

AFRICAN UNION

**African Committee of Experts on the
Rights and Welfare of the Child**



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**Comité Africain d'Experts sur les
Droits et le Bien-être de l'Enfant**

"An Africa Fit for Children"

UNIÃO AFRICANA

الاتحاد الأفريقي

P. O. Box 3243 Roosevelt Street (Old Airport Area), W21K19, Addis Ababa,
Ethiopia

Tel: (+251 1) 551 3522 Fax: (+251 1) 553 5716 Website : [**www.acerwc.africa**](http://www.acerwc.africa)

GENERAL COMMENT

ON ARTICLE 22 OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD:

“Children in Armed Conflict”

ACERWC

Table of Contents

GENERAL COMMENT ON ARTICLE 22 OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD: “Children and Armed Conflict”	1
1. Introduction	1
2. Objectives.....	5
3. The scope of the General Comment.....	6
4. General Principles	7
4.1 The use of the Best interests' principle	7
4.2 The right to participation	10
4.3 Non-discrimination	11
4.4 The right to life, survival and development	12
5. Nature of State Party Obligations in the context of children and armed conflict	14
6. Substantive content of Article 22	16
6.1 The prohibition against tortured, or cruel, inhuman or degrading treatment.....	16
6.2 Sexual abuse, exploitation and violence.....	19
6.3 The right to health	21
6.4 The right to education	23
6.3 Rules of IHL applicable in armed conflicts which affect the child... 27	
6.4 Situations of internal armed conflicts, tension and strife	28
6.5 All necessary measures.....	28
6.6 Hostilities.....	29
6.7 Part in the hostilities.	29
6.8 The protection of the civilian population in armed conflicts	30

6.9 All feasible measures	30
7. Role of other stakeholders.....	31
7.1 Stakeholders generally	31
7.2 National Human Rights Institutions	31
7.3 Regional Economic Communities and Regional Mechanisms	31
7.4 Media	32
7.5 Private actors	32
8. Remedies	33
9. Accountability	34
10. Dissemination of the General Comment.....	35

GENERAL COMMENT ON ARTICLE 22 OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD: “Children and Armed Conflict”

1. Introduction

1. The African Committee of Experts on the Rights and Welfare of the Child (the ACERWC) has a mandate to formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa.¹ It is prudent that States Parties are able to deal with the implications of the conflicts in situations of conflict, tension and strife.

2. The African Charter on the Rights and Welfare of the Child (the ACRWC) has allocated Article 22 to protect the rights of children in situations of armed conflict. The Article states:

1. State Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.

2. State Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.

3. State Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

It provides for the obligations to respect ensure respect, refrain from, take necessary measures, promote, fulfil protect and ensure protection.² It is

¹ Article 42 (a) (ii), ACRWC. A number of African countries experience conflicts and crises, which leaves devastating effects on children.

² These obligations discussed in the section on specific obligations under Art 22.

imperative that these obligations are able to address violations affecting children in situations of armed conflict.³

3. The protection of children in armed conflict is informed by an international legal framework, which is useful in dealing with the violations of children's rights in armed conflict, tension and strife. Some of the notable violations include the recruitment and use of children by armed forces or groups, killing and maiming of children, rape and sexual violence, abduction, attacks on schools and hospitals, and the denial of humanitarian access by parties to armed conflict, tension and strife.⁴ The international legal framework includes international humanitarian law,⁵ and international human rights law.⁶ While International humanitarian law (IHL) has a set of rules which are different from International

³ There are grave "breaches" as recognised under the Geneva Conventions that govern international armed conflicts while the six grave "violations" were established by the Security Council Monitoring and Reporting Mechanism. See Children and armed conflict, Report of the Secretary-General, A/59/695-S/2005/72, 9 February 2005, para 68, on grave violations. On grave breaches, see John Wiley & Sons; May, R., & Furley, O. (2016). Introduction. In *Ending Africa's Wars* (pp. 11-22). Routledge; Harvey, R. (2003). *Children and Armed Conflict: A guide to international humanitarian and human rights law*. Bureau international des droits des enfants; La Rossa, R. (2016). Further inspiration is obtained from various Security Council Resolutions. See SCR 1261/1999; SCR 1314/2000; SCR 1379/2001; SCR 1460/2003; SCR 1539/2004; SCR 1612/2005; SCR 1882/2009; SCR 1998/2011; SCR 2068/2012; SCR 2143/2014; SCR 2225/2015; SCR 2427/2018.143/2014. The General Comment envisages violations that go beyond the six grave violations and opts to address them as violations.

⁴ There have been various steps since the early 1990s that have been taken to contextualise the problem of children and conflict. Some of the notable steps include the report by Graca Machel, the continued work of the Peace and Security Council of the African Union and other AU Organs, as well as the role of the Regional Economic Communities. At the 23rd session of the ACERWC, a decision was taken to prepare this General Comment. This followed the continental study on the impact of conflict and crises on children in Africa, which reflected the lived realities of children in areas experiencing armed conflict, tension or strife

⁵ These include the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), the additional Protocol to the Geneva Conventions relating to the protection of victims of international armed conflicts (Protocol I), and the the additional Protocol to the Geneva Conventions relating to the protection of victims of non-international armed conflicts (Protocol II).

⁶ These include the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO Convention 182), the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC), and the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (Paris Principles).

Human Rights Law (IHR), there is an intersection in their commonality in the protection of human dignity and life.⁷ The three main principles of IHL governing the conduct of hostilities are; distinction, proportionality and precautions.⁸

4. International Human Rights include various rights such as; respect for human dignity,⁹ the prohibition against torture, non-discrimination, the right to privacy, the right to life and the right to be treated equally. The recognition of these rights complements the application of IHL. It is proposed that the States Parties use both IHL and IHR in situations of armed conflict. This complementarity approach requires an application and interpretation of both laws in a coordinated manner that protects the children's right to life and human dignity under Article 22.¹⁰

5. Article 22 specifically reaffirms the application of rules of IHL in situations of armed conflict, but it is simultaneously a provision situated within an instrument of IHR. The approach taken throughout this General Comment is one of complementarity between IHR and IHL. In light of the continued application of IHR in situations of armed conflict, that both IHR and IHL obligations will be addressed throughout the General Comment, as rules in both bodies of law add value and specificity to the rights and protections of children in this

⁷ Daniel Moeckli, Human Rights and Non-discrimination in the "War on Terror" 92 (2008).

⁸ The scope of the protection of children in IHL includes general and special protection as members of the civilian population. Available at <https://www.icrc.org/en/doc/resources/documents/article/other/57jmat.htm> (accessed 27 August 2019).

⁹ For instance with regard to education, see Art 11(5) of the ACRWC, sixth preambular paragraph of the ACRWC, Article 13(1) for the handicapped children, Article 17(1) in juvenile justice, and Article 21 with regard to protection from harmful social and cultural practices). Where these rights are threatened in armed conflict, the dignity of the child should be upheld. Daniel Moeckli, Human Rights and Non-discrimination in the "War on Terror" 92 (2008).

¹⁰ See Jakob Kellenberger, President, Int'l Comm. of the Red Cross (ICRC), Address at the 27th Annual Round Table on Current Problems of International Humanitarian Law (Sept. 6, 2003), available at <http://www.icrc.org/web/eng/siteengO.nsf/html/5rfgaz>. See also Oona A. Hathaway; Rebecca Crootof; Philip Levitz; Haley Nix, Which Law Governs During Armed Conflict – The Relationship between International Humanitarian Law and Human Rights Law, (2012) 96 Minn. L. Rev. 1883 at 1897.

context. Greater focus is placed on IHR, in line with the ACERWC's mandate and intention to adopt a child rights-based approach to its work.¹¹

6. While IHL applies exclusively in situations of armed conflict, Article 22(3) is also applicable in situations of tension and strife to ensure the protection and care of children. This Article is not intended to apply IHL rules on the conduct of hostilities outside of situations of armed conflict, as these rules permit a certain degree of civilian harm and could result in lower protection for children. Rather, this provision is intended to ensure children benefit from the highest protection in armed conflicts including internal armed conflicts, and during tension and strife.

7. The ACERWC draws inspiration from various international instruments such as the United Nations Convention on the Rights of a Child, the Optional Protocol on the Involvement of Children in Armed Conflict,¹² the ILO Convention 182 on the Elimination of the Worst Forms of Child Labour¹³ and the Geneva Convention and its protocols.¹⁴ Further inspiration is drawn from international and domestic jurisprudence,¹⁵ academic commentaries, the *travaux préparatoires* of various instruments, and soft law instruments in its interpretation of Article 22. Further inspiration is derived from principles of IHL, United Nation's Security Resolutions,¹⁶ the Paris Principles and guidelines on

¹¹ The use of complementarity requires that where IHR offers the best protection to the child, it should be used. Conversely, where IHL offers better protection, it should then be used.

¹² Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000, available at: <https://www.refworld.org/docid/47fdfb180.html> (accessed 31 December 2018).

¹³ Worst Forms of Child Labour Convention, C182, 17 June 1999, C182, available at: <https://www.refworld.org/docid/3ddb6e0c4.html> (accessed 31 December 2018).

¹⁴ See footnotes 5 and 6 above.

¹⁵ The international instruments are listed in footnotes 5 and 6 above. Some of the jurisprudence includes Concluding Recommendations By the ACERWC on the initial report of the Republic of Sierra Leone on the status of implementation of the ACRWC.

¹⁶ Resolutions include 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004), 1612 (2005), 1882 (2009), 1998 (2011) and 2068 (2012).

children associated with armed forces or armed groups¹⁷ and policy decisions by the African Union (AU) Peace and Security Council (PSC).¹⁸

2. Objectives

8. The need for a General Comment on Article 22, is to guide and offer insights to States Parties in the prevention of the violations of the rights of children in armed conflict, tension and strife. The preventive mandate of the ACERWC is evident in some of its activities such as the use of the State Party Report mechanism, the Individual Complaints mechanism, the use of investigative missions and commemorations of significant events like the Day of the African Child.

9. The General Comment clarifies the nature of State Party obligations that arise from Article 22 on children and armed conflict. These obligations include legislative, administrative and other measures that should be taken by States Parties to protect the rights of children in situations of, or affected by armed conflict.

10. The main objective of the General Comment is to use a child-based approach that the States parties will use in the conceptualisation, adoption and implementation of laws, policies, and practices to protect children in the context of armed conflict, tension and strife. This General Comment elaborates the interpretation of the human rights obligations under the Charter.

¹⁷ Available at <https://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf> (accessed 29 October 2018).

¹⁸ The African Union Disarmament, Demobilisation Reintegration Capacity Program; DDR and Children Operational Guidelines (2014) available at <http://www.peaceau.org/uploads/au-operational-guidance-note-on-children-in-ddr.pdf> (accessed 29 October 2018). See also Press Statement of the 841th PSC meeting on the theme: "Children Affected by Armed Conflicts in Africa" available at <https://reliefweb.int/report/world/press-statement-841th-psc-meeting-theme-children-affected-armed-conflicts-africa> (accessed 17 June 2019).

3. The scope of the General Comment

11. The General Comment covers key principles, nature of States Parties' obligations, an elaboration of Article 22, the role other stakeholders, accountability and dissemination of the General Comment. It is also instructive on how the States Parties should deal with the violations with regard to children in armed conflict, tension and strife.¹⁹ The interpretation of Article 22 of the ACERWC relates to how the State Parties should deal with grave violations that arise under IHL and IHR.²⁰ The General Comment adopts a child-based approach which recognises children as victims first, before their role is dealt with.

12. The application of the General Comment extends from States that are experiencing or have experienced armed conflict, to those that experience tension and strife. The existence of armed conflict, tension or strife is based on their effect on the disruption of the political, socio-economic and the enjoyment of human rights in the respective State.

13. The General Comment reiterates the need for the use of synergies from other sources to prevent conflicts, and promote post-conflict management. In this regard, the ACERWC recognises that the Peace and Security Council of the African Union plays a key role in the promotion of peace, security and

¹⁹ While there is documentation that indicates that there are 6 grave violations, the ACERWC states that this is not an exhaustive list (Comments by the Special Rapporteur of the ACERWC on Children in Armed Conflict, Prof Benyam Dawit Mezmur at the 33rd session of the ACERWC, Addis Ababa, Ethiopia). The six breaches are: a) the recruitment and use of children (reiterated in some of the ACERWC's jurisprudence, like Michelo Hansungule para 40); b) Killing or maiming of children; c) Sexual violence against children; d) Attacks against schools or hospitals; e) Abduction of children; and f) Denial of humanitarian access. See paragraph 5 above.

²⁰ While there is documentation that indicates that there are 6 grave violations, it is argued that these are but an inclusion of various grave breaches. For instances where there is sexual violence, this should be interpreted to Sexual violence includes both physical and psychological attacks directed at a person's sexual characteristics such as forcing a person to strip naked in public, genital mutilation, or slicing off a female's breasts.

stability in Africa, anticipation and prevention of conflicts.²¹ This role extends to the promotion and implementation of peace-building and post-conflict reconstruction activities to consolidate peace and prevent the resurgence of violence.²² In addition, the United Nations Security Council has in a number of its resolutions indicated that crimes against children in armed conflicts is an issue on international peace and security.²³ In this regard, the protection of children from the dangers of war should be recognised as a 'moral imperative, a legal responsibility and a question of international peace and security'.²⁴

14. The ACERWC recognises that the best protection to the rights of a child in armed conflict, tension and strife stems from the identification of the violations under IHR and IHL.²⁵ The scope of the protection should be a child-based approach that is aimed at preventing and, dealing with post-conflict societies; drawing on synergies from the international framework on children and armed conflict and bodies that deal with conflict.

4. General Principles

4.1 The use of the Best interests' principle

15. Armed conflicts, tension and strife stifle the best interests of the child as they affect the development of children physically, socially, psychologically, economically and culturally; and affect the enjoyment of their rights. Article 22

²¹ Article 3(a), (b) and (c) of the Protocol relating to the establishment of the Peace and Security Council of the African Union. Available at <http://www.peaceau.org/uploads/psc-protocol-en.pdf> (accessed 28 August 2019).

²² Article 3(d).

²³ See the following security council resolutions; SCR 1261/1999, preambular paras 2-3; SCR 1314/2000, SCR 1379/2001, SCR 1460/2003, SCR 1539/2004, SCR 1612/2005 and SCR 1882/2009.

²⁴ See SCR 1314/2000, SCR 1379/2001, SCR 1460/2003, SCR 1539/2004, SCR 1612/2005 and SCR 1882/2009.

²⁵ Office of the Special Representative of the Secretary-General for Children and Armed Conflict, "The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation" (2013) United Nations Working Paper No 1 at 9, online: <www.childrenandarmedconflict.un.org/publications/WorkingPaper-1_SixGraveViolationsLegalFoundation.pdf>. See also Anaise Muzima, Reimagining the Scope of Children's Legal Protection during Armed Conflicts under International Humanitarian Law and International Criminal Law, 8 W. J. Legal Stud. 1 (2018) at 2.

read in conjunction with Article 4(1) places obligations on State Parties to use the best interests' principle in all matters affecting children including children and armed conflict. The ACERWC has developed jurisprudence that emphasises the use of the best interest principles, such as its General Comment No 5 on 'State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection. In the context of armed conflict, tension and strife, the Best Interests Principle deals with the prevention of the recruitment and protection of children from the effects of combat. It extends to the protection of children from violations such as abduction, killing and maiming children, sexual violence and exploitation, attacks on schools and hospitals and associated persons, and the need to support the child as a victim first, and then as a perpetrator of the violations.

16. There are various issues in armed conflict, tension and strife that need to be dealt with as part of the holistic approach to the best interest of the child, such as, radicalisation of children by armed groups, and children who are in need of psychosocial support. With regard to prevention, a child –based approach that places the wellbeing of the child at the centre of the possible instances that lead to armed conflict, tension and strife should guide the preventive measures by States Parties. The mitigation of the impact of armed conflict, tension and strife should inform the interventions undertaken by States Parties. The redress should be aimed at ensuring that the best interests of the children are upheld in armed conflict, tension and strife.

17. Armed conflict, tension and strife lead to various outcomes on children such as psychosocial and psychological problems. These problems affect children even after the conflicts are over. This is exacerbated in gender contexts, where the girls are stigmatised for their role in armed conflicts, or

where the boys 'voluntarily get recruited' as child soldiers to protect their communities.²⁶

18. The registration of births may be stifled by the existence of armed conflict, tension or strife. As such, the State is not able to make informed decisions on the nature of support like immunisation, provision of maternal health care, care to newborn children due to lack of information. The use of registered births should likewise, not be used as a tool to determine the age of the child to aid his or her recruitment in an armed force.

19. The registration of births is closely linked to the realisation of the best interest of the child under Article 22 of the ACRWC. For instance birth registration becomes key in armed conflict situation as it is used to determine age for purposed of recruitment;

20. It is in the best interest of the child affected by armed conflict that he or she is treated as a child first. Children involved in conflict are victims, and prosecution of perpetrators is in the best interest of the child. As such the justice systems have to be close to the children in the affected Community. Justice systems should be adequately resourced to investigate violations against children in armed conflict, and ensure that the perpetrators responsible are brought to justice.

21. States, armed and other similar groups to an armed conflict, tension or strife should not recruit children under the age of 18, and should take all necessary measures, such as legislative, administrative, and policy to prevent such recruitment. This ensures that the best interests of the child is upheld at all times.

²⁶ Study by Save The Children 'War on Children' depicts effects on war on children in selected countries. Report available at <https://www.savethechildren.net/sites/default/files/waronchildren/pdf/waronchildren.pdf> (accessed 30 September 2019).

Special steps shall be taken to ensure that the rights of children in vulnerable situations are not violated on account of their status.

4.2 The right to participation

22. State Parties have an obligation to ensure that a child who is capable of forming his or her own views exercises the right to express them freely on matters that affect him or her.²⁷ The States Parties have a duty to consider these views with regard to the maturity, age and other matters that show the evolving capacity of the child.²⁸

23. States Parties shall develop laws, policies, decisions and finance activities that allow child participation in matters that concern them. Their participation shall be assured in a manner that allows them to express their opinions as individuals or collectively, freely.²⁹ These matters should be widely interpreted to include armed conflict, tension, strife, humanitarian crises, emergencies and other related incidences. Special emphasis has to be placed on vulnerable children including those with disabilities.

24. The stage at which participation shall be sought in an armed conflict, tension or strife shall be determined by the effect of a proposed action or decision on the interest of a child. The State shall create an enabling atmosphere where children will be able to express their views on matters that affect them including non-recruitment into armed forces, education, health and justice. Child participation shall be used as a tool to create awareness of the dangers of armed conflict. This should be inculcated in the prevention, conflict resolution, recovery and reconstruction of affected communities. Children should be allowed to share their experiences with their peers, and

²⁷ ACRWC, Art. 7 General Comment 12 of the CRC on Child Participation,

²⁸ ACRWC, Art. 7.

²⁹ ACRWC, Art 7.

express their views as a way of harnessing their strengths, skills and self-confidence.

25. States Parties should engage other stakeholders who work with children including parents, teachers, community elders, NGOs, CSOs, the media, NHRIs, government officials and UN agencies to ensure the inclusion of children's voices and their representation in the peace talks, mitigation of the effects of conflict, and rebuilding of communities. The participation of the child should be used in a manner that does not lead to exclusion, traumatising; or the violation of a child's inability to consent due to age.

4.3 Non-discrimination

26. According to Article 3 of the ACRWC, "every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in [the] Charter irrespective of his/ her parents" or legal guardians" race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.³⁰ In the context of armed conflict, tension and strife, a child's status should not be used as a bar to the enjoyment of rights under the ACRWC.³¹ The protection against discrimination of a child extends to actions of his or her parents, caregivers or persons in authority that would be a ground for offering different treatment to the child.³²

27. In armed conflict, tension and strife, discrimination is evident where the rights of children are not prioritised or are accorded less weight because they are not life-threatening violations in relation to the rights of adults.³³ For

³⁰ Reproduced in para 18 of the General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on "Children of Incarcerated and Imprisoned Parents and Primary Caregivers" 2013

³¹ IHL applies to armed conflict and should be used as an interpretative guide to instances of tension and strife

³² For instance discrimination on grounds of ethnicity which may be a reason for the armed conflict does not create a loophole for children in such a situation to be discriminated against

instance, the children's rights to education, health, human dignity, may not be accorded the same weight as other rights like the right to life or the prohibition against torture, cruel, inhuman and degrading treatment. Instances, where a child gets less desired treatment in comparison to the rights of adults, shall be taken as indicators of discrimination.

28. Discrimination is evident where refugee children who have fled from areas of armed conflict are discriminated against on the basis of their status as refugees. Discrimination is in acts where the host State fails to ensure that the refugee child enjoys his or her rights; investigation or prosecution of perpetrators of the criminal acts against children is done.

29. Periods of armed conflict, tension and strife may present widespread and/or systematic forms of human rights violations which affect boys and girls differently according to their gender. This may leave negative mental, emotional, spiritual, physical and material effects, and exacerbated where the child has a disability. Girls often suffer slavery, sexual exploitation³⁴ like forced marriages and enforced pregnancies, physical and sexual violations like rape and forced prostitution. When States Parties do not ensure women and girls have access to safe and legal abortion, unwanted pregnancies may, in turn, lead to high rates of unsafe abortion, resulting in serious health complications and preventable deaths.³⁵ Boys may 'voluntarily' join armed conflict to protect their communities and families, and be used as tools of human rights violations.

4.4 The right to life, survival and development

30. The ACRWC provides for the right to life. Under Article 5 of the ACRWC, every child has an inherent right to life. The States Parties have a duty to ensure

³⁵ UNFPA, *Shelter from the Storm*, 38-40.

the survival, protection and development of the child. States have a non-derogable responsibility to ensure that the right to life is protected.³⁶

31. The context of survival and development connotes an existing right that society has an obligation to protect. To this end, States Parties are mandated to ensure the survival, protection and development of the child to the maximum extent possible. The context of "survival" illuminates a positive obligation on States to ensure that appropriate measures are taken to prolong the life of a child. The context of "development" refers to a comprehensive process of realising children's rights in an environment where they grow up in a healthy and protected manner, free from fear and want, and to develop their personality, talents and mental and physical abilities to their fullest potential consistent with their evolving capacities.³⁷

32. The enjoyment of the rights of a child in the context of Article 22, therefore should be used to create an environment where a child enjoys all his or her rights such as health, food, shelter, education and adequate standard of living to ensure that he develops into a responsible and informed citizen, capable of defending his or her rights.

33. States Parties should uphold the rights of children, and ensure humanitarian access to a child, to ensure the provision of the conducive environment in Article 1 of the ACRWC. The Human Rights Council has reiterated this requirement by stating that consent to provide relief to a civilian population including to children, must not be refused by a Party to a conflict on arbitrary

³⁶ See Art 3 of the Universal Declaration of Human Rights 1948. This right is further provided for in various human rights treaties, which declare the paramount importance of the 'right to life, liberty and security of person.' There are various international and regional IHR instruments that protect the right to life include the ACHPR, ICCPR and the CRC. See General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right To Life (Article 4), paragraph 6.

³⁷ General Comment No. 1 (Article 30 of the African Charter on the Rights And Welfare of the Child) on "Children of Incarcerated and Imprisoned Parents and Primary Caregivers" 2013, para 25-26.

grounds, and each party must refrain from deliberately impeding the delivery of relief supplies to civilians in need in areas under its control.³⁸

5. Nature of State Party Obligations in the context of children and armed conflict

34. Article 22 should be read in light of Article 1 of the ACRWC and should be interpreted through a child-rights-focused and child-centred lens and in manner that emphasises and strengthen the dynamic relationship between the obligations under Article 22 with the fundamental principles of the Charter. States Parties have an obligation to take necessary steps to develop administrative, legislative and judicial measures to deal with; the protection for children separated from their family and those in the hands of fighting groups, children who are deprived of liberty, the recruitment of children and their participation in hostilities. This obligation extends to the treatment of children who are accused of association with armed or designated terrorist groups, and the provision of access to quality health care and relevant education. These steps shall form the content of the reports to the ACERWC.

35. In light of the above paragraph, Article 22 describes the general nature and scope of the legal obligations undertaken by state parties, domestically and abroad. The obligations place immediacy on state parties to deliberately, concretely and in a targeted manner, take all necessary legislative, administrative and other feasible measures including adequate budgetary allocation, in accordance with their Constitutional processes and with the provisions of the present ACRWC, to comply and ensure compliance with applicable rules of IHL.

³⁸ Instances of such impediment have been repeatedly condemned by the UN Security Council, General Assembly and Human Rights Council. See UNSC Res 824, UNGA Res 55/2, UN Commission on Human Rights Res 1995/77.

36. The obligation to respect has an immediate effect on the States parties to refrain from violation of the rights recognised by the ACRWC, and any restrictions on any of those rights must be permissible under the relevant provisions of the ACRWC. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of rights under Article 22. The obligation requires a good-faith implementation of the basic rules of IHL, without discrimination including on the basis of nationality, sex, age, immigration status or statelessness.

37. The obligation to respect ensures not only that the right of boys and girls under the age of 18 years are not to be recruited or used, directly or indirectly, in hostilities by armed forces, non-state armed groups, but it also establishes an international obligation on state parties to refrain from doing so. In addition, the obligation to respect places a positive duty on state parties to: firstly, prevent violations of provisions of Article 22 as well as applicable IHL rules. The state parties should further take measures to ensure that all individuals and state entities know about and comply with IHL and this ACRWC including through legislative measures and training. Secondly, to respond to violations or potential violations of rights contained in this ACRWC and specifically Article 22, including through ensuring accountability, monitoring and reporting. Thirdly, to provide effective remedy and redress, including through compensation and victim assistance for violations of IHL and this ACRWC and to ensure that adequate human and financial resources are allocated for children's rehabilitation, re-integration and reunification with their families.

38. Further, the obligation to respect places a negative duty on states that provide or aid the provision of arms, resources, right of passage and protection of perpetrators to States Parties or parties to the conflict. The actions of providing resources or any support have to be interpreted as a violation of rights and disregard of obligations under the ACRWC.

39. The obligation to 'ensure respect' requires that States Parties take all appropriate measures with regard to its population and the groups within its territories to observe the obligations in the ACRWC. This obligation extends to other States and non-State partners operating in other States. These measures include taking administrative, judicial and other measures to ensure the practical recognition of the rights affected by Article 22 of the ACRWC. It relates to preventive, mitigating and corrective actions taken by a state party in respect of violations, or potential violations of IHL and this ACRWC, by other states or non-state actors in a conflict. The overall responsibility to secure the safety and the liberty of its citizens rests with the state party within its territory and to all persons subject to their jurisdiction. It is, therefore, incumbent on the State to exercise due diligence in relation to violations or potential violations of IHL and this ACRWC by any actor in a conflict on the territory of a state party. The obligation to protect arises in two ways. First, through the State Party's performance of other obligations. Secondly, the obligation may arise out of the requirement to protect without invoking other obligations as a basis for protection. As such protection arises out of the need to create an enabling environment as a condition precedent to the respect, or fulfilment of a given right. Examples include the provision of physical protection to ensure the smooth running of schools or hospitals and the safety of related civilians, such as students, teachers, doctors, nurses, and patients.

6. The substantive content of Article 22

6.1 The prohibition against torture, or cruel, inhuman or degrading treatment.

40. The ACRWC protects children against child abuse and torture (Article 16), sexual exploitation (Article 27), trafficking and abduction (Article 29). Any actions by States parties or Parties to an armed conflict, tension or strife that imposes the prohibition against torture in any form on children is inconsistent

with the ACRWC.³⁹ Under both the IHR and IHL children are protected from actions that impede the prohibition against torture or cruel, inhuman and degrading treatment. This protection is fortified under IHL in the Geneva Convention IV.⁴⁰

41. The ACRWC mandates States Parties to take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the parent or guardian.⁴¹ The mandate should be evident in the provision of special monitoring units that provide effective procedures to prevent, identify, report, investigate, treat and conduct follow-ups to affected children.⁴² A reading of Article 16 and 22 of the ACRWC shows that the State has to carry out its mandatory obligations under Article 16 despite the existence of circumstances that fall within the bounds of armed conflict, tension and strife.⁴³ The prohibition against torture or cruel, inhuman or degrading treatment recognises one of the grave violations that requires parties to a conflict not to rape or otherwise sexually abuse children.

42. States Parties have an obligation to train and build the capacity of their armed forces to prevent torture. The training should target the troops that States may deploy in other countries, AU, or UN as well. The State should develop educational curriculum that can be inculcated in training to ensure that the protection of a child in armed conflict, tension and strife is guaranteed.

³⁹ See the Convention on the Rights of the Child, Article 37.

⁴⁰ Article 3, Geneva Convention IV. Protocol I Additional, Article 77(1). See also Additional Protocol I, Article 75(2); Additional Protocol II, Article 4(2).

⁴¹ ACRWC, Article 16(1).

⁴² ACRWC, Article 16(2).

⁴³ This obligation extends to child in areas of armed conflict and areas where children have been displaced to, due to armed conflict. See Concluding Recommendations by the ACERWC on the second and third periodic report of the Republic Of Rwanda on the status of implementation of the ACRWC, para 28.

43. States Parties that send troops to a mission should set up a child protection unit that should be functional for purposes of investigation and collection of evidence with regard to the violations of the rights of children. It is also prudent that States Parties provide early response mechanisms to prevent acts of torture or cruel, inhuman and degrading treatment, and to secure environments including schools, places of worship and hospitals.

44. As children involved in armed conflict are primarily victims, States Parties shall take appropriate steps to prevent the detention or prosecution of children for alleged involvement with armed groups, including violent extremist groups. Detention is contrary to the best interests of the child and often associated with ill-treatment and torture. States should develop handover protocols to prevent detention and ensure that children taken into military custody are swiftly transferred to civilian child protection authorities for rehabilitation and community reintegration.⁴⁴

44 bis. Children should not be detained or prosecuted solely for their participation in armed conflict or mere membership in armed groups, including violent extremist groups. If there is evidence that a child has committed a further criminal offense, States Parties should treat them in accordance with international juvenile justice standards – notably ensuring that detention is a last resort and is used for shortest appropriate period of time, that children are detained separately from adults, that they have access to legal counsel, that the best interests of the child is the primary consideration, and that rehabilitation and reintegration into society are priorities. Wherever possible, alternatives to judicial proceedings must be sought.⁴⁵ Children should always be tried in specialized child justice systems.

44 ter. States Parties should work together with human rights and humanitarian organisations, peace and support operation personnel and other inter-

⁴⁴ Countries including Chad, Niger, Mali and Sudan have signed such handover protocols.

⁴⁵ See Paris Principles 8.7, Security Council resolution 2427, paras 19-21.

governmental agencies in the vetting process of members of the military forces who are expected to have contact with children and ensure child protection training for all military personnel.⁴⁶ Where acts of human rights violations have already occurred, the States Parties should ensure that the perpetrators are investigated and where necessary, prosecuted.

45. The States Parties shall exercise due diligence in the provision of justice systems in areas of armed conflict, tension and strife that are child-friendly justice system, provisions for receipt of psychosocial support. The States Parties shall provide these services regardless of the provision of similar services by humanitarian organisations.

6.2 Violence, exploitation, and sexual abuse

46. States Parties have an obligation to take legislative, administrative, social and educational measures to protect the child from all forms of maltreatment including sexual abuse, exploitation and violence.⁴⁷ This obligation should be evident in the existence of special monitoring units that prevent, identify, report, investigate, treat and conduct follow-ups to affected children.⁴⁸ The protection against such maltreatment requires parties to a conflict not to sexually abuse or exploit children. States Parties should also provide mechanisms to address situations that lead to vulnerability of boys and girls to sexual abuse, exploitation and violence.

47. States Parties should maintain a child protection unit that investigates and collects evidence relating to violence, sexual abuse and exploitation of children. There should be early response mechanisms to prevent sexual abuse and exploitation in all environments involving children. States Parties should work together with other organisations and inter-governmental agencies in

⁴⁶ Countries like Uganda and Cote D'Ivoire already have a protocol that is used to ensure child protection forms part of the training.

⁴⁷ ACRWC, Article 16(1).

⁴⁸ ACRWC, Article 16(2).

ensuring that the acts of sexual exploitation, violence and abuse are investigated and or prosecuted.

48. Due diligence shall be exercised by States Parties to ensure that child-friendly justice systems that protect the person of the child from traumatic, psychosocial or psychological problems. The States Parties shall provide these services in instances regardless of the provision of humanitarian services by other stakeholders.

49. Girls affected by armed conflict, tension and strife often have limited access to reproductive health care and are particularly vulnerable to sexual abuse, exploitation and violence.⁴⁹ These abuses contribute to unintended pregnancies, high rates of unsafe abortion and maternal mortality.⁵⁰ Access to comprehensive sexual and reproductive health information and services, including emergency contraception and safe abortion, is critical in these settings. States Parties have the obligation to ensure that girls can survive pregnancy and childbirth during armed conflict, tension and strife, including by ensuring pregnant girls' access to adequate pre- and post-natal care and emergency obstetric services. States Parties have an obligation to inform adolescent children of and provide them access to a comprehensive range of good quality, modern, safe, effective, affordable and acceptable methods of family planning.⁵¹ In line with recommendations of the UN Committee on the Rights of the Child, States Parties should decriminalize abortion by removing all criminal penalties for abortion from criminal laws.⁵² They must ensure that safe

⁴⁹ United Nations Population Fund (UNFPA), *State of World Population 2015: Shelter from the Storm* 38-40 (2015), available at https://www.unfpa.org/sites/default/files/sowp/downloads/State_of_World_Population_2015_EN.pdf [hereinafter UNFPA, *Shelter from the Storm*]. See also CRR and UNFPA, *Reproductive Rights: A Tool for Monitoring State Obligations* (2013), available at http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/crr_Monitoring_Tool_State_Obligations.pdf.

⁵⁰ UNFPA, *Shelter from the Storm*, 38-40.

⁵¹ Programme of Action of the International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, U.N. Doc. A/CONF.171/13/Rev.1 (1995), Principle 8.

⁵² UN Committee on the Rights of the Child, "General comment No. 20 (2016) on the implementation of the rights of the child during adolescence," 6 December 2016,

abortion is both legal and accessible to girls in situations of armed conflict, tension and strife, at a minimum, “in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.” In addition, they should “review legislation with a view to guaranteeing the best interests of pregnant adolescents and ensure that their views are always heard and respected in abortion-related decisions. States Parties should ensure women or girls with incomplete abortions or post-abortion complications can access prompt, neutral, professional, rights-respecting, and non-discriminatory care. States Parties have a duty to offer prevention, testing, counselling and treatment of HIV/AIDS and other sexually transmitted infections to children.

50. Ordinary criminal procedure standards with regard to collection and admission of evidence of sexual abuse in armed conflict, tension and strife may be difficult or impossible. States Parties should adopt proactive measures by the stakeholders in the provision of justice such as the judiciary, the prosecution, the investigators, to balance between the ordinary application of criminal procedure rules and need for sensitivity to the child victims.

6.3 The right to health

51. According to Article 14(1) of the ACRWC, every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. States Parties have an obligation to take the requisite measures to undertake to pursue the full implementation of the right. According to IHL the importance of the protection of the right to health calls for the protection of hospitals. Concerns about the health of the civilian population are eminent in armed conflict, more so where children are involved. The ACRWC recognises the right to enjoy the best attainable state of physical, mental and spiritual health.⁵³ The

CRC/C/GC/20, para. 60, available at: <https://www.refworld.org/docid/589dad3d4.html> [accessed 20 December 2019]

⁵³ ACRWC, Article 14(1).

relevant provision is silent on the limits to the enjoyment of the right with regard to times of peace or war. Notwithstanding this, Article 22, is by implication interpreted to refer to both periods of peace and conflict. Similar provisions on the right to health in the CRC recognise the vital importance of children's right to health-care.⁵⁴ Similar provisions are provided for in the UDHR (1948), and the ICESCR.

52. A State Party's realisation of the right to health is instructive on how it upholds the social-economic rights in times of armed conflict. The existence of an armed conflict does not mean a disregard of the rights of the child, but rather the need to fulfil the rights by all the parties to the conflicts.

53. Children in armed conflict, tension and strife have the right to receive quality basic health care in a nurturing environment. The children should be able to receive immunisation benefit from policies that address malnutrition, basic nutrition, reduction of deaths due to preventable causes before the age of five, and reduction in maternal mortality rates. The use of nuanced approaches such as ceasefires can be used to enable humanitarian assistance.⁵⁵ The girl child's right to health is often grossly affected. Sexual abuse, exploitation and violence often leads to forced marriages and enforced pregnancies, physical and sexual violations like rape and forced prostitution. When States Parties do not ensure women and girls have access to safe and legal abortion, unwanted pregnancies may, in turn, lead to high rates of unsafe abortion, resulting in serious health complications and preventable deaths.⁵⁶ The State should ensure emergency contraception is available and accessible to all, particularly victims of sexual violence, and ensure the provision of quality maternal health services, safe abortion and post-

⁵⁴ Article 28 of the CRC.

⁵⁵ The failure to have humanitarian access has exacerbated the breakout of diseases such as Polio in various States like Nigeria, Cote D'Ivoire, Chad. See Grundy J & Biggs BA 'The Impact of Conflict on Immunisation Coverage in 16 Countries' (2019) 8(4) International Journal of Health Policy and Management 211, 218.

⁵⁶ UNFPA, Shelter from the Storm, 38-40.

abortion services, HIV testing, prevention and treatment. This treatment should be accessible to children in areas of armed conflict, tension and strife.

54. The States Parties have to ensure that children who are victims of sexual violence and exploitation receive reproductive health care and psychosocial support. Preventive steps should be taken to ensure that the physical health needs of adolescents, such as sanitary towels and contraceptives are met. The recovery and reintegration programmes that are engaged have to address issues of the effect of conflict and possible trauma. These measures should be tailored on grounds of gender and age of the children.

55. Where the right to health of children in situations of armed conflict, tension and strife is violated, protection under human rights law is triggered due to the obligation on the State to protect this right. Underlying this protection is the obligation to respect the right to health by ensuring the realisation of this right even in instances of armed conflict.⁵⁷ The States Parties are reminded of their obligations with regard to the right to health under the ICESCR. States Parties are urged, as a basic minimum to positively realise the right to health; towards prioritisation and progressive realisation in light of the minimum core obligation to this right. The protection of the right to health extends to instances where children have been displaced to other States or territories where a State or receiving State has control.⁵⁸

6.4 The right to education

56. The ACRWC provides that '(e)very child shall have the right to an education.'⁵⁹ It is required of States Parties to ensure that they fulfil the

⁵⁷ See the ICESCR, Article 2 on State obligations, the CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant). Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23). UNICEF has conducted research on education and as an organisation, offers insights to the enjoyment of the right to education.

⁵⁸ Paragraph 25 of Res A/RES/61/146 on the Rights of the child; adopted by the General Assembly on 19 December 2006.

⁵⁹ ACRWC, Article 11(1).

obligation to provide for the right to education even in times of armed conflict or crisis situations.⁶⁰

57. The protection against the violation of this right extends against attacks on education institutions because they usually harbour the civilian population that stays in education institutions. As such, attacks on students, educational personnel and schools in the context of armed conflict and insecurity violate the rights of children in various ways.

58. Attacks on education include violence against educational facilities, students and education personnel.⁶¹ Such actions by state security forces and non-state armed groups that target school buildings; violence towards education personnel and students at schools, sexual violence, abduction, and forced recruitment are prohibited. This extends to the use of harassment and threats against teachers, parents and students which culminates in the violation of the right to education. The African Union's Peace and Security Council has urged all Member States to endorse the Safe Schools Declaration, an inter-governmental political commitment aimed at strengthening the prevention of, and response to, attacks on education during armed conflict, including by: collecting reliable data on attacks and military use of schools and universities; providing assistance to victims of attacks; investigating allegations of violations of national and international law and prosecuting perpetrators where appropriate; developing and promoting "conflict sensitive" approaches to education; seeking to continue education during armed conflict; restricting the use of schools and universities for military purposes; and supporting the work of the United Nations on the children and armed conflict agenda.⁶²

⁶⁰ The ACRWC, like the Convention on the Rights of the Child, does not contain a derogation clause.

⁶¹ Safe Schools Declaration available at http://www.protectingeducation.org/sites/default/files/documents/safe_schools_declaration-final.pdf (Accessed 26 September 2019).

⁶² Peace and Security Council of the African Union's 597th meeting on May 10, 2016: "Children in Armed Conflicts in Africa with particular focus on protecting schools from attacks during armed conflict;" Peace and Security Council of the African Union's 615th meeting on

59. Children's right to education can also be violated when schools and other education institutions are used for military purposes, such as for military barracks or bases, for storage of weapons or ammunition, for military trainings of soldiers, as observation posts, or as a detention facility. The military use of schools can result in reduced enrolment and high drop-out rates, especially among girls, contrary to State Parties' obligations under ACERWC's article 11(1), 11(3)(a), 11(3)(d), and 11(3)(e). If an armed force only uses part of a school, students are at risk of violence; sexual assault, exploitation, and harassment; and illegal recruitment and use, by the soldiers within their schools. The use of schools for military purposes may also lead to schools being attacked by opposition forces, thus endangering student and teacher's safety, and jeopardizing vital education infrastructure. As a result, all State Parties' should either ban the use of schools for military purposes, or, at a minimum, enact concrete measures to deter the use of schools for military purposes in accordance with the Safe Schools Declaration's *Guidelines on Protecting Schools and Universities from Military Use during Armed Conflict*, including through their legislation, doctrine, military manuals, rules of engagement, operational orders, and other means of dissemination to encourage appropriate practice throughout the chain of command.⁶³ In States affected by armed conflict, the ministries of defence and interior should establish and implement preventive measures, including advance planning and the provision of necessary logistics and equipment, through coordination with the security forces and the education ministry, to

August 9, 2016: "Education of Refugees and Displaced Children in Africa;" Peace and Security Council of the 692nd meeting on June 13, 2017, of the PSC dedicated to an Open Session on the theme: "Ending Child Marriages;" and Peace and Security Council of the 706th meeting on July 26, 2017, of the PSC on the theme: "Child Soldiers/Out of School Children in Armed Conflict in Africa."

⁶³ See *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict*; and United Nations Security Council Resolution 2225, June 18, 2015, S/Res/2225 (2015), para. 7 ("encourages Member States to take concrete measures to deter such use of schools by armed forces and armed groups") and Resolution 2427, July 9, 2018, S/Res/2427 (2018), paras. 15-16 ("Encourages Member States to take concrete measures to deter the use of schools by armed forces and non-State armed groups in contravention of applicable international law").

avoid the military use of schools contrary to policy, and to expeditiously vacate any schools used by armed forces.

60. The use of schools and other education institutions by peacekeeping forces can be equally negative for children's right to education. For this reason, the African Union and other relevant African inter-governmental organizations that authorize peace support operations should adopt an explicit ban on the use of schools in their operations.

61. Attacks on education institutions may have a disproportionately negative effect on girls, for example, if they are specifically targeted for sexual violence or abduction if they are displaced to a more distant school, if infrastructure such as toilets is destroyed or occupied, or if they are perceived to be at risk of sexual harassment from occupiers. In some instances, attacks are motivated by opposition to girls' education.

62. The 2016 ACERWC's Continental study recognises that post-conflict reconstruction remains a serious challenge.⁶⁴ In some States, both the health and educational systems are affected by underfunding, inefficiency, lack of qualified personnel, poor infrastructure and lack of equipment. Social protection structures are very weak, even non-operational in some instances, due to lack of funds and absence of personnel.

63. The ACERWC uses jurisprudence of the CRC to urge States Parties to provide education as a tool to respect, protect and fulfil the holistic development of children in armed conflict.⁶⁵ The enjoyment of the right to

⁶⁴ ACERWC Continental study on the impact of conflict and crises on children in africa (2016) available at www.acewrc.africa (last accessed 1 January 2019)

⁶⁵ Concluding observations on the report submitted by Portugal under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, paragraph 23 to 24.

education also helps in the re-integration of children who have been affected by armed conflict into the community. As such, asylum-seeking, refugee or migrant children benefit from this right by seeking an education in the host community.

64. Female students who are pregnant and/or adolescent mothers, and those who are forced to get married, face very high levels of stigma and discrimination, and may be refused re-entry to schools. States should ensure girls can remain in school, or resume education if they have dropped out because of pregnancy or marriage, by adopting special continuation policies to guarantee their right to education, including in conflict, and provide support to adolescent mothers.⁶⁶

65. The destruction of schools takes on a spiral effect of denying educational opportunities to children, making them vulnerable to human trafficking where they are forced to seek education elsewhere. The perpetrators of human rights violations use the vulnerability and the insufficiency of children to abuse them.⁶⁷

6.5 Rules of IHL applicable in armed conflicts which affect the child.

63. The IHL rules require that children affected by armed conflict are entitled to special protection, including protection against all forms of sexual violence;

⁶⁶ See African Charter on the Rights and Welfare of the Child, arts. 21(2), 11(3)(e) and 11(6); African Youth Charter, art. 13(1) and art. 13 (4)(b); African Commission on Human and Peoples' Rights and African Committee of Experts on the Rights and Welfare of the Child," Joint General Comment on Ending Child Marriage, 2017, para. 31.

⁶⁷ This can be avoided through the development of a curriculum that promotes durable peace, without propaganda overtures against one group or the other. Furthermore, out of school education should be monitored to avoid radicalising children.

separation from adults while deprived of liberty unless they are members of the same family; provision of access to education, food and health care services; evacuation from areas of active conflict for safety reasons; reunification of unaccompanied children with their families.

6.6 Situations of internal armed conflicts, tension and strife

64. Armed conflict requires the State Party's recourse to its military, for a duration of the fighting with frequency of acts of violence and military operations which may lead to the displacement of civilians, the control by territories by armed groups.⁶⁸ The point of departure between armed conflict and tension and strife is the nature and effect of the internal disturbance to affect the political social and economic routine of a given community.⁶⁹ The internal disturbances may be either political or violent in nature affecting the realisation of children's rights. The internal disturbance has to be durable to be qualified as tension or strife. Tension and strife may include notable examples such as gang violence, inter-communal conflict, electoral violence, ethnic and religious conflicts.

6.7 All necessary measures

65. The concept of all necessary measures is used in the context of the need to ensure that a child does not take a direct part in hostilities, and is not recruited to take part in the hostilities. Necessary measures shall include legislative measures that set the age of child recruitment at 18 years that perpetrators of human rights violations and abuses against children in armed conflict are brought to book, and that amnesty for the recruitment and use of children in hostilities is prohibited. The States parties shall ensure that birth registration over a sufficient period of time using methods that suit the circumstances of the children.

⁶⁸ See R. Pinto 'Report of the Commission of experts for the study of the question of aid to the victims of internal conflicts', *International Review of the Red Cross*, February 1963, 82–83.

⁶⁹ Vité, S. (2009). Typology of armed conflicts in international humanitarian law: legal concepts and actual situations. *International Review of the Red Cross*, 91 (873), 69-94, 74.

66. The States Parties have an obligation to ensure that there is a decentralized, effective, well managed and birth registration system especially in areas of armed conflict. The States Parties shall use alternative methods to determine the age of the child in armed conflict, tension and strife. Where the age of the child is in doubt, he or she shall be presumed to be below the age of 18 until the age is determined. This will avert the vulnerability of children to various abuses such as recruitment into armed forces, sexual exploitation and violence, child labour, human trafficking and early marriages. The existence of a birth certificate aid the reconnection between unaccompanied minors or children separated from their parents or caregivers.

6.8 Hostilities.

67. Hostilities refer to instances of conflict, tension and strife, with varying nature and effects of the intensity that involve, either a State's armed force against (an)other armed group(s) or between two or more armed groups. A State's recourse to its military, or altercations between two or more armed groups for a duration with of the acts of violence, military operations, with regard to the nature of the weapons used, displacement of civilians, the control by territories by armed groups and the number of victims of the fighting; will aid the ACERWC recognition of a hostility.⁷⁰

6.9 Direct part in the hostilities.

68. States are prohibited from recruiting children or using them to take direct part in hostilities. The principles that underscore the protection of children, such as, the best interest principle and the application of the complementarity between IHL and IHR should be used in instances where a child takes a direct

⁷⁰ See R. Pinto 'Report of the Commission of experts for the study of the question of aid to the victims of internal conflicts', International Review of the Red Cross, February 1963, 82– 83.

part in hostilities. The conduct includes fighting and violation of human rights or playing a role that aids the continuance of the conflict, tension or strife.

69. The child's "consent" to join an armed group should not be construed to defer the criminal liability of the perpetrators or the non-conformation to the obligations under Article 22, and the violation of the rights of a child. A violation occurs whether the child is forcibly recruited or "volunteers" because of their circumstances.⁷¹

6.10 The protection of the civilian population in armed conflicts

70. The protection of the civilian population in armed conflict should be through the complementary application of the IHL through IHR. The States are encouraged to use a preventive and a human rights violation approach.⁷² This approach is instructive in aiding the understanding of both necessary and feasible measures under Article 22.⁷³

6.11 All feasible measures

71. Feasible measures refer to measures that are at the disposal of the State to protect and care for children. These measures should be positive steps that progressively lead to the protection of children affected by armed conflicts, tension and strife. These measures should reflect the balance between the desired progressive measures that in light of the steps that a State can take to ensure the realisation of the rights of a child in armed conflict, tension and strife.

⁷¹ Paris Principles 6.0

⁷² A Chapman and S Russell, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia: Antwerp-Oxford-New York, 2002), 38.

⁷³ This is in line with the use of the complementarity approach alluded to earlier in the General Comment, paragraph 7.

7. Role of other stakeholders

7.1 Stakeholders generally

72. All persons, organisations, entities that are able to improve the position of a child affected by armed conflict are stakeholders have a role to play to prevent conflict, to protect children during and after conflict. This role may be carried out by an organisation on its own or in consultation with other stakeholders.

7.2 National Human Rights Institutions

73. National Human Rights Institutions have a key role to play in the monitoring, evaluation and investigation of a State's observance of its obligations in the prevention of and management of conflicts and the peacebuilding process. They have a role in holding the State accountable at the international human rights bodies through advocacy, and submission of alternative reports among other roles.⁷⁴ The National Human Rights Institutions may attend the meetings and the sessions or attain affiliate status to the ACERWC to add meaningful engagement to the protection of children in armed conflict. This leads to the making of informed decisions by the ACERWC.

7.3 Regional Economic Communities and Regional Mechanisms

74. The Regional Economic Communities (RECs) and Regional Mechanisms (RM) have a role to advise States Parties to develop national policies, legislative, judicial and administrative guidelines that are crucial to the protection of the rights of a child during armed conflict, tension and strife in their various regions. This role extends to the implementation of the policies and decisions that are coordinated by the AU, and to act as a norm-setting platform for the regions on matters dealing with children in armed conflict in

⁷⁴ Article 20 of the Protocol Establishing the Peace and Security Council.

relation to children affected by armed conflict. The implementation of these roles should cover prevention, mitigation, intervention and redress with respect to the rights of children under armed conflict.

7.4 Media

75. The media have a role to ensure that their reporting ascribes to professional and ethical standards that uphold the holistic welfare of the children involved through the mitigation of traumatic experiences and non-violation of rights of children affected in armed conflicts. The media has to be used as a conduit that disseminates information for prevention, peacebuilding as well as post-conflict reconstruction. The media should be used to disseminate evidence to educate the masses on the rights of children in armed conflict. The role extends to online platforms where the information that is being distributed is not used to hurt the person of the child in any way. In particular, media should not reveal the identity of any child involved in armed conflict, to prevent unnecessary stigmatization or retaliation.

7.5 Private actors

76. Private persons, companies or entities that violate the rights of a child affected by armed conflict by encouraging, ordering, tolerating or perpetrating prohibited acts, have to be held responsible.⁷⁵ There is evidence that some private companies may finance and supply arms, while others provide security forces to serve in an armed conflict, provide transportation of arms to make profit. These actions that perpetuate the continuance of armed conflict and the violation of the rights of a child shall make the private actors responsible for the violations.

⁷⁵ The General Comment 20 of the Committee Against Torture on the Prohibition of Torture, Articles 1 and 13 are very instructive in this regard.

77. The States Parties have an obligation to regulate the activities of private actors such that their activities do not violate the rights of a child in armed conflict, tension and strife. Conversely, private actors have an obligation not to supply arms that would be used to lead to armed conflict. Private actors that train the military have a role to ensure that the protection of children forms part of the syllabus.

8. Remedies

78. The ACERWC reiterates its mandate in offering remedies through the individual complaints mechanisms, use of mission visits, use of State Party reporting, consideration of State reports and use of Concluding Observations on Reports of States Parties.

79. The States Parties shall provide adequate, effective and comprehensive remedies that provide for reparations that include restitution, rehabilitation compensation, satisfaction and guarantees of non-repetition. This obligation shall extend to all children affected directly or indirectly by armed conflict, tension and strife. Restitution shall be aimed at returning the children affected by armed conflict to positions there were in before. Rehabilitation of victims of child marriage shall be aimed at restoring the psychosocial, psychological and mental abilities of a child to enhance his or her participation in society.

80. States Parties have an obligation to provide for appropriate remedies for violations of the rights of children affected by armed conflict. Appropriate remedies have to be determined by a competent judicial, administrative, legislative or any other competent authority as provided for by law. The competent authorities should engage administrative and judicial review mechanisms to enable children and individuals affected by armed conflict to apply for review or appeal any decision denying them any of the rights

enshrined in the ACRWC. The mechanisms have to provide for the participation of children affected by any such decision. The remedies that are offered shall be accessible, available and affordable.⁷⁶

9. Accountability

81. States Parties should hold perpetrators accountable for human rights violations that occur in the context of children affected by armed conflict. Accountability extends to non-State actors who are in a position of authority in areas of armed conflict, tension and strife. The failure to account by the States Parties leads to ineffectiveness in preventing, stopping or managing conflicts and crisis situations.

82. States shall criminalize human rights violations that take place during armed conflict, tension and strife, and as such establish a criminal responsibility against perpetrators. This is based on the decision by the AU to establish a continental monitoring framework on conflict that requires both political and judicial accountability.⁷⁷ The ACERWC reiterates its obligation to work with the PSC to urge States Parties to provide political and judicial accountability in relation to children affected by armed conflict.

83. States Parties shall in their State Reports inform the ACERWC on steps taken on children who have been affected by armed conflict, including disarmament, demobilization, rehabilitation, and community reintegration. These reports shall detail the social services that the children have been offered and how the mechanisms have treated all children victims regardless of their role in the conflict.⁷⁸

⁷⁶ Michelo Hansungule paras 26 and 65.

⁷⁷ This is the Peace and Security Council, a standing organ of the AU for the prevention, management and resolution of conflicts.

⁷⁸ UNSC Resolution No 2427/2018.

84. States Parties shall from time to time assess the efficacy and accessibility of the accountability mechanisms. States Parties should avoid the use of alternative justice mechanisms that do not serve the best interest of the child.

85. States Parties should offer accountability through the response mechanisms, and the development of policies that address gender-related challenges and human rights violations against children. This accountability should extend to the reports that are submitted to the ACERWC on steps on the implementation of obligations under Article 22.

10. Dissemination of the General Comment

86. States Parties, other stakeholders such as the National Human Rights Institutions, Regional Economic Communities, the private sector and the civil society organisations, should widely disseminate this General Comment in all sectors of the government that deal with justice, law and order, and those responsible for implementing the ACRWC. The dissemination should be extended to the general public, other professionals such as academics, judges, parents, guardians, teachers, legal aid officers, social workers and other related persons who with, and for children.