic reach, massive case backlogs, and a lack of coordination with other actors."

With regard to the Children Act in particular, the Yale University survey "Representing Children Worldwide" notes that "Uganda lacks the institutional and financial resources necessary to fully implement the provisions." In May 2013, it was reported that the Minister of Justice and Constitutional Affairs was considering a legal aid policy bill. While a child's parents or guardian are not required to consent to a next friend initiating legal proceedings, any parent or appointed guardian of the child may petition the court to be appointed in place of the next friend. The court may then replace the next friend with the parent or appointed guardian. While there is no limit to the number of subsequent friends who may bring a case, it is worth noting that any proposed settlement in a civil proceeding involving a child must be approved by the court.

According to the Constitution, anyone who alleges that a fundamental or other right or freedom guaranteed by the Constitution has been violated or threatened may seek redress from the High Court via the procedure established by the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules 2009. Additionally, the Constitution states that "any person alleging that an Act of Parliament or any other law, or anything contained in or done pursuant to any law, or

any act or omission by any person or authority, is inconsistent with or in violation of a provision of the Constitution, may petition the Constitutional Court for a declaration to that effect, as well as for redress as appropriate."

Any person may bring a private prosecution in a magistrate's court, including a child and/or their representatives, if they have reasonable grounds to believe an offense has been committed. This action may be taken as a last resort if a report pursuant to Section 11 of the Children Act does not have the desired effect. Judicial review proceedings may be instituted with the permission of the High Court under Order XLIIA of the CPRs, as amended by the Civil Procedure (Amendment) (Judicial Review) Rules 2003. Again, such action may be taken as a last resort if a report pursuant to Section 11 of the Children Act is found to be ineffective.

However, the legislation provides that the majority of cases involving children's rights should be brought through the Children Act's procedure. Typically, such cases are heard by a Village Executive Committee Court, from which they can be appealed to a Sub County Executive Committee Court, from which they can be appealed further to a Family and Children Court. The Village Executive Committee Court has broad jurisdiction over cases involving children; the appropriate local court has jurisdiction over "all causes and matters of a civil nature involving children."

Additionally, the Village Executive Committee Court has jurisdiction over less serious child-related criminal offenses. The Family and Children Court has jurisdiction over all criminal charges brought against a child, except those punishable by death or those brought jointly by a child and an adult over the age of

18, which are heard by a magistrate's court or the High Court. Finally, children may lodge complaints with the national Human Rights Commission, "a body established by the government to investigate complaints and raise public awareness about human rights in Uganda."

However, only 3.3 percent of the Commission's 4,753 complaints received in 2013 were filed by children, the majority of which concerned the right to education, maintenance, and neglect by parents or guardians. The Committee on the Rights of the Child expressed concern about the Commission's lack of a dedicated department for children's rights and recommended that Uganda establish a separate department with the necessary human and financial resources to receive and investigate complaints about violations of children's rights from or on behalf of children.

Individuals, including child victims, their parents or legal representatives, groups, or NGOs recognized by the African Union may submit complaints (referred to as "communications") to the African Committee of Experts on the Rights and Welfare of the Child ("African Committee") regarding alleged violations of the African Charter on the Rights and Welfare of the Child ("African Children's Charter"). Prior to bringing a case to the African Committee, all available domestic remedies must have been exhausted.

The complaint must include, among other things, the complainant's name or, in the case of an NGO, the legal representative's name, as well as whether or not the complainant wishes to remain anonymous and why. The African Committee will investigate the complaint and render a decision on its merits, as well as make

recommendations to the State, which may include compensating the victim(s) and instituting measures to prevent future violations. Commission africaine des droits de l'homme et des peuples Individuals, groups, and non-governmental organizations ("NGOs") may lodge complaints with the African Commission on Human and Peoples' Rights ("African Commission") regarding alleged violations of the African Charter on Human and Peoples' Rights ("African Charter").

Prior to bringing a case to the African Commission, all available domestic remedies must have been exhausted. The complaint must include the following information: the name of the person filing it or, in the case of an NGO, the name of the legal representative; whether the complainant wishes to remain anonymous and why; and the name of the victim, if he or she is not the complainant. The African Commission will investigate the complaint and render a decision on its merits, as well as make recommendations to the State, which may include compensating the victim(s) and implementing measures to prevent future violations. If the case involves grave or widespread human rights violations, or if the Commission believes the State will not follow through on its recommendations, the Commission may refer the case to the African Court on Human and Peoples' Rights.

4.7. Conclusion

Following the unfinished business of children being involved in war, particularly in northern Uganda, Local government and law enforcement's ability to address the region's numerous child welfare issues is being questioned. Uganda's legal framework governing child protection is fragmented and ineffective, with a poorly coordinated referral system, limited services for survivors, children lacking the

ability to speak out and report abuse, and traditional beliefs frequently perpetuating certain forms of violence. Despite this international commitment to child rights protection, promising legal frameworks and strategies for child protection have yet to translate into significant progress in terms of guaranteeing these rights, which remain weak and absent, particularly in conflict-affected regions.

CHAPTER FIVE

LEGAL FRAMEWORK FOR PROTECTION OF CHILDREN IN ARMED CONFLICT IN DEMOCRATIC REPUBLIC OF THE CONGO (DRC)

5.1 Introduction

Through various international and regional legal instruments, the DRC is committed to the protection and implementation of numerous important international standards pertaining to child rights. Despite this international commitment to child rights protection, promising legal frameworks and strategies for child protection have yet to translate into significant progress in terms of guaranteeing these rights, which remain weak and absent, particularly in conflict-affected regions. This chapter examines the Democratic Republic of Congo's legal protection for children caught up in armed conflict (DRC).

5.2. Treaty Practice of Democratic Republic of the Congo in International Law

As discussed in the preceding chapter, the term 'Treaty Practice' in international law refers to the procedures and practices used by States and International Organizations in the formation and administration of treaties and treaty-related acts. This includes treaty drafting, adoption, signature, and ratification; making reservations and declarations; withdrawing from or winding up a treaty; managing treaty records and publications; managing domestic constitutional and parliamentary procedures; providing the public with official treaty status information; implementing treaty obligations in domestic law; and depositary functions.

The Democratic Republic of the Congo is a monist state, which means that domestic and international law are manifestations of the same legal order. Monist systems that

prioritize domestic law undermine international law's obligatory nature, reducing it to the status of external public law that the State may unilaterally modify. The Constitution provides that when regularly concluded international treaties and agreements are published, they have greater authority than the law, provided that each treaty or agreement is implemented by the other party.

In practice, however, courts and tribunals disregard the principle of international law's superiority over domestic law. They apply national law almost instinctively, owing to their ignorance of international human rights instruments, which is largely due to the fact that the Official Journals in which these international texts are published are not published on a regular basis or are widely distributed. Additionally, Congolese courts and tribunals lack libraries, and judges' salaries do not allow them to acquire all necessary documents on their own. Additionally, the Congolese authorities do not pursue any policies aimed at promoting the principle of international treaties' superiority in domestic law, nor do they conduct any training in this area. Certain trainings were funded by bilateral and multilateral partners.

Congolese law is heavily influenced by French law, specifically French Common Law. OHADA, the common French commercial law applicable to all francophone countries, serves as the country's commercial law, but it is also subject to specific Congolese legislation. In the Republic of Congo, there is a Commercial Court, but it meets infrequently. The Commercial Court last convened more than three years ago. Although the judicial system is theoretically autonomous, the executive branch frequently intervenes in the judicial system. Judges are under considerable pressure to rule in the executive branch's favour and in favour of the ruling party or system.

When a court rules on an enforcement action, the decision may be appealed to an appellate court. The Public Law established the country's international investment charter, which provides for the resolution of investment disputes under Congolese law. However, either party may initiate independent settlement or conciliation procedures. The International Centre for Dispute Resolution in Investment Matters (ICSID).

In practice, it is difficult to enforce foreign court judgments in the Republic of Congo. While the government does not explicitly deny the judgment, it proposes meetings and solutions that prolong the stalemate. There is a known case of a foreign-owned company having a judgment against the Republic of Congo government for unpaid work from over 25 years ago. Despite court rulings in favour of the foreign-owned company in the United States and France, the Republic of Congo government continues to assert that the company was insolvent in the Republic of Congo and had not complied with its tax obligations.

5.3 DRC's Status of Ratification of International and Regional Treaties on

Protection of children

The DRC has ratified the major human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on All Forms of Discrimination Against Women, and the Convention on the Rights of the Child. Additionally, the DRC is a signatory to the Convention on the Prevention and Punishment of Genocide and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. At the regional level, the DRC has

ratified the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of Children, and the African Charter on the Establishment of an African Court on Human and Peoples' Rights, all of which were adopted in June 1998. Additionally, it has ratified or acceded to the four 1949 Geneva Conventions on the protection of victims of armed conflicts, their additional Protocols I and II, the Optional Protocol to the Convention on the Rights of the Child on the participation of children in armed conflict, and the Rome Statute of the International Criminal Court.

Additionally, the DRC is bound by international customary law. The DRC is a signatory to the Cotonou Agreement, which governs EU relations with developing countries in Africa, the Caribbean, and the Pacific. The agreement binds States parties to it to uphold the rule of law and to respect fundamental human rights. According to the Constitution, "duly concluded international treaties and agreements shall have precedence over laws following their publication..." This provision reaffirms the Congolese legal system's monist character.

Additionally, the constitution requires judges to directly apply duly ratified international treaties, laws, and regulatory acts, provided they are consistent with applicable laws and custom and do not violate public order or good morals. In the event of a conflict between these two provisions, judges and magistrates would be required to apply international treaties over domestic law. However, except in exceptional circumstances, the judge would be able to interpret international standards into domestic law. Except for the Rome Statute, DRC courts have generally been reluctant to rely directly on international law in the absence of

implementing legislation. Additionally, judges, lawyers, and the general public have a limited understanding of international legal concepts; as a result, they are rarely consulted during court proceedings.

5.4. DRC's Constitution on Protection of Children in Armed conflict

The Democratic Republic of Congo's (DRC) Constitution ushers the DRC into a democratic era in which the Rule of Law and the protection and promotion of human rights are fundamental tenets of social and political life. The Constitution guarantees the protection of fundamental human rights, including equality before the law, the right to be heard and represented in court, as well as freedom of expression and information. The DRC Constitution guarantees that all individuals have the right to marry someone of the opposite sex and to establish a family. The family, as the fundamental unit of the human community, is organized in such a way that its unity, stability, and protection are ensured. It is safeguarded by the authorities. For parents, providing care and education for their children is a natural right and duty that they exercise under the supervision and assistance of public authorities. Additionally, all children owe their parents assistance. The parliament has been tasked with the responsibility of defining the rules governing marriage and family organization through legislation.

The Constitution defines a child as anyone who has not reached the age of 18 and is also referred to as a minor, without regard for gender. All minors have the right to know their father's and mother's names. Additionally, they have the right to protection from their family, society, and public authorities. Child abandonment and maltreatment, in particular paedophilia, sexual abuse, and charges of witchcraft, are

illegal and punishable under the law.

Parents have a responsibility to care for their children and to protect them from acts of violence both inside and outside their parental home. The public authorities have an obligation to protect children in perilous situations and to prosecute those who commit acts of violence against children and their accomplices. All other forms of exploitation of minors are strictly prohibited by law. The Constitution imposes a duty to the public authorities to protect the youth against any attack on their health, education or integral development. This general duty of protection refers to all measures that are taken to prevent and respond to all forms of abuse, neglect, exploitation and violence against children and their rights. Thus, the public authorities in DRC should make sure to create a system that seeks to address the full spectrum of risks faced by children and their families, and comprise the related set of laws, policies, regulations and services across all social sectors, particularly social welfare, education, health, security and justice.

The Constitution ensures that all individuals, including children, have the right to an education. National education provides it. National education is comprised of public institutions and approved private institutions. The law establishes the conditions for the establishment and operation of these institutions. Parents have the right to decide how their children will be educated. In public institutions, primary education is compulsory and free. The constitution entrusts public authorities with the responsibility of supervising the provision of free education in the DRC under the conditions specified by law.

Additionally, the Constitution guarantees that all persons have the right to equal access to institutions of national education regardless of their place of origin, race, religion, sex, political or philosophical beliefs, or physical, mental, or sensorial condition in accordance with their capacities. National educational institutions, in collaboration with religious authorities, may provide pupils who have not reached the age of maturity with an education consistent with their religious convictions upon parental request.

5.5 DRC's National Legislation on Protection of Children

The Democratic Republic of Congo's human rights situation continues to be a source of concern, particularly for children. The Congolese government has enacted legislation to protect children, building on prior commitments to international conventions.

5.5.1 Law on the Protection of the Child, 2009

The Child Protection Law was enacted in 2009 and published in the Official Gazette on 12 January 2009. The law defines "child in an exceptional situation" as any person under the age of 18 who is found in a situation of armed conflict, tensions or civil unrest, natural disasters, or a situation of significant and prolonged degradation of socioeconomic conditions. Similarly, it provides for "exceptional protection," prohibiting children from being enlisted or used in the armed forces or armed groups. Additionally, it establishes that the State is responsible for reintegrating children enlisted or used by forces or armed groups into their family or community. The law imposes a responsibility on the state to ensure the protection and education of children affected by armed conflict, as well as their reintegration. In terms of

penal repression, the law states that enrolment or use of children under the age of 18 in the armed forces or armed groups is punishable by a 10- to 20-year prison sentence.

5.5.2 The Labour Code, 2002

The Labour Code establishes a minimum age of 16 years for employment or engagement to work, and the code also prohibits forced labour in the DRC. Additionally, the law prohibits child trafficking, commercial sexual exploitation of children, and the use of children in illegal activities. The Democratic Republic of the Congo's laws regarding child labour are not entirely consistent with international standards. The penalties stipulated in the Labour Code for the use of forced or compulsory labour are insufficient to deter violations. The Labour Code imposes a maximum penalty of six months' imprisonment and/or a fine for the use of forced or compulsory labour.

Children are only required to attend school until they reach the age of 15. This standard exposes children under the age of 15 to the most heinous forms of child labour, as they are not required to attend school but are also not legally permitted to work. Although the Constitution guarantees the right to free education, in Kinshasa and Lubumbashi, school fees are still required. Children work in a variety of jobs to help pay school fees and compensate underpaid teachers, including artisanal mining and on the farms of their teachers.

5.5.3 The Family Code, 1987

The Family Code, enacted in 1987, marked a significant improvement in the status of children and women in comparison to the previous Civil Code. It made

improvements to marriage consent and inheritance. The Family Code establishes that marriage establishes the household and that the term "household" refers to the spouses, their unmarried dependent children, and all other persons to whom the spouses are obligated to provide support, provided that those individuals reside regularly in the conjugal home and are registered in the family record.

The Family Code establishes an age of 18 years for men and 15 years for women for contracting marriage. However, pursuant to paragraph 2 of that article, a court may grant age exemptions for compelling reasons. Any person with a legitimate interest may petition the court for such a decision. The Family Code provides the following regarding "emancipated" children: "A child, even if emancipated, who has not reached the required age for marriage, may not contract marriage without the consent of its father and mother." If either parent is deceased, absent, unable to declare his or her will, or has been deprived of parental authority, the other spouse's consent shall suffice. In the absence of the father and mother, the child must obtain consent from his or her tutor, who must first consult the family council.

5.5.4 Penal Code Amendment on Sexual Offences, 2006

According to the Democratic Republic of the Congo's Penal Code, any of the following acts committed as part of a widespread or systematic attack directed against the Republic or its civilian population constitutes a crime against humanity and is punishable by death, regardless of whether committed during peacetime or war: rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, and other forms of comparable sexual violence.

The Democratic Republic of the Congo's 2006 Sexual Violence Amendment amended and completed the Congolese Penal Code in accordance with international law. Congolese penal law lacked many of the incriminations found in international law, particularly humanitarian law, depriving the civilian population of humanity's quality and values. Thus, the current law amends and completes the Congolese Penal Code by incorporating international humanitarian law's provisions on sexual violence offenses. Thus, it prioritizes the protection of the most vulnerable individuals, particularly women, children, and men who are victims of sexual violence.

It states that any act contrary to morals committed against a person intentionally and directly without their valid consent constitutes an indecent assault. Any indecent assault committed without the use of violence, trickery, or threats against the person or through the person of a child under the age of 18 years shall be punished by six months to five years of penal servitude. Medical examinations can determine the child's age, but official information on personal data is lacking. Indecent assault committed with violence, deception, or threats against a person of either sex is punishable by up to five years in prison. Indecent assault committed with violence, trickery, or threats against the person or through the person of a child under the age of 18 years is punishable by five to fifteen years of penal servitude. If the assault was committed against or through persons under the age of ten, the penalty is between five and twenty years in prison.

Rape has been defined precisely in this amendment as any person who, either directly or indirectly through a third party, or by surprise, psychological pressure, or

in the context of a coercive environment, or by abusing a person who has lost the use of his or her senses due to illness, alteration of faculties, or any other accidental reason, or who has been deprived of them by artifice: a) any man, regardless of his age, who has inserted his sexual organ, however briefly, into that of a woman, or any woman, regardless of her age, who has compelled a man to insert his sexual organ, however briefly, into hers; b) any man who has penetrated, however briefly, the anus, mouth, or any other orifice of the body of a woman or a man with a sexual organ, with any other part of the body, or with any object Whoever is found guilty of rape shall face a sentence of five to twenty years in prison and a fine of not less than 100,000 Congolese francs.

Article 174 c Whoever induces one or more persons to commit one or more sexual acts through force, threat of force, or coercion, or by exploiting such persons' inability to give genuine consent, with the intent of obtaining financial or other advantage, shall be sentenced to three months to five years of penal servitude. The amendment criminalizes the act of Sexual slavery carries a penalty of five to twenty years in prison and a fine of 200,000 Congolese francs for anyone who exercises one or more of the powers associated with the right of ownership over a person, most notably by detaining or imposing a similar deprivation of liberty or by purchasing, selling, lending, or bartering such a person for sexual purposes, and causes that person to commit one or more sexual acts. Any act or transaction involving the trafficking or exploitation of children or another person for sexual purposes in exchange for money or any other benefit is punishable by ten to twenty years in prison.

5.6 Case Law on Protection of Children in the DRC

259/02 Working Group on Strategic Legal Cases v. Democratic Republic of Congo, 2011³²⁰

The African Commission on Human and Peoples Rights stated that there are numerous international obligations prohibiting the imposition of the death penalty on children, which the Democratic Republic of Congo has committed to protect. The International Covenant on Civil and Political Rights and the African Charter expressly prohibit the imposition of death sentences for crimes committed by minors. Violation of any Charter right demonstrates a State Party's failure to take the necessary measures to ensure the enjoyment of that right.

In this case, the African Commission on Human and Peoples Rights decided on a case brought against the Democratic Republic of Congo by the Working Group on Strategic Legal Cases, a group of lawyers in the DRC. The Complainants stated in their submissions on admissibility that the content concerns some minors who were sentenced by a court whose decisions cannot be appealed. According to them, this is not a communication based on a collection of media reports, but rather on tangible facts established through legal texts and rulings by Respondent State authorities. Article 5 of Decree No. 019 of 23 August 1997 establishing the Military Courts provides that their decisions are final and cannot be appealed. According to the Complainants, no remedies are available, and thus the Communication must be declared admissible.

³²⁰ Adopted at the 14th Extraordinary Session of the African Commission on Human and Peoples Rights, held from 20 to 24 July 2011, Nairobi, Kenya

The Complainants assert that the African Charter's Articles 1, 3, 4, and 7 have been violated. That the Complainants' merits submissions do not directly address Charter provisions. Rather than that, the Complainants seek to establish that the facts presented constitute violations of international legal instruments and Congolese national law. On the basis of international legal instruments, the Complainants allege a violation of children's rights to special judicial treatment, which are guaranteed by the charter, which requires States Parties to promote the establishment of laws, procedures, authorities, and institutions specifically applicable to children who are alleged to have committed, been charged with, or recognized as having committed a violation of the penal law.

On the other hand, the respondent state contended that the victims were child soldiers charged with more serious offenses, including criminal conspiracy, armed robbery, and murder, all of which are punishable by death under national law. Additionally, the DRC reports that the victims were military personnel. The Respondent State's primary argument is that the sentence imposed on them was never carried out and that the sentences were commuted. The respondent State contended that the facts fell within the jurisdiction of a statutory Military Court.

Additionally, it was argued in this case, that the provisions of the Convention on the Rights of the Child contained in the following Standard Minimum Rules shall be applied equally to juvenile offenders regardless of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, or other status. Additionally, where appropriate, consideration shall be given to dealing with juvenile offenders without resorting to formal proceedings before a competent

authority. If a juvenile offender's case is not diverted, she or he shall be dealt with by the competent authority (court, tribunal, board, or council, for example) in accordance with the principles of a fair and just trial.

Concerning the merits, the Complainants assert that, while the DRC is required by Article 1 of the Charter to take all necessary legislative measures to implement the Charter's provisions, the State failed to harmonize its domestic legislation with the international instruments to which it is a party. According to the Complainants, this failure established the legal basis for the enforcement of domestic laws that violate the Charter and international human rights law. This enforcement was used to justify the victims' sentencing to death.

The convention on international obligations establishes that a State is bound by an obligation only if it has acceded to it either by becoming a party to the legal instrument or by authorizing a specified entity to bear the burden of the obligation. According to Article 1 of the Charter, "The Member States of the Organization of African Unity, as parties to this Charter, shall recognize the rights, duties, and freedoms enshrined in this Charter and undertake to implement them through legislative or other measures."

Communication 278/2003 - Promoting Justice for Women and Children (PROJUST NGO) vs. Democratic Republic of Congo

Prior to international courts and tribunals such as the African Commission for Human and People's Rights enforcing a child's rights, some local remedy within the state's jurisdiction must be exhausted. This was confirmed in the case of PROJUST

NGO v. Democratic Republic of Congo. According to the Complainant, these six women were arrested in lieu of their husbands, who had fled the country or died. The latter were accused of involvement in the 2001 assassination of President Laurent Désiré Kabila.

Additionally, the Complainant alleged that these Victims were taken to a jail that is not under the jurisdiction of the Prosecutor's Office and tortured before being transferred to the Kinshasa Penitentiary and Re-education Center in March 2001. Additionally, the Complainant stated that several of the Victims were detained there with their children, and one of them even gave birth to her second child in the Centre. The requirement of exhaustion of domestic remedies was determined to stem from the principle of complementarity, which states that international or regional mechanisms cannot and should not take the place of national courts. International or regional bodies have jurisdiction over these cases only when national courts are unable to deliver justice. As a result, the African Commission strictly enforces the rule requiring the exhaustion of domestic remedies and has waived this requirement only in a few limited circumstances.

5.7 Challenges of Implementation of Protection of the Child Rights in the DRC

The Democratic Republic of Congo has ratified a number of international legal instruments, most notably the Convention on the Rights of the Child and its Optional Protocols on child soldiers, child prostitution, and child pornography. It has not, however, ratified the CRC's third optional protocol on a communications procedure. All international treaties and conventions that the DRC regularly ratifies and publishes take precedence over domestic law. Due to the fact that the CRC was duly

ratified and published, it supersedes national legislation. However, it is unclear whether it would also prevail over a conflicting constitutional provision. In theory, it is impossible to have a treaty provision that contradicts the Constitution, because prior to ratification of any treaty, the Constitutional Court is tasked with examining the treaty's constitutionality and amending the Constitution as necessary.

Due to the fact that the CRC took precedence over national law upon publication, it does not require incorporation into national law. However, the 2006 DRC Constitution's Preamble makes a direct reference to the State's commitment to the CRC. Additionally, the DRC has implemented provisions of the CRC through the adoption of a number of domestic laws aimed at promoting and ensuring children's rights. Numerous legislative reforms have been implemented in the area of children's rights, most notably Act No. 001 09/10 of 10 January 2009 on Child Protection ("Child Protection Code").

Additionally, the following instruments address the child's rights: Congolese Family Code (equivalent to the Civil Code), Inter-ministerial Decree No.13 12/MINTPS/AR/34/2006 of 10 June 2006 establishing and operating the National Committee against the worst forms of child labour, and Ministerial Order establishing and operating the National Council of Children. The Constitution requires that courts apply duly ratified international treaties.

5.7.2 Legal Challenge on Children Access to Justice at Domestic Level

Civil actions, legal proceedings in the Children's Court under the Child Protection Code, administrative proceedings, or proceedings referred to the Constitutional

Court may be brought to challenge violations of children's rights. It is then necessary to determine whether children of any age may bring these cases in their own names/on their own behalf, or whether the case must be brought by or with the assistance of a representative.

Minors are defined in the Constitution, the Family Code, and the Child Protection Code as children under the age of 18. This definition is limited to the measures discussed in the Child Protection Code. The Constitution's definition, on the other hand, is universal in scope and supersedes all contradictory national laws (including minimum age of marriage and criminal responsibility). Minors are not allowed to exercise their civil rights under the Family Code; they remain subject to their parents' authority until they attain majority or emancipation. If the parents cannot agree, the fathers will take precedence, although the mother may then appeal to the Peace Tribunal.

Once a child reaches the age of 15, his or her parents or legal guardian may petition for emancipation. Thus, children would be unable to bring cases of rights violations in their own name in civil or criminal courts. If the child's interests' conflict with those of his or her parents or legal guardian, the civil judge will appoint an appropriate representative or perform this function himself or herself. According to the Child Protection Code, any child may petition the Children's Court on his or her own behalf. Of course, the law does not preclude a parent or guardian, or even a representative, from submitting an application. The Child Protection Code states that all decisions and actions involving a child must be made with the child's best interests in mind. This principle, however, has not been translated into specific

procedures for challenging violations of the rights of infants and young children brought by the child's parents or legal guardian.

The Constitution provides that "all persons have the right to defend themselves or to be assisted by a lawyer of their choice" during criminal proceedings, thereby establishing a right to counsel during a criminal trial. There is, however, no specific provision regarding free or subsidized legal aid in general. In civil cases, the Public Ministry may request that the presiding judge appoint legal counsel for individuals who are incapable of representing themselves, such as children. Additionally, civil cases involving minors are automatically referred to the Public Ministry for review, ensuring that the Public Ministry is always aware of such cases and has the option of requesting the appointment of legal counsel. It is unclear whether the appointed legal counsel will be compensated or subsidised.

Additionally, the Child Protection Code provides that a child has the right to counsel, either appointed by the judge or chosen by the child, in the context of the Children's Court. However, it is unclear whether this assistance is provided for free or at a reduced rate. Parents or guardians are not required to consent or express an opinion when a child brings a case to the Children's Court on his or her own. Children may be denied access to justice in remote areas of the country due to a lack of judicial bodies. There is a need for additional instances to protect children's rights, particularly in the context of contemporary armed conflict.

Another impediment to children's access to justice is the right holders' ignorance of the law (children, their parents, or legal guardians). Finally, in addition to the State's

lack of commitment to uphold the international instruments it ratified, there is a dearth of material, human, and financial resources. These funds are required to establish and sustain long-term paralegal initiatives aimed at assisting children in obtaining justice.

5.7.3 Legal Challenges on Mechanism for Children Access to National Courts

Criminal court proceedings may be initiated only by the Public Ministry; private prosecutions are not permitted in the Democratic Republic of the Congo. However, a victim of a crime being tried in a criminal court may bring a civil action for damages caused by the crime concurrently with the criminal trial and at any time during the proceedings. Additionally, for less serious offenses, a victim may summon the perpetrator to court via a writ of summons, bringing the facts to the attention of the Public Ministry, which will decide whether or not to prosecute.

A child's representative may bring a civil case in civil court to defend the child's rights. Civil cases may be brought by any individual by submitting a declaration to the clerk of the court that includes the claimant's and defendant's names, as well as the nature of the dispute. Additionally, the child being represented will be identified. A child's parents or guardians, the child himself or herself, or a social worker may bring a legal action in the Children's Court to challenge the child's identity, capacity, filiation, adoption, or family relationships, or to contest the child's detention. Additionally, the judge may decide to hear the case on his or her own initiative.

Complaints seeking to vacate an administrative decision may be filed with the appellate courts (against decisions made by local governments) or with the Supreme

Court's administrative section (against decisions by central authorities). Simultaneously, the individual who sustained damages as a result of the erroneous administrative decision may seek compensation from the same court. Any individual may appeal to the Constitutional Court a law they believe is unconstitutional if it is invoked in a case involving that individual.

The Constitution contains a Bill of Rights, which makes it possible to challenge a law that violates children's rights. The court then vacates its decision pending a ruling by the Constitutional Court. Any individual or group of individuals who have suffered a violation of their rights may file a complaint with the National Human Rights Monitoring Centre ("NHRMC"). Human rights organizations may also take a stand against human rights violations on behalf of victims. The NHRMC has the authority to investigate a case on its own initiative.

Individuals, including child victims, their parents or legal representatives, groups, or non-governmental organizations ("NGOs") recognized by the African Union, may submit complaints (referred to as "communications") to the African Committee of Experts on the Rights and Welfare of the Child ("African Committee") regarding violations of the African Charter on the Rights and Welfare of the Child ("African Children's Charter"). Prior to bringing a case to the African Committee, all available domestic remedies must have been exhausted. The complaint must include, among other things, the complainant's name or, in the case of an NGO, the legal representative's name, as well as whether or not the complainant wishes to remain anonymous and why.

The African Committee will investigate the complaint and make a determination on the merits of the case, as well as make recommendations to the State, which may include compensating the victim(s) and preventing future violations. Individuals, groups, and non-governmental organizations ("NGOs") may lodge complaints with the African Commission on Human and Peoples' Rights ("African Commission") regarding alleged violations of the African Charter on Human and Peoples' Rights ("African Charter"). Prior to bringing a case to the African Commission, all available domestic remedies must have been exhausted. The complaint must include the following information: the name of the person filing it or, in the case of an NGO, the name of the legal representative; whether the complainant wishes to remain anonymous and why; and the name of the victim, if he or she is not the complainant.

The African Commission will investigate the complaint and render a decision on its merits, as well as make recommendations to the State, which may include compensating the victim(s) and implementing measures to prevent future violations. If the case involves grave or widespread human rights violations, or if the Commission believes the State will not follow through on its recommendations, the Commission may refer the case to the African Court on Human and Peoples' Rights. For an illustration of the DRC Communication in action.

5.7.4 Challenge of Insufficient Powers of the Judiciary for Child Protection

Concurrent civil actions with criminal proceedings may result in restitution and compensation, the amount of which is determined by the judge. Even if the victim of the crime does not bring a civil action, the judge may order restitution and/or compensation in appropriate cases. Although no specific provision addressing this

issue has been identified, it appears likely that the same remedies are available in separate civil actions. The Children's Court will provide the same level of protection as the civil courts. The children's judge has the authority to vacate the child's detention if he or she believes it is illegal.

When a judge determines that a child is in violation of the law, the judge may decide to place the child under the effective authority of his or her legal guardians, to place the child under house arrest, or to temporarily place the child with another family or, as a last resort, in an institution. A complaint of administrative nature may result in the revocation of the administrative decision, as well as restitution and/or compensation if the illegal decision resulted in damages that were not fully compensated by the decision's simple revocation. A law declared unconstitutional by the Constitutional Court is automatically declared null and void.

In every jurisdiction, the Child Protection Code established Children's Courts (Tribunal pour enfants). These courts have exclusive jurisdiction over minors (children under the age of 18) and are the only ones authorized to adjudicate children who have violated the law, as well as cases involving children's identity, capacity, filiation, adoption, and family relationships. Additionally, children may contest their detention in the Children's Courts. A child's parents, legal guardian, or social worker may submit a request to challenge a violation of his or her rights. Additionally, proceedings may be initiated by the child's spontaneous declaration or by the judge on his or her own initiative. Although the Children's Courts initially encountered difficulties, several judges were appointed in 2013 to help alleviate the case backlog.

The Constitutional Court, the members of which were sworn in in April 2015, adjudicates on the constitutionality of legislative provisions. Applicants who are involved in legal proceedings may refer to the Constitutional Court a law they believe is unconstitutional if the law is being used against them. This ostensibly efficient judicial system is actually reduced to 230 jurisdictions serving approximately 60 million inhabitants, concentrating access to justice in urban areas.

The "audiences foraines," mechanisms by which a jurisdiction sends judges to remote rural locations to bring justice, are extremely rare in practice due to a severe lack of resources and frequently obstruct the administration of justice at the court, which is against the law. While customary courts are not officially part of the judicial system, they are frequently involved in resolving disputes, particularly in rural areas where formal justice does not reach. Magistrate's courts have the authority to hear appeals from decisions rendered by customary courts.

5.7.5 Challenge of Poor Legal Aid Services/Complicated Court costs for Child Protection

There are legal provisions referring to legal assistance; however, the extent to which this assistance is free or subsidized, as well as the conditions under which it is available, are unclear. In criminal courts, if the defendant prevails at trial, the victim who brought the case via writ of summons is responsible for the entirety of the court costs. If the victim files a civil action following the court's seizure, he or she will be responsible for half of the court costs. According to the Code of Criminal Procedure, litigants who are determined by the judge to be indigent may have their court costs paid in part or in full by the Treasury. Unemployed individuals and those without

official pay documents must present a certificate of indecency issued by their local government in exchange for a high.

Prior to proceeding in civil courts, the claimant must pay the court costs. At the conclusion of the trial, the judge will determine which party - typically the loser - will bear the court costs. The claimant may then seek reimbursement from the losing party for his/her monetary advance. Additionally, indigent claimants may have their court costs waived in part or entirely in civil cases. The court's presiding judge will determine the claimant's indigency based on the criteria outlined above. Prior to the decision's execution in civil courts, the winning party must pay a "proportional right" equal to 6% of the amount granted by the decision. Court officials frequently disregard the statutory court fees and demand exorbitant, illegal additional fees in US dollars.

5.7.6 Challenges Related to Admissibility of Evidence in Child Rights Cases

Are there any specific rules, procedures, or practices regarding the handling of evidence produced or presented by children? For Children's Courts and other jurisdictions, the burden of proof is the same. Before testifying, witnesses are required to take an oath, although this requirement is discretionary in criminal proceedings. There are no specific rules governing proceedings involving children, and it is unknown whether children may testify. According to the Constitution, "a person (s) has the right to have their case heard by a competent judge within a reasonable time." The Criminal Procedure Code and the Child Protection Code require that judgments be rendered in criminal courts and children's courts within eight days of the hearing.

Additionally, the law n° 06/019 of 20 July 2006 on the repression of sexual crimes and amending the Criminal Procedure Code states that investigations into sexual violence cases must be completed within a month of the competent judge being seized. The court must render its decision within three months of that date. In practice, however, actions brought before Congolese courts can last several months or even years before a final hearing is scheduled. This is especially true in cases involving children, as the judicial system continues to suffer from a shortage of professionals trained to handle such cases, despite the new appointments made in 2013.

5.8 Conclusion

The situation of child rights in the Democratic Republic of Congo continues to be a source of concern, particularly in the eastern Congo's war-torn provinces. The promising legal frameworks and strategies for the protection of women and children have not yet resulted in significant progress in terms of human rights respect, particularly in these provinces with a long history of unresolved conflict. The Congolese government enacted the Child Protection Law, which builds on previous international commitments. However, the institutional framework necessary to protect these rights, particularly law enforcement and judicial institutions, remains weak or non-existent throughout the country. These grave deficiencies are compounded by a social and economic environment that leaves children particularly vulnerable to abuse, deprivation, and the life-threatening situations that poverty inflicts across the country.

CHAPTER SIX

**COMPARATIVE ANALYSIS OF THE LEGAL FRAMEWORKS FOR
PROTECTION OF CHILDREN IN ARMED CONFLICT BETWEEN
UGANDA AND THE DEMOCRATIC REPUBLIC OF THE CONGO**

6.1 Introduction

Comparison is a logical and inductive method of reasoning that enables the objective identification of the advantages and disadvantages of any norm, practice, system, procedure, or institution in comparison to others. It is crucial for legal research emanate from the comparative study of human experience in legal realm spanning a variety of situations and jurisdictions. This chapter scrutinizes a comparative analysis of Uganda's and the Democratic Republic of Congo's legal frameworks for protecting children in armed conflict, which serves as the case study for the preceding research.

6.2 Comparative Analyses of Legal Framework

This section covered the comparison on how the two countries affected by armed conflicts have dealt with the legal matters pertaining to children in armed conflict areas. The section looked at legal framework and practice across various aspects within a legal framework, or more precisely, within the dual frameworks of international and domestic law.

**Findings on the existing Gaps in the International Legal Framework governing
Child Protection in the DRC and Uganda?**

International and Africa regional legal frameworks for protection of children's rights in armed conflicts. Worldwide, child abuse and exploitation have become a growing

concern. Given children's unique vulnerability, numerous international UN and regional instruments establish a series of rules and legal provisions providing them with special protection. These include; International Legal Frameworks, Africa Regional Legal Frameworks of Protection of Children's Rights in Armed Conflicts, Instruments on Child Health and Development

DRC Congo

In DRC In practice, however, courts and tribunals ignore the principle of international law's superiority over domestic law, implementing national law almost impulsively, given their ignorance of international human rights instruments, which originates largely from the fact that the official 186 journals in which these international texts are published are not published on a regular basis or are widely distributed (subjectivist state). International treaties and international agreements that the DRC has duly concluded must prevail over Congolese legislation upon publication in the government gazette Journal Official. application of international law to the Constitution and requires domesticating legislation for specified types of international treaties

It is unclear whether it would also prevail over a conflicting constitutional provision. In cases of armed conflicts -In practice, the prevalence of corruption in the judiciary and the executive's limit interference in the judicial process introduction and implementing formal justice nearly impossible. Generally, most disputes are addressed through customary law in customary courts. This leaves out inclusion of the CRC

Uganda

Uganda is a dualist country, which means that before any court can rely on a treaty, it must first be domesticated through enabling legislation. However, while the majority of the treaties referred to by the Supreme Court have been ratified by Uganda, they have at no time domesticated. As a result, international law does not operate automatically in Uganda, but rather requires domestication and incorporation into the national legal system.

International law is not explicitly recognized as a source of law in Uganda, and in order for it to be applied in Ugandan courts, a treaty must be ratified in accordance with the Ratification of Treaties Act and then domesticated by an Act of the Ugandan parliament. All laws and conventions are subordinate to the Ugandan Constitution; any law or custom that conflicts with a provision of the Constitution is deemed void. Uganda has also ratified numerous international and regional treaties relating to child protection. But in practice the national constitution superseded the international conventions

The Gaps in Literature

There is numerous literature that describes the situations of war and armed conflicts across the world, and in Africa in particular have detailed stories of war and their effects. In spite of the legal literature that exists internationally, and in the countries, there are also various researches that have been conducted by post graduate students and non-governmental organisations/ actors. The literature gaps, however, are that;

- i. Little has been written on the real causes of the armed conflict in these countries,

- ii. There is little or no written on the measure to bring lasting solutions with finality on the armed conflicts.
- iii. Very little exists in literature on the suppliers of arms in both Uganda and DR Congo.
- iv. There is a hanging cloud on the invisible beneficiaries of war and armed conflicts even when there are visible victims that are suffering and huge budgets.
- v. There is extensive literature on law (domestic and international) and continued modifications that respond to the developments, however, there is no commensurate account of the progresses made in areas affected by conflicts to alleviate the situation.
- vi. There aren't tracer studies that are longitudinal in nature that provide an account of those that were children who grew up as armed war victims and now they are adults. These doesn't seem to be worth causes to pursue and have literature on and this therefore ignore the fact that biomedical theory (trauma in physical nature and psychological and emotional) and remedies have been dealt with shallowly and in some cases, nothing is written on this account except those proposals for funding by non-profit state actors from funding agencies.

6.2.1 Similarities between Uganda's and the DRC's

Both Uganda and the DRC adopted democratic rule following the abolition of colonial rule. Democratic rule requires three fundamental principles: upward control (sovereignty resides at the lowest levels of authority), political equality, and social

norms that limit acceptable behaviour to those that reflect the first two principles of upward control and political equality. A democratic legal system views legal equality, political liberty, and the rule of law as necessary characteristics of a healthy democracy.

Uganda and the DRC are both signatories to a number of international and regional treaties, which contain secondary rules governing the formation, entry into force, implementation, operation, interpretation, and termination of treaties. Numerous international actions are required, including treaty negotiations, delegation of full powers to another government or secretariat, adoption of a treaty text, signing or ratification, or making reservations. Numerous domestic actions are also required in connection with the same treaty, including cabinet approval, parliamentary approval, national promulgation, or publication.

Both Uganda and the DRC have a significant number of children involved in armed conflict, and they receive little protection under the various international and regional treaties that both countries have signed. This means that, despite the fact that these countries have signed numerous international and regional treaties, they have been of little assistance to children whose rights have been violated in conflict zones. Additionally, both Uganda and the DRC have constitutional provisions protecting children's rights. However, such protection is never linked to the protection defined in the numerous international and regional treaties signed by these countries. To safeguard the rights enshrined in these legal instruments, the available international and regional standards have not been fully incorporated into domestic law.

6.2.2 Disparities between Uganda and the Democratic Republic of the Congo

The Democratic Republic of the Congo is a subjectivist state, which means that regularly concluded international treaties and agreements have precedence over domestic law, on condition that each treaty or agreement is implemented by the other party. In practice, however, courts and tribunals ignore the principle of international law's superiority over domestic law, implementing national law almost impulsively, given their ignorance of international human rights instruments, which originates largely from the fact that the official journals in which these international texts are published are not published on a regular basis or are widely distributed.

Uganda is a dualist country, which means that before any court can rely on a treaty, it must first be domesticated through enabling legislation. However, while the majority of the treaties referred to by the Supreme Court have been ratified by Uganda, they have at no time domesticated. As a result, international law does not operate automatically in Uganda, but rather requires domestication and incorporation into the national legal system. International treaties and international agreements that the DRC has duly concluded must prevail over Congolese legislation upon publication in the government gazette *Journal Officiel*.

The Constitution provides for the application of international law to the Constitution and requires domesticating legislation for specified types of international treaties. International law is not explicitly recognized as a source of law in Uganda, and in order for it to be applied in Ugandan courts, a treaty must be ratified in accordance with the Ratification of Treaties Act and then domesticated by an Act of the Ugandan parliament. The Ratification of Treaties Act empowers Parliament to ratify

treaties through a resolution of that body when the treaty in question concerns armistice, neutrality, or peace; or when the treaty in question concerns.

6.3 Similarities and Differences in National Children's Rights Legislation

6.3.1 Similarities

Both Uganda and the Democratic Republic of the Congo are democratic states, and their constitutions contain constitutional principles stating that democracy requires three fundamental principles: upward control (sovereignty resides at the lowest levels of authority), political equality, and social norms requiring individuals and institutions to accept only acts that reflect the first two principles of upward control and political equality.

Both Uganda and the Democratic Republic of the Congo have explicitly protected children's rights in their constitutions and call for the promotion and protection of these rights throughout their countries. This protection is derived from a number of significant international and regional legal instruments pertaining to the protection of children's rights, to which these two countries have ratified. Both constitutions were ratified following the signing of international and regional treaties by the two countries.

Both Uganda and the DRC, as signatories to numerous international and regional child protection legal instruments, have failed to incorporate the international and regional standards contained in these legal instruments into their national laws. Both countries' national laws lack an effective mechanism for implementing international and regional standards at the national level. This is because certain other laws and

other factors act as inhibitions to their implementation. Due to the fact that both Uganda and the DRC are signatories to numerous key international and regional instruments aimed at protecting children, access to justice via these legal instruments is largely barred under the current legal system. Almost all of these instruments require that someone first exhaust domestic legal processes available for adjudicating the issue before proceeding to international courts and tribunals. As a result, children in these two countries face particularly formidable obstacles when it comes to accessing these international and regional systems of redress.

For example, access to the Optional Protocol (OP) is conditional on meeting the OP's admissibility criteria. This provision has the potential to become an extremely restrictive admissions criterion for children. It states that claims brought under the procedure will be denied unless all available domestic remedies have been exhausted. This will not be the case if the solutions are ineffective or take a prolonged amount of time. As a result, children must exhaust their domestic remedies before filing a complaint under the OP.

According to the Ugandan Constitution, anyone who alleges that a fundamental or other right or freedom guaranteed by the Constitution has been violated or threatened may seek redress from the High Court via the procedure established by the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules 2009. Additionally, the Constitution provides that "any person alleging that an Act of Parliament or any other law, or anything contained in or done pursuant to any law, or any act or omission by any person or authority, is inconsistent with or in violation of

a provision of the Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress as appropriate." This means that a child and/or their representatives may do so if they have a reasonable suspicion of an offense being committed.

According to the DRC Constitution, "all people have the right to self-defence or assistance from a lawyer of their choice" during criminal proceedings. This means that individuals have a right to counsel during a criminal trial. However, there is no specific law governing free or low-cost legal aid in general. In civil cases, the public ministry may request that the presiding judge appoint legal counsel for individuals who are incapable of representing themselves, such as children. Additionally, civil cases involving minors are automatically referred to the Public Ministry for review, ensuring that the Public Ministry is always aware of such cases and has the option of requesting the appointment of legal counsel. It is unclear whether this appointed legal counsel would be compensated or not. Additionally, the Child Protection Code provides that a child has the right to counsel in the Children's Court, either chosen by the child or appointed by the judge. However, it is unclear whether this assistance is provided for free or at a reduced rate.

6.3.2 Differences

Children's rights protection in the DRC constitution appears to be more comprehensive and detailed than in Uganda's constitution. The DRC constitution protects children's rights from Article 41 to Article 45, encompassing several critical children's rights, including the right to a parent's name, the right to a free education,

protection against child exploitation, and protection against child violence. Additionally, it imposes a duty on parents and the government to ensure the protection of children. While the Ugandan constitution specifically protects children's rights in article 34 of the entire Constitution. Its provisions are not more detailed, which forces courts to interpret them. International conventions that have been ratified are not automatically effective in Ugandan law or enforceable by local courts. They are incorporated into law through the implementation of convention-compliant legislation or must be re-enacted through legislation. All laws and conventions in Uganda are subordinate to the Ugandan Constitution; any law or custom that conflicts with a provision of the Constitution is declared null and void.

The President of the Republic of the Democratic Republic of the Congo is responsible for treaty negotiation and ratification. Certain types of international treaties, such as peace treaties, trade agreements, agreements relating to international organizations, conflict resolution or civil status, treaties involving public funds, and treaties amending the law or the national territory, must be ratified by a law. Treaties and conventions signed and made public by the DRC always take precedence over national law.

Uganda's Child Act (Cap.59) reforms and consolidates the law relating to children; provides for the care, protection, and maintenance of children; establishes a family and children's court; provides for children charged with offenses; and provides for other related purposes. Despite the Act's broad protections for children against trafficking, hazardous employment, abduction, child exploitation, and sexual exploitation, it makes no specific reference to child soldiers being deployed in armed

conflict.

Uganda's national child policy incorporates its international and regional commitments to protect children. The National Child Policy satisfies the Government of Uganda's constitutional mandate to protect children's welfare, as well as the Ministry of Gender, Labour, and Social Development's mission "To mobilize and empower communities to maximize their potential while safeguarding the rights of vulnerable population groups." "(The National Child Policy (NCP) demonstrates the government of Uganda's commitment to ensuring the well-being of all children and is another significant step in the country's efforts to uphold children's rights and protect them from all forms of abuse, neglect, exploitation, and violence.

The DRC does not have a unified single child act or national policy for children; rather, international and regional commitments to child protection have been reflected in several pieces of legislation, as they require only publication to be applicable; they do not need to be incorporated into national law. However, the preamble of the 2006 DRC Constitution makes a direct reference to the State's commitment to the CRC. The DRC has implemented a number of legislative reforms in the area of children's rights, most notably in the area of child protection ("Child Protection Code"). The Congolese Family Code (which is the equivalent of the Civil Code), the Inter-ministerial Decree on the establishment and operation of the National Committee against the Worst Forms of Child labour, and the Ministerial Order on the establishment and operation of the National Committee against the Worst Forms of Child Labour.

6.4 Conclusion

While a dualist views international and domestic legal orders as distinct and independent, monism views a single and comprehensive legal order that can operate with either domestic or international law as a higher order of law. A comparison of the legal frameworks protecting children's rights in the Democratic Republic of Congo and Uganda appears to have similar foundations.

Findings on the existing Gaps in the International Legal Framework governing Child Protection in the DRC and Uganda?

International and Africa regional legal frameworks for protection of children's rights in armed conflicts. Worldwide, child abuse and exploitation have become a growing concern. Given children's unique vulnerability, numerous international UN and regional instruments establish a series of rules and legal provisions providing them with special protection. These include; International Legal Frameworks, Africa Regional Legal Frameworks of Protection of Children's Rights in Armed Conflicts, Instruments on Child Health and Development.

The Gaps in the Domestic Legal Framework Governing Child Protection in the Democratic Republic of Congo

Legal framework for protection of children in armed conflict in Democratic Republic of the Congo (DRC), through various international and regional legal instruments, the DRC is committed to the protection and implementation of numerous important international standards pertaining to child rights by ratification of International and Regional law, Treaties on Protection of children, the DRC's Constitution on Protection of Children in Armed conflict as well as case laws.

There are Gaps in the Domestic Legal Framework Governing Child Protection in the Democratic Republic of Congo

This is lacks clarity on whether it is superior cases of conflicting constitutional provisions. The Constitution requires that courts apply duly ratified international treaties. The right holders' ignorance of the law (children, their parents, or legal guardians). The children are expected to know the law even as a minor. This is insensitive to age and the fact that they are victims of war/armed conflicts. Due to the pre-occupation with war/armed conflict the State's lack of commitment to uphold the international instruments it ratified, there is a dearth of material, human, and financial resources. These funds are required to establish and sustain long-term paralegal initiatives aimed at assisting children in obtaining justice.

Legal Challenge on Children Access to Justice at Domestic Level

Minors are not allowed to exercise their civil rights under the Family Code; they remain subject to their parents' authority until they attain majority or emancipation. Parents or guardians are not required to consent or express an opinion when a child brings a case to the Children's Court on his or her own. Children have limited or denied access to justice. The children may be denied access to justice in remote areas of the country due to a lack of judicial bodies.

There are gaps in legal mechanism for children access to national courts. These are in the form of insufficient powers of the Judiciary for Child Protection- judicial system is actually reduced to 230 jurisdictions serving approximately 60 million inhabitants, concentrating access to justice in urban areas. The mechanisms by which a jurisdiction sends judges to remote rural locations to bring justice, are extremely

rare in practice due to a severe lack of resources and frequently obstruct the administration of justice at the court, which is against the law. Further there is poor Legal Aid Services/Complicated Court costs for Child Protection. This further aggravates the situation on access to justice and therefore denies the children the much-needed services and protection. These are also compounded by the challenge of inadmissibility of evidence in child rights cases-getting admissible evidence is difficult and impossible in many children cases.

The Gaps in the Domestic Legal Framework Governing Child Protection in Uganda

The following are the gaps that were found to be existing in the Ugandan situation:

There is as domestic legal framework governing child protection in Uganda. It was evident that Uganda has domesticated many of the international laws and complimented the areas that have gaps. It was further observed that there was use of Case Law on Protection of Children. That meant precedence provides a legal basis for administration of justice and further legislation. However, there were gaps in the domestic legal framework governing child protection in Uganda. These include. That there is no statutory right to legal aid in civil or family law cases. The lack of a legal aid policy and a national body to guide and coordinate legal aid provision exacerbates the situation.

Further, Uganda lacks the institutional and financial resources necessary to fully implement the provisions. In cases of Instituting litigation on violation or any offense on children rights is covered in constitution as a last resort. These violates the interests and rights of the children especially those that are already victims of

armed conflicts. It was also observed that the existence of Village Executive Committee Court has jurisdiction over less serious child-related criminal offenses. This is predisposed to violation due to cultural practices.

Individuals, including child victims, their parents or legal representatives, groups, or NGOs recognized by the African Union may submit complaints to the African Committee of Experts on the Rights and Welfare of the Child. Prior to bringing a case to the African Committee, all available domestic remedies must have been exhausted. The African Commission will investigate the complaint and render a decision on its merits, as well as make recommendations to the State, which may include compensating the victim(s) and implementing measures to prevent future violations. If the case involves grave or widespread human rights violations, or if the Commission believes the State will not follow through on its recommendations, the Commission may refer the case to the African Court on Human and Peoples' Rights.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

The overall objective of this study was to identify gaps in the protection of children from abuse of their rights in the Democratic Republic of Congo and Uganda, which are both in conflict. The study's specific objectives were to identify gaps in the international legal framework governing child protection in the DRC and Uganda; to identify gaps in the Democratic Republic of Congo's domestic legal framework governing child protection; and to examine gaps in Uganda's domestic legal framework governing child protection.

7.2 Conclusion

One of the defining characteristics of today's world is the culture of impunity that surrounds those who harm or fail to protect children on purpose. The magnitude, scope, and impact of child abuse indicate systematic violations of both civil and criminal international law. Yet the perpetrators of these violations, as well as the leaders who authorize or simply tolerate them, rarely face justice or fear prosecution. The only effective means of combating this culture of impunity is through the enforcement of the rule of law by effective institutions.

Protecting Children in Armed Conflict is a thorough legal analysis of pertinent international and domestic law. This study offered a re-examination of the current legal framework governing the protection of children in Uganda's and the Democratic Republic of the Congo's war zones. It has made recommendations aimed at putting an end to what has been aptly dubbed "the war on children." Numerous

international instruments safeguard children on a broad scale. Children benefit from the general protection afforded to civilians who do not take part in hostilities in the event of an armed conflict, whether international or non-international. Given children's unique vulnerability, the 1949 Geneva Conventions and their 1977

Additional Protocols established a series of rules ensuring their special protection. Children who are directly involved in hostilities retain their special protection. Children's participation in hostilities is also restricted under the Additional Protocols to the 1989 Convention on the Rights of the Child and its recent Optional Protocol.

Nonetheless, the magnitude and complexity of humanitarian needs and security concerns in the Democratic Republic of the Congo are shocking at the moment. Chronic poverty and underdeveloped essential service systems, recurrent armed conflict, acute malnutrition, and major epidemic outbreaks, such as the coronavirus disease 2019 (COVID-19) pandemic, all contribute to increased vulnerability. In the Democratic Republic of the Congo, four million children are in desperate need of protection. In 2020, violent crimes against children increased by 16 percent in Ituri, North and South Kivu provinces. Gender-based violence continues to be prevalent, particularly in conflict-affected provinces.

Uganda continues to have Africa's largest refugee population. Uganda will host approximately 1.3 million refugees by the end of 2020 due to the ongoing conflict, poverty, and food insecurity in Burundi, the Democratic Republic of the Congo, and South Sudan. Children account for 61% of the population affected. Children who are refugees face a variety of protection risks, including violence, abuse, neglect, and exploitation. Despite widespread evidence of child recruitment and/or use by armed

forces and groups in the DRC, there had been no convictions for this crime by national military courts as of mid-2015. Military courts have exclusive jurisdiction over members of the armed forces and armed groups in the DRC. In 2006, a military tribunal in Bukavu convicted Jean-Pierre Biyoyo, the former leader of a Mai Mai militia faction in South Kivu that was notorious for recruiting and using children, of the Congolese crime of "abduction by deception." However, this was not a conviction for war crimes involving the recruitment and/or use of children and did not require application of the Rome Statute.

Military justice actors interviewed for this framework attributed the lack of convictions to the courts' insufficient technical capacity and resources to deal with conflict-related crimes against children. The Congolese Child Protection Law (2009), which prohibits the recruitment and use of individuals under the age of 18 in armed forces or groups, as well as the national police, and which punishes violators with imprisonment and/or fines, is only partially understood by judicial authorities. It is critical to note that military justice actors also blamed the lack of convictions on the FARDC's inability to apprehend NSAG commanders due to the FARDC's lack of territorial control over certain areas where NSAGs operate.

The UN and a few international NGOs provide limited judicial assistance in the DRC, such as mobile courts ("audiences foraines") that travel to scenes of serious crimes in eastern Congo to assist investigators and prosecute members of armed forces or groups accused of serious violations. Similarly, since the end of the armed conflict in 2006, the Ugandan government has enacted a slew of new laws, policies, and institutions aimed at redressing and preventing grave violations against civilians,

including children. This includes, but is not limited to, the Ugandan High Court's International Crimes Division (ICD), which prosecutes genocide, crimes against humanity, war crimes, and other international crimes; the Ugandan People's Defence Force's (UPDF) Human Rights Directorate; the Children's Act of 1997; and measures to implement the UN Action Plan, such as child protection training for the UPDF.

Despite these reform efforts, the Ugandan Cabinet had not approved the final draft national transitional justice policy necessary to provide the necessary resources and institutional structure to significantly advance CAC accountability as of early 2015. A draft version of the policy (as of April 2015) identified a "lack of a comprehensive and coherent government policy and an insufficient legal framework to address crimes or wrongs committed in pre-conflict, conflict, or post-conflict situations." While the amnesty certificate issued shielded these individuals from criminal prosecution, it also obscured any distinctions between them and other members of the armed forces or groups, including senior commanders. As a result, those who suffered violations as children and grew into adults during the armed conflict have not received reparations or other adequate forms of redress. Numerous individuals continued to face significant levels of social stigma and economic marginalization.

7.2.1 Democratic Republic of the Congo Situation

The magnitude and complexity of humanitarian needs and security concerns in the Democratic Republic of the Congo are shocking high. Chronic poverty and underdeveloped essential service systems, recurrent armed conflict, acute malnutrition, and major epidemic outbreaks, such as the coronavirus disease 2019

(COVID-19) pandemic, all contribute to increased vulnerability. In the Democratic Republic of the Congo, four million children are in desperate need of protection. (In 2020, violent crimes against children increased by 16 percent in Ituri, North and South Kivu provinces).

The promising legal frameworks and strategies for the protection of women and children have not yet resulted in significant progress in terms of human rights respect, particularly in these provinces with a long history of unresolved conflict.

Law enforcement and judicial institutions, remains weak or non-existent throughout the country. These grave deficiencies are compounded by a social and economic environment that leaves children particularly vulnerable to abuse, deprivation, and the life-threatening situations that poverty inflicts across the country

7.2.2 Conclusions based Ugandan Situation

Uganda continues to have Africa's largest refugee population. Uganda will host approximately 1.3 million refugees by the end of 2020 due to the ongoing conflict, poverty, and food insecurity in Burundi, the Democratic Republic of the Congo, and South Sudan. Children account for 61% of the population affected. Children who are refugees face a variety of protection risks, including violence, abuse, neglect, and exploitation. In Uganda there is lack of a comprehensive and coherent government policy and an insufficient legal framework to address crimes or wrongs committed in pre-conflict, conflict, or post-conflict situations.

While the amnesty certificate issued shielded these individuals from criminal prosecution, it also obscured any distinctions between them and other members of

the armed forces or groups, including senior commanders. As a result, those who suffered violations as children and grew into adults during the armed conflict have not received reparations or other adequate forms of redress. Numerous individuals continued to face significant levels of social stigma and economic marginalization.

7.3 Recommendations to (DR Congo & Uganda)

The national Human Rights Commission's lack of a dedicated department for children's rights and recommended that Uganda establish a separate department with the necessary human and financial resources to receive and investigate complaints about violations of children's rights from or on behalf of children. The problem necessitates a multidisciplinary and holistic approach. Political will is necessary for achieving legal reform and enforcing the law, but so is concern for children's physical and psychological well-being, as well as consideration of educational, economic, and sociocultural issues. During times of war, justice and human rights are frequently pushed to the sidelines. Additionally, conflict tends to erode already frail institutions charged with enforcing justice and accountability.

The Democratic Republic of the Congo's government should develop and strengthen domestic legislation and capacity to ensure a functioning judicial system. Legislation should establish procedures for investigating, prosecuting, and trying those responsible for crimes against children, including sexual assault. The Democratic Republic of the Congo's government should ensure that human rights defenders are protected by a widespread climate of support for their efforts to bring violations of human rights and child rights to the public's attention, as well as to support programs and policies that would put an end to such crimes.

For two compelling reasons, the protection of children in armed conflict must be a global priority. To begin, the laws, rights, and standards governing civilian protection in conflict were drafted in response to twentieth-century wars that exemplify humanity's worst excesses. However, they enshrine the values, rights, and obligations that define the global community as a whole. At our collective peril, we allow these assets to deteriorate.

Second, even as we fall short of our moral obligation to protect children adequately, children can serve as a unifying force in an increasingly fractured world. Their rights and claim to our protection are universal, transcending national boundaries, cultures, and faiths. The generation of children provides humanity with the opportunity to rebuild its shattered world. If humanity cannot unite to protect children from the atrocities of war, what hope do we have for international cooperation in other areas? Perhaps the young's unifying force explains why global awareness of conflicts and their human consequences is frequently sparked by images of suffering children, such as those enrolled in the army by Joseph Kony, a notorious figure in Uganda, or those suffering in the Democratic Republic of Congo's war zones.

Society's and the international community's commitment to emotional responses to the pain and tragedy endured by our most vulnerable should provide that elusive factor of common ground and, thus, an opportunity for inspiring collective action to protect our children from what Graça Machel described as "unregulated violence and deliberate victimisation." The problem necessitates a multidisciplinary and holistic approach. Political will is necessary for achieving legal reform and enforcing the law, but so is concern for children's physical and psychological well-being, as well

as consideration of educational, economic, and sociocultural issues. During times of war, justice and human rights are frequently pushed to the side-lines. Additionally, conflict tends to erode already frail institutions charged with enforcing justice and accountability.

The study recommends that the government of the Democratic Republic of the Congo ensures the implementation of age verification mechanisms and procedures to prevent child recruitment, in accordance with international humanitarian law norms and best practices, and that children currently ensnared in government military ranks and armed groups be released to child protection actors. This could be accomplished through the enactment of legislation such as the Registration of Persons Act, which would ensure the verification of birth and death, as well as the issuance of harmonised national identification documents for all Congolese.

The government was urged to take concrete steps to ensure accountability and end impunity in the DRC, including by enacting necessary legislative measures to end impunity for sexual violence and child recruitment into armed conflict. For example, insecurity in Orientale, North and South Kivu, and parts of Maniema and Katanga provinces had provided armed forces, both state and non-state, with basic impunity to commit violence against children. Insecurity and underdevelopment facilitated the emergence of a lawless environment in which civilian violence against children increased and became systematized. Thus, the government of the Democratic Republic of the Congo needed to expedite the investigation and prosecution of those responsible for grave violations against children, reminding all parties that children should be treated first and foremost as victims entitled to full protection of their

human rights. The DRC should immediately put an end to all violations of the security and rights of Congolese children committed by government armed forces, police, or other officials by punishing specific violators personally. This could be accomplished by enacting and enforcing legislation prohibiting such conduct.

The DRC's government should strictly adhere to all international human rights and humanitarian law, with a particular emphasis on the Child Rights Convention (CRC). This included the submission of a government report on the CRC to the Geneva-based Child Rights Committee. This should be a collaborative process in which non-governmental organizations are encouraged to submit alternative reports rather than having their participation and inputs ignored. Being a party to these agreements was sufficient.

The DRC's government should issue the clearest possible instructions on a strict code of conduct prohibiting all forms of sexual violence against all government armed forces. They immediately began the process of developing and implementing explicit accountability and disciplinary measures. Additionally, he ensured that all forces integrated into the FARDC were trained on child and human rights, as well as the prohibition of sexual violence.

The Democratic Republic of the Congo's government should develop and strengthen domestic legislation and capacity to ensure a functioning judicial system. Legislation should establish procedures for investigating, prosecuting, and trying those responsible for crimes against children, including sexual assault. Make public condemnation of all forms of sexual violence a priority, as well as the public trial

and prosecution of commanders responsible for the most egregious and well-documented mass rapes of girls and women in the eastern provinces. This should be accomplished while maintaining the victims' confidentiality and security.

The Democratic Republic of the Congo's government should ensure that human rights defenders are protected by a widespread climate of support for their efforts to bring violations of human rights and child rights to the public's attention, as well as to support programs and policies that would put an end to such crimes. The Congolese government immediately followed through on commitments to end child recruitment and/or use, as required by the Optional Protocol to the Convention on the Rights of the Child, to which the DRC was a party. and to also call on all non-state armed groups to formally endorse the Protocol's standards and to take immediate steps to uphold them.

The study recommends that the DRC government support and encourage all efforts to hold those responsible for crimes against children in the DRC accountable, including child recruitment and use. This includes the following:

- i. Congo's government must now implement the Pretoria agreement by establishing a National Human Rights Office and a Truth and Reconciliation Commission.
- ii. Urging Congo's government to cooperate with the International Criminal Court in combating war crimes and other human rights violations in the country, including crimes against children.
- iii. Inviting the Congolese government to enact national implementation legislation to facilitate the International Criminal Court's prosecution of war crimes or crimes against humanity, including crimes against children;

- iv. As necessary, assisting in the establishment of an effective international criminal tribunal for the Democratic Republic of the Congo; ensuring that any amnesty or traditional reconciliation mechanism adequately addresses crimes against children affected by armed conflict;
- v. Promotion of the rule of law in the Democratic Republic of the Congo, with the goal of putting an end to the culture of impunity;
- vi. Ugandans and Congolese should ensure that child conscription and sexual violence against women and girls are classified as war crimes. The Court's initial investigations and trials should focus exclusively on these crimes, which should be made illegal.

Governments support and encourages all efforts to hold those responsible for crimes against children in the DRC accountable, including child recruitment and use. This includes the following:

- i. Establishing a National Human Rights Office and a Truth and Reconciliation Commission in both Uganda and DRC Congo
- ii. Enactment national implementation legislation to facilitate the International Criminal Court's prosecution of war crimes or crimes against humanity, including crimes against children (Establishment of an effective international criminal tribunal)
- iii. Promotion of the rule of law in the Democratic Republic of the Congo, with the goal of putting an end to the culture of impunity;
- iv. Improved access to justice even in rural areas of both Congo DRC and Uganda

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APPENDICES

APPENDIX II: DATA COLLECTION TOOL

RESEARCH INTERVIEW QUESTIONS

Legal framework governing protection of children’s rights in armed conflict regions: a comparative study between DRC and Uganda

The tool contains questions that are meant to collect data regarding armed conflict and how children are affected and protected. The results from this study will be used purely for academic purpose, in the fulfilment of the requirement of the doctor of philosophy program o the open university of Tanzania.

Feel free to respond on the areas you’re comfortable with. It will take a few minutes of your time only.

	Key Informants,	Questions or areas of observation
A.	Victims (Survivors/guardians or parents) & Refugees	<p>Observe (find evidence of physical abuse, housing, hygiene, presence of basic facilities)</p> <p>Ask:</p> <ol style="list-style-type: none"> 1. Tell me about how long you’ve been here (refugee camp or area affected by armed conflict) 2. Are you staying with family members / do you know there whereabouts? 3. Tell us about the security incidences you’ve witnessed in the past 6 months 4. Are you free to leave this area? (If no why not?) 5. How easy is it to access (security services, courts of law/advocate/legal practitioners by government?) 6. What are the challenges your face in the situation you’re in? 7. What do you recommend to be done to make the situation better for you? 8. How do you access the education, religious, medical, emergency services?
B.	Non-state actors (Community based organisations and NGOs and advocacy	<ol style="list-style-type: none"> 1. Tell us about the role you play in this assisting children affected by armed conflict? 2. Do you have a special department that addresses children’s issues in your organisation?

	groups and agencies)	<ol style="list-style-type: none"> 3. What services does your organisation provide to all affected by armed conflicts and especially to children? 4. What are the main laws and regulations that you use in addressing children's issues?
C.	Government representatives	<ol style="list-style-type: none"> 1. How long have you served in the area? 2. What is your perspective on the armed conflict situation in the country? 3. What services are frequently asked for by the victims of armed conflict? 4. Can you specify the challenges in addressing children protection related issues? 5. Can you provide access to some existing records on the cases of armed conflict in your possession?
D.	Any other comments	Is there anything you wish you add regarding what you've experienced/seen and /or heard?

Thank you for participating in this important exercise

Researcher: David Rugaza

APPENDIX II: CERTIFICATES AND JOURNALS

Certificate No: PUB. 2022/ARJASS/92386

Asian Research Journal of Arts & Social Sciences
Certificate of Publication

Manuscript Title: Political Instability as Root of Armed Conflict in the Democratic Republic of Congo

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