

Chapter 23
Article 22
Armed conflicts

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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.

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1 Introduction

The problem of armed conflict in Africa significantly affects mostly children.¹ Statistics indicate that at least one in every six children in Africa live in a conflict zone, with six of the ten worst countries for children to grow up in, or live in, being in Africa. These countries are the Central African Republic, the Democratic Republic of the Congo (DRC), Mali, Nigeria, Somalia and South Sudan.² It is estimated that as of 2022, approximately 468 million children were living in a conflict zone – a number that increased by 2,8 per cent from 2021.³ It is widely observed that armed conflict continues to disrupt the political, social and economic fabric of society.⁴ As a consequence, the displacements affect large numbers of people across Africa. A study by the African Centre for Strategic Studies reveals that an estimated 40,4 million people are forcibly displaced annually (internally, as refugees, and asylum seekers) especially due to armed conflict.⁵

Article 22 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) is greatly linked to African Union (AU) programmes and with a particular emphasis on Agenda 2063 of the AU which contextualises a peaceful and secure Africa,⁶ with the importance of children, women and the youth as critical pillars in the continent's economic development.⁷ Consequently, Agenda 2040 of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) has 10 aspirations that include the protection of children from situations of conflict,⁸ creating an intrinsic link to Aspiration 4 of Agenda 2063. Article 22 remains key in giving normative guidance to various initiatives by other AU organs, such as the Peace and Security Council,⁹ in dealing with aspects of children affected by armed conflict.¹⁰ The article is also linked to promoting education, especially in emergencies, where it works with the AU policy on education that envisages that children in all environments (including in armed conflict environments) enjoy the right to education.¹¹

This chapter unpacks article 22 through nine designated parts. An introduction to the importance of article 22 is provided in part 1. Part 2 links article 22 to other articles in the African Children's Charter. Part 3 highlights links with other human rights treaties while part four provides a legal interpretation of article 22. Part 5 looks at the engagement in the regional fora followed by part 6 on the obligations

- 1 UNICEF Annual Report 2023, <https://www.unicef.org/reports/unicef-annual-report-2023>. (accessed 2 August 2024).
- 2 Save the Children UK 'The war on children' 8, https://resourcecentre.savethechildren.net/pdf/SWOC_report_2023_WEB.pdf (accessed 2 August 2024).
- 3 As above.
- 4 See, generally, K Ballentine & J Sherman (eds) *The political economy of armed conflict: Beyond greed and grievance* (2003).
- 5 African Centre for Strategic Studies 'African conflicts displace over 40 million people' (2023), <https://africacenter.org/spotlight/african-conflicts-displace-over-40-million-people/> (accessed 2 August 2024).
- 6 Agenda 2063 'Our aspirations for the Africa we want', <https://au.int/en/agenda2063/aspirations> (accessed 2 August 2024). Aspiration 4 envisages mechanisms for the functional peaceful prevention and resolution of conflicts at all levels.
- 7 As above. Aspiration 6 envisages an Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children.
- 8 Agenda 2040, <https://www.acerwc.africa/en/page/agenda-2040> (accessed 3 August 2024).
- 9 See Communiqué of the 1202nd meeting of the PSC held on 27 February 2024, on the Fight Against the Use of Child Soldiers, <https://www.peaceau.org/en/article/communique-of-the-1202nd-meeting-of-the-psc-held-on-27-february-2024-on-the-fight-against-the-use-of-child-soldiers> (accessed 2 August 2024).
- 10 As above. The third preambular paragraph of the Communiqué reiterates the deep concern by the increasingly asymmetrical nature of armed conflicts on the continent, that have resulted in increased vulnerability of children to the grave violations of their rights in situations of conflict, particularly to the recruitment and use of children by armed forces and armed groups. Para 13 urges state parties to facilitate the continuation of education even in situations of conflict; including the signing of the safe schools declaration.
- 11 The African Union (AU) Continental Strategy on Education for Health and Well-Being of Young People aims to enhance the physical, mental and reproductive health of young people while contributing to the achievement of education goals. See <https://bit.ly/3yLyXCD> (accessed 2 August 2024).

of non-state armed groups. Part 7 evaluates the jurisprudence of the African Children's Committee, followed by an evaluation of the domestication of article 22 in Part 8. Part 9 offers a conclusion and recommendations. The terms 'children affected by armed conflict' and 'children in conflict situations' are used interchangeably and refer to the same thing.

2 Links to other Charter articles

There are various provisions in the African Children's Charter to which article 22 is linked. While it is agreed that all provisions in the Children's Charter are intrinsically linked to one another to form a holistic whole, specific provisions stand out and need to be mentioned. This non-exhaustive list includes the provisions on state obligations;¹² the definition of the child;¹³ the child rights-based four principles of non-discrimination;¹⁴ the best interests of the child;¹⁵ the right to life, survival and development;¹⁶ and participation.¹⁷ The other provisions include harmful traditional practices and child marriages;¹⁸ protection of refugees and asylum seekers;¹⁹ the right to education;²⁰ rights of handicapped children;²¹ the right to health;²² prohibition on child labour;²³ torture and inhumane treatment;²⁴ and the use of inspiration from other sources in the promotion and protection of the rights of the child.²⁵

2.1 Nature of state party obligations

Regarding state party obligations, all members of the AU that are party to this Charter are obligated to recognise the rights, freedoms and duties enshrined herein and to take necessary steps within their constitutional processes to engage necessary measures to give effect to the provisions of this Charter, to which article 22 is no exception. Concerning article 22, it is argued that five guiding principles inform the relationship between the two provisions.

First, the obligation on state parties is mandatory with an indelible requirement to recognise the rights, freedoms and duties in the African Children's Charter and to undertake to take on necessary measures towards their enjoyment. Second, the expanse of this recognition inculcates all rights, freedoms and duties. It is interesting to note that concerning rights, there is no distinction regarding their nature as civil and political, on the one hand, and socio-economic, on the other. As such, the protection of the rights of children affected by armed conflict embraces all rights under the Charter. Third, state parties are expected to take necessary measures to ensure the enjoyment of rights, duties and obligations under the Charter.

12 Preamble, art 1 African Children's Charter.

13 Art 2 African Children's Charter.

14 Art 3 African Children's Charter.

15 Art 4(1) African Children's Charter; Concluding Recommendations by the African Children's Committee on the Republic of South Africa Initial Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child (2016) para 24. See Lesotho Child Protection and Welfare Act 7 of 2011 sec 4.

16 Art 5 African Children's Charter.

17 Arts 4(2), 7, 9 & 315 African Children's Charter.

18 Art 22(1) African Children's Charter.

19 As above. 22(1).

20 Art 11 African Children's Charter.

21 Art 13 African Children's Charter.

22 Art 14 African Children's Charter.

23 Art 15 African Children's Charter.

24 Art 16 African Children's Charter.

25 Art 46 African Children's Charter.

State parties are expected to take necessary steps concerning the protection of children affected by armed conflict,²⁶ and to deal with separation from parents, where state parties take all necessary measures to trace and reunite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.²⁷

This is a contextual approach that calls for the protection of children in the environments where children affected by armed conflict may be situated, such as in the actual theatres of conflict,²⁸ in places of transition,²⁹ and peaceful communities.³⁰ It is buttressed by the need for states to take only necessary measures in light of their obligations,³¹ as an overarching obligation. The third instance that is equally linked to article 22 is a call to return children to a family setting using necessary measures.

2.2 Definition of a child

The definition of a child is equally important as it sets the beneficiary's age of protection and protection under the African Children's Charter. To this end, the definition of a child under article 2 as a person below the age of 18 years sets the bar for the protection of the child and offers three guiding principles for the application of article 22. First, since it provides the age of the child to be below 18 without any qualification, it entails that the African Children's Charter does not provide for the concept of child soldiers. Second, it prohibits the recruitment of children as far as it protects persons between the ages of 0 and below 18. One may argue that if there were no article 2 in the African Children's Charter or a qualification of the child's age to be below 18 as far as national legislation allowed, this would lead to a lesser threshold of protection under article 22.

2.3 Non-discrimination

The principle of non-discrimination in article 3 of the African Children's Charter indicates that a child's status is irrelevant and is not a condition precedent to the enjoyment of their rights under the Charter. This article is significant as it extends protection by implication to all environments where a child finds themselves, such as in peace, in transit communities where children are refugees or asylum seekers, and environments of actual theatres of conflict. It is argued that if one accords a broad-based contextual application to the principle of non-discrimination, it is clear that there is a non-exhaustive list of vulnerable children,³² to which children in situations of conflict are no exception. In addition, the principle of non-discrimination applies in all environments whether there is armed conflict, tension, strife, refugee settings or in places of peace.³³ Other related articles include article 4(1) on the best interests of the child (see chapter 5), right to life, survival and development under article 5 (see chapter 6), and participation of the child under articles 4(2) and 7 (discussed under chapter 8 of this volume).

26 Art 22(2) African Children's Charter.

27 Art 25(2)(b) African Children's Charter.

28 Art 1 African Children's Charter.

29 As above.

30 As above.

31 As above.

32 This list continually extends as the context demands. Eg, the General Comment on Sexual Exploitation adds to this non-conclusive list other vulnerable children such as victims of sexual violations, including children with disabilities, children in care institutions, children in conflict situations, children in street situations, and displaced and migrant children. General Comment 7 on art 27 of the African Children's Charter 'Sexual Exploitation, para 40.

33 General Comment 6 on art 22 of the African Children's Charter in Situations of Conflict paras 38-40. See Concluding Recommendations by the African Children's Committee on the Republic of South Africa Initial Report on the Status of Implementation of the African Children's Charter paras 22 & 23.

2.4 Right to education

The importance of article 11 (discussed in chapter 12 of this volume) on the right to education in the African Children's Charter is that it finds its relevance in that every child has a right to education. As indicated earlier, every child is entitled to this right, regardless of the environment in which they are. In the same vein, since protecting a child affected by armed conflict extends to various environments, so does the enjoyment of the right to education. A contextual approach to the right to education is important concerning education in emergencies. It is expected that spaces of humanitarian crises, armed conflict, tension and strife all point to the need for children to enjoy this right. A contextual approach ensures that children who are internally displaced, asylum seekers or those seeking refuge all ought to have access to education whether they are in camps or integrated into the communities. It is important that by design, tailor-made curricula, with educators in languages that the children understand, are used.

2.5 Right to health care and healthcare services

The import of article 14 under the African Children's Charter (discussed under chapter 15 of this volume) is to enable the provision of a platform where the child affected by armed conflict can enjoy not only the right to health but the highest attainable standard. Important aspects of the rights include accessibility, affordability and availability.³⁴ In addition, the vision to have the highest standard of health is evident in the fact that this ascribes to the same threshold of protection and enjoyment of the right. Theatres of conflict are usually plagued with the lack of health services, or at times the hospitals are attacked by armed forces and groups, which affects the delivery of services to the children. Some of the health needs arise as a result of the traumatic events that the children undergo, and it thus is important that aspects that involve their mental health and well-being, psychological and psychosocial health are a priority. As indicated earlier, the provision of this right extends beyond spaces of actual conflict, to space of transition and host communities.

2.6 Prohibition on child labour

The prohibition on child labour is provided for under article 15 of the African Children's Charter (discussed under chapter 16 of this volume) and it is a common occurrence experienced by children affected by armed conflict. The link between child labour and children affected by armed conflict is evident in the statistics provided by the International Labour Organisation (ILO). Child labour is prevalent in spaces of armed conflict where children work as labourers for armed groups.³⁵ While the reports from the ILO show that the percentage of children in child labour in Africa has increased from 19,6 to 21,6 per cent over four years from 2017 to 2021 with a corresponding increase in engagement in hazardous work from 8,6 to 9,7 per cent, the environments show a connection to armed conflict.³⁶ Close to 14,7 million children in Africa are engrossed in child labour due to the existence of conflict, violence and displacement.³⁷ In the Democratic Republic of the Congo (DRC), Somalia and South Sudan, it is reported that there are high rates of child labour.³⁸ For instance, in the DRC, approximately

34 ESCR Committee General Comment 14: The Right to the Highest Attainable Standard of Health (art 12) adopted at the 22nd session of the Committee on Economic, Social and Cultural Rights on 11 August 2000 DocE/C.12/2000/4, <https://www.refworld.org/legal/general/cescr/2000/en/36991> (accessed 2 August 2024).

35 'Ending child labour by 2025', https://webapps.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_653987.pdf (accessed 2 August 2024).

36 International Labour Organisation (2021) 'Child labour', <https://www.ilo.org/projects-and-partnerships/projects/child-labour> (accessed 2 August 2024).

37 UNICEF Data 'Uncertain pathways' (2020), https://data.unicef.org/wp-content/uploads/2021/09/Uncertain-Pathways_Sep-7th_final.pdf (accessed 2 August 2024).

38 UNICEF Data 'Child labour statistics' (2023), <https://data.unicef.org/topic/child-protection/child-labour/> (accessed 2 August 2024).

1,3 million children (ages 5 to 17) are engaged in child labour, with 60 per cent of these children in conflict-affected areas.³⁹ A gender lens shows that girls are more likely to be engaged in child labour than boys, with 55 per cent of girls aged 5 to 14 working, compared to 42 per cent of boys.⁴⁰

With regard to dealing with child labour, the General Comment on article 22⁴¹ on children in conflict situations qualifies this as cruel, inhumane and degrading treatment.⁴² It calls on state parties to be more proactive by having special monitoring units that provide effective procedures to prevent, identify, report, investigate, treat and conduct follow-ups to affected children.⁴³

2.7 Prohibition on harmful traditional practices and child marriages

Article 21 of the African Children's Charter (discussed under chapter 22 of this volume) mandates and obliges state parties to take all appropriate measures to eliminate harmful social and cultural practices that affect the welfare, dignity, normal growth and development of the child.⁴⁴ There is an emphasis on the need to ensure that practices that are detrimental to the health or life of the child or promote discrimination on grounds of sex or other status are avoided.⁴⁵

The article also prohibits child marriages and/or the betrothal of children with a call for effective action that embraces a preventive approach that categorically states that the minimum age of marriage is 18 years and above.⁴⁶ In connection with article 22, theatres of armed conflict are breeding centres for harmful traditional practices, especially child marriages. As such, article 21 acts as a double-edged sword that ensures that harmful traditional practices do not rule the day, while at the same time complementing the application of article 22 which prohibits the use of children in armed forces and groups.

2.8 Protection of refugees and asylum seekers

The African Children's Charter provides expansive protection to children under article 23 with four critical principles that support the implementation of article 22. First, state parties from both an individualistic and joint effort are obliged to take all appropriate measures to ensure that a child seeking refugee status or considered a refugee, accompanied or not by parents, legal guardians or close relatives, receives protection and humanitarian assistance.⁴⁷ Second, the Children's Charter also calls on state parties to cooperate with existing international organisations that protect and assist refugees to ensure that the child is protected and, where possible, unaccompanied children are reunified with their parents or legal guardians.⁴⁸ Third, if the legal guardians are not traceable, the state should ensure that the child is accorded protection in their own right as a result of the permanent or temporary deprivation of the family environment.⁴⁹ Fourth, this threshold of protection applies to children who

39 UNICEF Data 'Uncertain pathways' (n 37); International Labour Organisation 'Global estimates of child labour: Results and trends' 2012-2016 (2020), https://webapps.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575499.pdf 31 (accessed 2 August 2024).

40 UNICEF Data 'Child labour statistics' (n 38).

41 General Comment on art 22 on Children in Conflict Situations (2020), [acerwc.africa/general-comments/](https://www.acerwc.africa/general-comments/) (accessed 2 August 2024).

42 General Comment on art 22 (n 41), see sec 4.1. Also see para 55.

43 General Comment on art 22 (n 41) para 55.

44 Art 21(1) African Children's Charter.

45 Art 21(1)(a) & (b) African Children's Charter.

46 Art 21(2) African Children's Charter.

47 Art 23(1) African Children's Charter.

48 Art 23(2) African Children's Charter.

49 Art 23(3) African Children's Charter.

are internally displaced as a result of natural disasters, internal armed conflicts, civil strife, or the breakdown of economic and social order.⁵⁰

2.9 Use of persuasive jurisprudence from other laws

Article 46 of the African Children's Charter allows the African Children's Committee to draw inspiration from international law on human rights, particularly from the provisions of the African Charter on Human and Peoples' Rights (African Charter), the Charter of the OAU, the Universal Declaration of Human Rights (Universal Declaration), the Convention on the Rights of the Child (CRC), and other instruments adopted by the United Nations (UN) and by African countries in the field of human rights, and from African values and traditions.⁵¹ Provisions in other international instruments, or working methods that allow the Children's Committee to promote and protect the rights of the child affected by armed conflict, are envisaged by this provision. As such, the provisions of CRC and its Optional Protocol on the involvement of children in armed conflict receive validation and legitimacy in application from this position.⁵²

3 Links to other human rights treaties

3.1 Constitutive Act of the African Union

The Constitutive Act calls on members of the AU to ensure that the use of democratic principles, human rights and the rule of law remains the central focus in all aspects of governance.⁵³ This is based on the bedrock of the promotion and protection of the rights of all persons in Africa.⁵⁴ While there is the narrative of the peculiarity of African values and traditions, the Constitutive Act recognises the diversity of traditions, and beliefs in Africa with a call for tolerance, dialogue and respect.⁵⁵ Closely related to the foregoing are the calls upon member states to inculcate peaceful coexistence and comprehension among various communities,⁵⁶ as a precursor for democracy and sustainable social and cultural development.⁵⁷ The Constitutive Act reminds state parties to engage in aspects of development with a keen interest in AU initiatives that point to a development that recognises the critical place of the child as a leader and the need for peaceful communities.⁵⁸

3.2 African Charter on Human and Peoples' Rights

The African Charter provides that all peoples shall have the right to national and international peace and security.⁵⁹ This is the import of article 22 in light of the mandatory obligations of the state and the nature of obligations under article 1, as discussed above. At the core of the application of this obligation is the use of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organisation of African Unity (OAU) which shall govern relations

50 Art 21(1) African Children's Charter.

51 Art 46 African Children's Charter.

52 See a discussion on CRC and the OPAC under parts 4.3, 4.4, 5.3 and 5.6.3.

53 Constitutive Act of the African Union, adopted at the 36th ordinary session of the Assembly of Heads of State and Government on 11 July 2000 in Lomé, Togo art 4(m).

54 Art 3(h) Constitutive Act.

55 Preamble Constitutive Act.

56 Art 4(i) Constitutive Act.

57 Art 3(j) Constitutive Act.

58 See the discussion on Agenda 2063 under part 6. Before the AU looked at children as future leaders, the narrative has changed viewing them as leaders now, who will impact their future.

59 African Charter on Human and Peoples' Rights 1981, OAU Doc CAB/LEG/67/3 rev. 5, art 23(1).

between states.⁶⁰ Using a human rights-based approach that embraces participation, accountability, non-discrimination and equality, empowerment and legality, the African Charter embraces the child rights-based approach principles.⁶¹ These principles include non-discrimination, the best interests principle, the right to life, survival and development and participation.⁶²

Armed conflict often offers an opportunity to manifest religious ideology (at times) through conflict, tension and strife.⁶³ Children are often indoctrinated to join armed groups with the aid of ideologies that are often linked to religion. It is fostered by the ease with which they learn to use the AK47 gun, which is a common weapon in theatres of conflict, the proliferation of firearms and the fact that children are dispensable.⁶⁴

The General Comment on article 22 reiterates that children involved in armed conflict are primarily victims, and states should take appropriate steps to prevent their detention or prosecution for alleged involvement with armed groups.⁶⁵ While their actions may account for an exercise of the freedom of thought, conscience and religion, their free will is contaminated by coercion from the armed forces or groups.⁶⁶ As a consequence, detention should be a matter of last resort and for the shortest period. The recovery of these children to be able to exercise their right to freedom of thought, conscience and religion should be guided by the conclusion of Disarmament, Demobilisation and Reintegration (DDR) programmes.⁶⁷

3.3 United Nations Convention on the Rights of the Child

CRC reiterates that state parties are obligated to respect and to ensure respect for rules of applicable international humanitarian law in armed conflicts to protect the child.⁶⁸ They are expected to take all feasible measures to ensure that persons below the age of 15 years do not take a direct part in hostilities.⁶⁹ This obligation extends to the non-recruitment of any person below 15 years of age.⁷⁰ This requirement of state parties to comply with international humanitarian law, to protect children under the age of 15 from direct participation in hostilities, the non-recruitment of children under 15 into armed forces, and the use of measures to protect civilian children affected by armed conflict, are the critical complementary areas that CRC has with article 22 of the African Children's Charter.

3.4 Optional Protocol to CRC on the involvement of children in armed conflict

The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict protects children from recruitment and use in hostilities.⁷¹ It requires state parties

60 Art 8 African Children's Charter.

61 M Hansungule 'Human rights in the African Charter on Human and Peoples' Rights' in M Hansungule (ed) *The African Union: Legal and institutional framework* (2012) 415-453.

62 Arts 3, 4(1), 5, 7 & 4(2) African Children's Charter.

63 RD Nanima 'An evaluation of the adequacy of the African Charter on the Rights and Welfare of the Child concerning economic crimes in armed conflict' (2020) 4 *Journal of Anti-Corruption Law* 66.

64 As above.

65 General Comment on art 22 (n 41) para 58.

66 As above.

67 As above.

68 CRC GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989), entered into force 2 September 1990 (UNCRC) art 38(1).

69 CRC (n 68) art 38(2).

70 CRC (n 68) art 38(2).

71 As of August 2024, OPAC has been ratified by 48 African states. See ratification information, <https://indicators.ohchr.org/> (accessed 3 August 2024).

to commit to the non-recruitment of children under the age of 18 years in armed conflict, through legislation that prohibits and criminalises the vice, and through the demobilisation and reintegration of children who have been conscripted or used in hostilities through the provision of physical and psychological services.

4 Legal interpretation

4.1 An overview of the General Comment on article 22

It is instructive to appreciate the nature of the state obligations from the wording of the article. These obligations stem, first, from the general obligations under the African Children's Charter and, second, from the specific obligations under the article. By design, this contribution hints at the general obligations under the Charter and delves into the specific obligations under the article.

The African Children's Committee has developed a General Comment that accords state parties with an interpretation and understanding of article 22. To this end, this part elucidates the meaning of article 22. The discussion will fuse the aspects of the legal interpretation of the article with the content and context of the General Comment, which remains the most extensive document that offers a legal analysis of article 22. In terms of its scope, the General Comment unpacks the key principles, the nature of state parties' obligations, an understanding of article 22 and the role of other stakeholders.⁷² It also deals with aspects of accountability and the dissemination of the General Comment, and how countries should deal with the promotion and protection of the child in situations of conflict.⁷³ It calls on states to deal with the promotion and protection of children with the aid of international human rights law and international humanitarian law, with the aid of various instruments to this end.⁷⁴

One of the critical aspects that the General Comment recognises is the fact that the six grave violations identified by the UN Special Rapporteur on Children and Armed Conflict are not an exhaustive list.⁷⁵ In addition, it reiterates the promotion and protection of children with a subjective elucidation of armed conflict. This is in the recognition that protection should be in spaces of armed conflict, tension and strife informed by an objective and subjective evaluation of the intensity of the conflict and its effect on the disruption of the political, socio-economic and the enjoyment of human rights in the respective state.⁷⁶

The issue of collaboration remains critical to the implementation of article 22 as far as there is a need for the use of synergies from all stakeholders to prevent conflicts and promote post-conflict management.⁷⁷ Some of the notable stakeholders include the Peace and Security Council of the AU and the UN Security Council as key players in ensuring international peace and security.⁷⁸ Other critical aspects that the General Comment unpacks include the use of the four principles of the child rights-based approach,⁷⁹ the nature of state party obligations,⁸⁰ the substantive content of article 22,⁸¹ and the

72 General Comment on art 22 (n 41) para 15.

73 As above.

74 As above.

75 General Comment on art 22 (n 41) paras 16-17.

76 General Comment on art 22 (n 41) para 19.

77 General Comment on art 22 (n 41) para 20.

78 As above.

79 General Comment on art 22 (n 41) paras 24-42.

80 General Comment on art 22 (n 41) paras 43-53.

81 General Comment on art 22 (n 41) paras 54-92.

role of other stakeholders.⁸² It also gives insights on remedies,⁸³ accountability,⁸⁴ and a dissemination strategy.⁸⁵

4.2 Nature and scope of state obligations generally

It is argued that the general obligation ‘to fulfil’ is in the call to state parties to adopt necessary measures to ensure that the children in spaces of armed conflict can enjoy their rights without regard to their status. This includes the right to education.⁸⁶ It should be recalled that any right that can be positioned to be enjoyed is not subjected to measures of implementation such as the progressive realisation of socio-economic rights. Rather, it is the call on state parties to adopt all the necessary measures from legislative, to administrative, judicial and other measures to ensure the promotion and protection of the rights of the child. These include the existence of a well-functioning and effective birth registration system⁸⁷ and the provision of remedies for the violation of the rights of children affected by armed conflict.⁸⁸

4.3 Nature and scope of state obligations specific to article 22

This part looks at the nature and effect of state obligations, the obligation to respect and ensure respect, the use of international humanitarian law and the engagement in regional fora.

4.3.1 Nature and effect of the specific obligations under article 22

It is widely acknowledged that the word ‘shall’ is widely used in this article. The term is used six times. First, states *shall* undertake to respect and ensure respect; second, *shall* take all necessary measures; third, no child shall take a direct part in hostilities; fourth, states *shall* protect; fifth, states *shall* take feasible measures to ensure protection; and sixth, the rules *shall* apply to children in situations of armed conflict, tension and strife.

From a bird’s eye viewpoint, the wording of article 22 starts from the vantage point that every child should be protected. This is a departure from other articles that start from the point of what every state should do. It is argued that the wording of article 22 places the agency for the enjoyment of obligations on the child rather than the conventional position of the state.⁸⁹ There is no doubt that it is important to establish the basis on which the term is used.

4.3.2 Effect of the obligation

Following the recognition of the nature of the obligations under art 22 as mandatory, it is important to recognise the effect of the nature of the obligations from the wording of the article. Every state party to the African Children’s Charter should ensure that it upholds the obligations under article 22. Two points are worth noting and evaluating here.

82 General Comment on art 22 (n 41) paras 93-100.

83 General Comment on art 22 (n 41) paras 101-104.

84 General Comment on art 22 (n 41) paras 105-114.

85 General Comment on art 22 (n 41) paras 115-117.

86 General Comment on art 22 (n 41) para 72.

87 General Comment on art 22 (n 41) para 87.

88 General Comment on art 22 (n 41) paras 103 and 109. Eg, the African Children’s Committee has also passed a Model Law on Children Affected by Armed Conflict which may be adopted by state parties in the drafting of legislation to deal with the vice of the direct and indirect use of children in armed conflict.

89 The central insistence on the child emphasises the added value of the Charter. See BD Mezmur ‘The African Children’s Charter versus the UN Convention on the Rights of the Child: A zero-sum game?’ (2008) 23 *SA Public Law* 1-29.

The wording of the article regarding the obligation is different from other articles. Most articles in the African Children's Charter use the wording 'every child' rather than 'every state party'. This position in essence shows that the child is not looked at as an individual who needs protection from the state as the main defining factor of child-state relationship but as a person who is a rights holder in their her own right and needs to be protected from that premise. This distinction as such informs the higher threshold of protection in the African Children's Charter by emphasising the agency of the child.⁹⁰

A closer look at the African Children's Charter reveals that some articles refer to the obligation of the state from the perspective of 'every child' to ensure agency. Some of the provisions that take on this approach include survival and development, name and nationality, freedom of expression, freedom of association, freedom of thought, conscience and religion, education, handicapped children, health and health sciences, and child labour. Other provisions include the administration of justice, parental care and protection, and responsibility of the child. There are a few provisions that emphasise the role of the state with the term 'state party' including the nomination of candidates to serve on the African Children's Committee, and on the reporting procedure.

Several provisions that start with the phrase 'member states' or 'state parties' include leisure, recreation and cultural activities, protection against child abuse and torture, administration of justice, protection of the family, and parental responsibilities, protection against harmful practices, armed conflicts, refugee children, adoption, separation from parents, protection against apartheid and discrimination, sexual exploitation, drug abuse, sale, trafficking and abduction, children of imprisoned mothers. Second, and as a consequence, the use of the phrase relating to 'state parties' introduces not only the obligation on the state from a singular or specific but from a pluralist perspective. This means that such obligations, including the article under review, present a collective effect of the obligation on state parties. Thus, while the obligation is specifically on the state, it is also jointly on all states that have ratified the African Children's Charter.

4.3.3 *Obligation to respect and ensure respect*

The African Children's Charter calls on states to respect and ensure respect for international humanitarian law. A discussion of humanitarian law is given below in part 4.3.4. It is also worth noting that the concept of respecting and ensuring respect is within the purview of international law.

The African Children's Committee has laboured to offer guidance on the scope of the obligation to respect by underscoring four aspects. First, the obligation has to be implemented immediately in giving effect to the promotion and protection of the rights of the child.⁹¹ Where restrictions are required, they need to pass the duo-rule of their presence in the Charter and, second, they ought to be necessary and proportionate in pursuance of legitimate aims to effectively protect the child encapsulated in article 22.⁹² The concept of good faith comes in handy as a consequence of the application of the dual role above. In addition, the obligation to respect ensures not only that the rights 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, or non-state armed groups, but also establishes an international obligation on state parties to refrain from doing so.⁹³

In addition, the obligation to respect places a positive duty on state parties to prevent violations of provisions of article 22 as well as applicable international humanitarian law rules. State parties

90 General Comment on art 22 (n 41) paras 17-18.

91 General Comment on art 22 (n 41) para 46.

92 As above.

93 General Comment on art 22 (n 41) para 47.

should further take measures to ensure that all individuals and state entities know about and comply with international humanitarian law and the African Children's Charter, including through legislative measures and training. Second, states must respond to violations or potential violations of rights contained in the African Children's Charter and specifically article 22, including through ensuring accountability, monitoring and reporting. Third, states should provide effective remedies and redress, including through compensation and victim assistance for violations of international humanitarian law and the Charter, and to ensure that adequate human and financial resources are allocated for children's rehabilitation, reintegration and reunification with their families.⁹⁴

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 state parties or parties to the conflict.⁹⁵ The actions of providing resources or any support have to be interpreted as a violation of rights and disregard of obligations under the African Children's Charter.⁹⁶

State parties must ensure respect for the rules of international humanitarian law, and this requires that they take appropriate measures to prevent international humanitarian law violations from happening in the first place. Accordingly, a party to a conflict must take all measures necessary to ensure respect for the applicable rules of international humanitarian law, beginning in peace time. The rules of international humanitarian law include the main principles of humanity, distinction, proportionality and necessity.⁹⁷ The application of these rules in situations of armed conflict is to ensure that children benefit from the highest protection in armed conflicts, including internal armed conflicts, and during tension and strife.⁹⁸ Parties to conflicts may take various measures to ensure respect for international humanitarian law rules by, among others, integrating these rules into legislative, administrative and institutional measures (including into military manuals and codes of conduct); making available legal advice to the armed forces as to the application of these rules; and teaching the civilian population about the protection of children in times of armed conflict.⁹⁹

The obligation to respect and ensure respect for international humanitarian law binds all states, whether they are party to a conflict or not. This is to ensure that in addition to international human rights law, children may still get a threshold of protection from international humanitarian law when it is applied.¹⁰⁰ The duty to ensure respect by others comprises both a negative and a positive obligation. Under the negative obligation, states may neither encourage, nor aid or assist in violations of international humanitarian law by parties to a conflict, and under the positive obligation, they must do everything reasonably in their power to prevent and bring such violations to an end.¹⁰¹

The obligation to 'ensure respect' requires that state parties take all appropriate measures concerning their population and the groups within its territories to observe the obligations of the African Children's Charter. This obligation extends to other states and non-state partners operating in other states.¹⁰² These measures include taking administrative, judicial and other measures to ensure the practical recognition of the rights affected by article 22 of the Charter. It relates to preventive,

94 General Comment on art 22 (n 41) para 48.

95 General Comment on art 22 (n 41) para 49.

96 As above.

97 The scope of the protection of children in international humanitarian law includes general and special protection as members of the civilian population, <https://www.icrc.org/en/doc/resources/documents/article/other/57jmat.htm> (accessed 2 August 2024).

98 General Comment on art 22 (n 41) para 50.

99 As above.

100 General Comment on art 22 (n 41) para 12.

101 General Comment on art 22 (n 41) para 51.

102 General Comment on art 22 (n 41) para 16.

mitigating and corrective actions taken by a state party in respect of violations, or potential violations of international human rights law, international humanitarian law, and the Charter, by other states or non-state actors in a conflict.¹⁰³

The overall responsibility to secure the safety and liberty of its citizens rests with the state party within its territory and extends to all persons subject to their jurisdiction. Therefore, it is incumbent on the state to exercise due diligence concerning violations or potential violations of international humanitarian law and the African Children's Charter 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; second, 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.¹⁰⁴

4.3.4 Use of international humanitarian law

Article 22 mandates state parties to use international humanitarian law to include humanity, distinction, proportionality and necessity. These principles should come through the use of feasible measures to ensure the protection and care of children who are affected by armed conflicts. The African Children's Charter neither defines nor describes the differences between armed conflict, tension and strife. The lack of a definition under the African Children's Charter is by design a position amplified in the African Children's Committee's General Comment on article 22 which opts to describe the terrain of armed conflict, tension and strife. To this end, the three concepts should be distinguished by the degree of severity using a case-by-case approach.

Article 38(2) of CRC is similar to article 22(2) of the African Children's Charter as far as state parties are obliged to take all feasible measures to ensure that persons do not take a direct part in hostilities. However, it does not give a stand on two critical aspects, namely, (i) the age of recruitment; and (ii) to refrain from recruiting any child.¹⁰⁵ Rather, article 38 allows for the recruitment of children aged 15 as opposed to the blanket implementation of the straight 18-year definition under the African Children's Charter.¹⁰⁶ In addition, while article 38 keeps the protection of the child affected by armed conflict in spaces of conflict, article 22 creates a higher threshold and contextualises armed conflict on account of the degree of severity. As such, this includes armed conflict, tension and strife.¹⁰⁷

5 Engagement in regional fora

The regional fora show an increased inclination toward the mitigation of armed conflict, tension and strife through the use of various initiatives. At the AU, there are specific initiatives such as Agenda 2063 which envisages a peaceful and secure Africa.¹⁰⁸ It recognises the importance of children, women and the youth as important key players in the economic development of the continent.¹⁰⁹ Agenda 2063 has been tailored to the various aspirations in the child rights space in Agenda 2040 which includes

103 General Comment on art 22 (n 41) para 52.

104 General Comment on art 22 (n 41) para 53.

105 See CRC art 38(2); compare with the African Children's Charter art 22(2).

106 See CRC arts 38(2) & (3).

107 See CRC art 38 generally and compare with the African Children's Charter art 22(3).

108 Agenda 2063 (n 6). Aspiration 4 envisages mechanisms for the functional peaceful prevention and resolution of conflicts at all levels.

109 Agenda 2063 (n 6). Aspiration 6 envisages an Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children.

the protection of children from situations of conflict.¹¹⁰ To this end, Aspiration 9 of Agenda 2040 envisages children being free from situations of conflict and humanitarian situations.

The African Commission on Human and Peoples Rights (African Commission) has developed Guidelines on Adhering to Human and Peoples' Rights under the African Charter in the Context of States of Emergency or Disaster¹¹¹ under article 23 of the African Charter.¹¹² These guidelines recognise that war, conflict and the accompanying violations of human and peoples' rights remain a reality across Africa, exacerbated by health emergencies, conflicts and crises. It is argued that if the African Commission is to effectively execute its mandate, it has to deal with issues of conflict and crises in both the human rights and humanitarian law space.

6 Obligations of non-state armed groups

While article 22 is silent on the issue of non-state armed actors, it is without a doubt that they are perpetrators of violations against the child in spaces of armed conflict, tension and strife. The report of the special representative of the Secretary-General on Children and Armed Conflict of 2024 recognises that the changing nature, complexity, expansion and intensification of armed conflict continue to see the emergence of new armed groups, leading to increases in grave violations.¹¹³ In addition, the report indicates the detention of over 2 400 children as a result of their actual or alleged association with armed groups, designated terrorist groups by the UN, and for national security reasons.¹¹⁴ This is exacerbated by the fact that armed groups contributed to more than 50 per cent of the grave violations.¹¹⁵ State parties are expected to take appropriate steps to prevent the detention or prosecution of children for alleged involvement with armed groups, including all non-state armed groups and those designated as terrorist groups.¹¹⁶

The African Children's Committee holds the view that non-state armed groups with effective control of the territory and which are parties to an armed conflict are obligated to respect the rules of international humanitarian law.¹¹⁷ Conversely, state parties and all other stakeholders should refrain from supporting non-state armed groups that violate children's rights.¹¹⁸

7 Jurisprudence from the African Children's Committee

There is jurisprudence from the African Children's Committee that has created traction regarding the interpretation of article 22 and the subsequent development of the General Comment on article 22. The part looks at three specific aspects: *Northern Ugandan Children*; the study on the impact of conflicts and crises in Africa; and visits by the African Children's Committee to selected states.

110 Agenda 2040 (n 8).

111 Guidelines on Adhering to Human and Peoples' Rights under the African Charter in the Context of States of Emergency or Disaster, <https://achpr.au.int/en/documents/2023-05-11/guidelines-adhering-human-and-peoples-rights-under-african-charter> (accessed 2 August 2024).

112 Agenda 2040 (n 8).

113 Report of the special representative of the Secretary-General on Children and Armed Conflict of 2024 para 8, <https://undocs.org/en/S/2024/384> (accessed 2 August 2024).

114 Report (n 113) para 10.

115 Report (n 113) para 6.

116 General Comment on art 22 (n 41) para 58.

117 The General Comment on Article 22 on Children in Conflict Situations (n 49 above) para 100.

118 As above.

7.1 Northern Ugandan Children

This was the first communication to be concluded by the African Children's Committee. It is also the only communication that relates to the interpretation of article 22 of the African Children's Charter.¹¹⁹ It was alleged by the applicants that the respondent state delayed domesticating article 22 of the African Children's Charter to protect children from involvement in armed conflict. It was alleged that as a result the children's rights to education, life, survival and development, health and protection from sexual abuse and violence were violated.

Two points are worth noting. First, the African children's Committee recognises a 'fundamental duty' on the state with a mandate to recognise rights, freedoms and duties in the African Children's Charter through the engagement of necessary steps through their constitutional processes.¹²⁰ It adds that the enjoyment of freedoms, rights and duties are not subject to progressive realisation or available resources.¹²¹

Second, the African Children's Committee is of the strong view that effective implementation of laws requires due diligence by the state.¹²² Although the Committee does not delve into the principles of due diligence, it goes ahead to indicate the importance of the principle.¹²³ It should be recalled that this was the first communication to be handled by the African Children's Committee and, as such, it could only use jurisprudence from other human rights bodies. To this end, the Children's Committee used jurisprudence from the African Commission showing the application of due diligence.¹²⁴

It is interesting to note that the African Children's Committee used article 46 to draw inspiration from other instruments such as the African Charter and the African Commission.¹²⁵ This reinforced the immediate reference to various sources of the law such as CRC, the Optional Protocol to CRC on the Involvement of Children in Armed Conflict, the four Geneva Conventions of 1949 and its additional Protocols to the Geneva Conventions.¹²⁶ Other international instruments include the ILO Convention 182 on the Worst Forms of Child Labour (1999), and the Statute of the International Criminal Court (1998).¹²⁷

The interesting point of departure was the reference to the then draft Statute of the International Criminal Court (ICC) and the Report of the Preparatory Committee on the Establishment of an International Criminal Court.¹²⁸ While these were draft instruments that had not become law, they were used to add voice to the violation of article 22. The African Children's Committee adopted an interpretational approach that recognises that the African Children's Charter uses the straight 18

119 *Hansungule & Others (on behalf of Children in Northern Uganda) v Uganda*, No 1/Com/001/2005, decided April 2013 (*Northern Ugandan Children*). For more insights on this communication, see TS Mbanje 'African Union at 20: Taking stock of the AU's normative and institutional frameworks on human rights and governance' in AO Akinola & EA Liaga *Development and regional stability in Africa: Unlocking potential* (2024) 65-81; JM Abelungu 'The African human rights system and the question of child soldiers' (2019) 3 *African Human Rights Yearbook* 1; J Sloth-Nielsen 'Remedies for child rights violations in African human rights systems' (2023) 56 *De Jure Law Journal* 625-645.

120 *Northern Ugandan Children* (n 119) para 37.

121 As above.

122 *Northern Ugandan Children* (n 119) para 38.

123 As above.

124 As above. See the various communications before the African Commission used by the African Children's Committee, such as *Malawi African Association & Others v Mauritania* (2000) AHRLR 194 (ACHPR 2000).

125 *Northern Ugandan Children* (n 119) para 24.

126 *Northern Ugandan Children* (n 119) para 39.

127 *Northern Ugandan Children* (n 119) paras 39 & 41.

128 *Northern Ugandan Children* (n 119) para 42.

year and the obligation on state parties to take on all measures to ensure that no child takes part in hostilities.¹²⁹ This interpretation reiterated the added value of the African Children's Charter and reiterated a higher threshold of protection to the child in Africa (including those affected by armed conflict).

7.2 The Continental Study on the Impact of Conflicts and Crises in Africa

The African Children's Committee has invested in research-informed jurisprudence, with various studies being conducted concerning children. Some of these include the Continental Study on the Impact of Conflicts and Crises on Children in Africa;¹³⁰ the Study on the Mapping of Children on the Move in Africa;¹³¹ the Stock Take Study On African Union Responses to Children Protection;¹³² Agenda 2040 implementation report;¹³³ and a study on child rights and business.¹³⁴ The *Commentary* looks at the Continental Study on the Impact of Conflicts and Crises on Children in Africa.

The study was guided by six objectives that included an assessment of the impact of armed conflict on children in the areas of education, health, nutrition/food security and child protection,¹³⁵ and whether African countries have mechanisms in place to respond to the challenges of especially vulnerable children in conflict situations.¹³⁶ Other objectives included an assessment of the role of children as victims and witnesses to gross violations, including killings, maimings and sexual abuse, and whether child safeguarding policies are in place in conflict situations.¹³⁷ The final objective was the need to collect, compile and analyse children's views on the impact of armed conflict on their rights and welfare.¹³⁸

The study established that the impacts of conflict on a child depend on the type of conflict and the impact itself. The general impacts of conflict included the separation of children from their families, the violation of the right to education and rendering children vulnerable to sexual and gender-based violence, forced marriage, trafficking and recruitment into armed groups.¹³⁹ For the children in spaces of actual armed conflict, the impact was evident in their poor emotional state and well-being,¹⁴⁰ and limited availability of drugs and medical supplies.¹⁴¹ In addition, some spaces of conflict reported a breakdown in the provision of basic social services such as a dysfunctional healthcare system, resulting in recurrent humanitarian crises and disease outbreaks.¹⁴²

129 *Northern Ugandan Children* (n 119) para 40.

130 The Continental Study on the Impact of Conflicts and Crises on Children in Africa, https://www.acerwc.africa/sites/default/files/2022-09/Study_on_the_impact_of_armed_conflict_and_crises_on_children_in_Africa_ACERWC_FINAL_ENGLISH_0.pdf (accessed 4 August 2024).

131 The Study on Mapping of Children on the Move in Africa, <https://www.acerwc.africa/en/resources/publications/mapping-children-move-within-africa> (accessed 4 August 2024).

132 The Stock Take of African Union Responses to Children Protection, https://www.acerwc.africa/sites/default/files/2022-09/Stoctake_Study_AU_Responses_to_Child-Protection-December-2020-English.pdf (accessed 4 August 2024).

133 Agenda 2040 implementation report, <https://www.acerwc.africa/en/page/agenda-2040-implementation-report> (accessed 4 August 2024).

134 The Study on Child Rights and Business in Africa, <https://www.acerwc.africa/en/resources/publications/study-childrens-rights-and-business-africa> (accessed 4 August 2024).

135 Continental Study (n 130) 6.

136 As above.

137 As above.

138 As above.

139 Continental Study (n 130) 35.

140 Continental Study (n 130) 36.

141 Continental Study (n 130) 38-39.

142 Continental Study (n 130) 42.

The study demonstrated that most countries in Africa face challenges in the promotion and protection of the rights of children affected by armed conflict due to poor implementation of legal, policy and institutional frameworks and, in some cases, the non-ratification of instruments.¹⁴³ About the implementation of article 22, the study called for the ratification of the international instruments, and fulfilment of the reporting obligations under the African Children's Charter to enable the African Children's Committee to guide the improvement of the implementation strategies.¹⁴⁴ The study also urged the AU to make use of the AU Peace and Security Architecture, through its mandated institutions, as a tool for conflict prevention and management and peace.¹⁴⁵ These recommendations culminated in the resolution to draft a General Comment on children affected by armed conflict, at the thirtieth session of the African Children's Committee.

7.3 State visits across Africa by the African Children's Committee

The African Children's Committee has conducted various visits across Africa regarding the protection of children affected by armed conflict.¹⁴⁶ This approach has seen an evaluation of the state's attempt to implement article 22, on the one hand, and the African Children's Committee engaging with aspects of promotion and protection of the rights of the children affected by armed conflict.¹⁴⁷ In its visit to the Central African Republic, the African Children's Committee noted the lack of a clear mechanism to effectively coordinate the implementation of initiatives to protect children affected by conflict.¹⁴⁸ It called on the state to ensure that a competent high-level body, with logistical financial and non-financial resources, effectively coordinate efforts to promote children's rights in the various sectors.¹⁴⁹

Pursuant to its advocacy mission to South Sudan, the African Children's Committee passed a resolution during the twenty-third ordinary session in Addis Ababa, Ethiopia to visit and advocate improved protection and response to children affected by armed conflict in South Sudan.¹⁵⁰ The African Children's Committee was informed of UN reports of grave child rights violations in armed conflict.¹⁵¹

While the Committee could not call on the state to account under the African Children's Charter due to the fact that it was not then a state party, it noted that there were numerous protection issues that needed to be addressed, such as reintegration of separated children; the disarmament, demobilisation and reintegration of child soldiers; and support for communities affected by violence.¹⁵² The African Children's Committee called on the warring parties to honour the commitment made in the peace agreement, desist from mobilising child soldiers, and demobilise children already in armed conflict.

143 Continental Study (n 130) 109.

144 As above.

145 Continental Study (n 130) 114.

146 Details of the various visits are available at <https://www.acerwc.africa/en/missions/investigation-missions> (accessed 26 October 2024).

147 Mission Report of the African Children's Committee to assess the situation of children affected by armed conflict in the Central African Republic para 36, https://www.acerwc.africa/sites/default/files/2022-10/Report_ACERWC_Advocacy_Mission_to_assess_the_situation_affected_by_the_conflict_in_CAR_0.pdf (accessed 26 October 2024).

148 As above.

149 As above.

150 Mission Report of the African Children's Committee to assess the situation of children affected by armed conflict in South Sudan para 36, https://www.acerwc.africa/sites/default/files/2022-10/ACERWC%20Advocacy%20Mission_South_Sudan%20August%202014.pdf (accessed 26 October 2024).

151 Mission Report South Sudan (n 150) para 13. The grave violations that included grave child rights violations continue to be analysed, documented and verified. The violations monitored include killing, recruitment and use of children by armed forces and groups, sexual violence, attacks on schools and hospitals, and denial of humanitarian access, including access to health.

152 Mission Report South Sudan (n 150) para 35.

8 Domestication of this provision in national legal systems

There has been considerable traction by a majority of state parties regarding the domestication of article 22 as far as various states have legislated against the recruitment of children or persons below the age of 18 years into the armed forces.¹⁵³ Some of the good practices involve the introduction of the prohibition of the recruitment of children as a constitutional imperative in some states, such as Burundi.¹⁵⁴ The provision states that '[n]o child may be used directly in a military conflict. The protection of children is assured in periods of military conflict.'¹⁵⁵

This is an emerging practice that needs to be replicated across Africa. In other states, such as the DRC, the constitution does not refer to a directive on the protection of children in armed conflict, but emphasises sexual violence and other forms of exploitation against the child.¹⁵⁶ While the Constitution of the Republic of Guinea-Bissau has no provision for the protection of children in armed conflict, it commits the state to guarantee the right to health care and the physical well-being of children.¹⁵⁷ In other states, such as the Sudan and the DRC, there is legislation that criminalises the use of children in armed forces and groups.¹⁵⁸

It was noted by the African Children's Committee that as of 2020, seven states are yet to harmonise their laws to reflect the position of article 22 concerning recruitment.¹⁵⁹ At the time of writing this *Commentary*, Niger had no law on the minimum age of recruitment by law, while Cameroon, São Tomé and Príncipe and Cabo Verde set the age of recruitment at 17 with parental consent. Guinea Bissau allows for voluntary enlisting according to national service.¹⁶⁰ In Algeria, a young person may voluntarily join if he has obtained a certain level of education coupled with the consent of a parent or care giver.¹⁶¹

9 Conclusion

The implementation of article 22 requires an appreciation of the jurisprudence of the African Children's Committee in addition to linkages to other articles in the African Children's Charter and other instruments. A legal interpretation that adopts a child rights-based approach is preferred. State parties are strongly advised to domesticate article 22 to ensure that the child affected by armed conflict is protected in domestic jurisdictions. The states should engage armed groups to mitigate the violation of the rights of children affected by armed conflict. The implementation of the domesticated provisions at the national level must be the basis for the successful implementation of article 22.

153 Agenda 2040: Assessment of first five-year period (2015-2020) 136.

154 The Constitution of the Republic of Burundi, 2005.

155 Art 45 Constitution of Burundi.

156 Continental Study (n 130) xvi.

157 Continental Study (n 130) xvii.

158 The DRC Child Protection Code, 2009 sec 71. See also the Sudan Child Act, 2010, sec 43(1).

159 Agenda 2040 Assessment (n 153) 136.

160 As above.

161 As above.