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Addis Ababa, ETHIOPIA

P. O. Box 3243

Tel: +251 115 517700

Fax +251 115 517844

www.au.int

**THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS
AND WELFARE OF THE CHILD (ACERWC)**

**DECISION ON THE COMMUNICATION SUBMITTED BY MICHELO HUNSUNGULE
AND OTHERS (ON BEHALF OF CHILDREN IN NORTHERN UGANDA) AGAINST
THE GOVERNMENT OF UGANDA**

15-19 APRIL 2013
Communication No. 1/2005

AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD
Twenty first Ordinary Session
15-19 April 2013
Addis Ababa, Ethiopia

MICHELO HUNSUNGULE AND OTHERS (ON BEHALF OF CHILDREN IN NORTHERN UGANDA)

v.
THE GOVERNMENT OF UGANDA

DECISION

Summary of Alleged Facts

1. In 2005, the Secretariat of the African Committee of Experts on the Rights and Welfare of the Child (African Committee) received a Communication brought by Michelo Hunsungule (Centre for Human Rights, University of Pretoria) and Others (the Complainants) on behalf of children in Northern Uganda, against the Government of Uganda.
2. For 20 years, from 1986, Northern Uganda was subjected to a debilitating insurrection which caused great suffering to the population, massive displacement and gross violations of human rights including children's rights. The insecurity was such that the people could be protected from the rebels only by being moved into camps (Internally Displaced Persons Caps) where living conditions were below the standard for decent human living and survival. Despite numerous initiatives undertaken by the Government of Uganda, the rebels had the opportunity in infiltrating camps, abducting local citizens in raids, destroying property, and performing numerous atrocities.
3. It has been well recorded that children bore a disproportionate brunt of the insurrection. Most notably, children were the targets for abduction into the rebel forces, and tens of thousands of boys and girls were taken captive by the Lord's Resistance Army (LRA) to serve various roles in furtherance of their evil cause. Children were often at such risk that they could not sleep at home and were forced to travel at night to central places where they could be better protected (the so- called 'night commuters'). Services such as health and education were severely disrupted, and internally displaced persons were largely dependent on humanitarian assistance for survival.
4. From 2005 onwards the position of the LRA weakened and since 2006, sufficient improvements in security were achieved to enable a programme of return and voluntary resettlement. Even today, the process of reconstruction of the region is visibly still

underway. Although the LRA has been defeated in Uganda, the UPDF still undertakes rescue missions in the DRC, South Sudan, and the Central African Republic where remnants of the LRA operate.

5. The backdrop to the Communication received by the Committee are the events which took place between the period 2001 and 2005 in Northern Uganda. The Complainants allege that a number of rights of children in Northern Uganda that are guaranteed in the African Children's Charter were violated as a result of the action or omission of the Government of Uganda. It should be noted that these rights include protection of children from being involved in armed conflict under Article 22; the right to education under Article 11; the right to life, survival and development under Article 5; and the right to enjoy the best attainable state of physical, mental and spiritual health under Article 14; and the right to be protected from sexual abuse and violence under Articles 16 and 27.

6. For instance, the Complainants argue that while the general response of the UPDF to the abduction of children and their recruitment as child soldiers was to rescue them from captivity and have them rehabilitated and reintegrated¹ into their family environment, there were instances where children were recruited into the UPDF and the LDUs. It is also argued that in some instances rescued children were taken to the front-line in order to support intelligence gathering against the LRA (for example of identify weapon catchment areas) which in turn exposed the children to danger and a violation of their rights.

7. At the height of the conflict in the North, the Government of Uganda decided to establish Internally Displaced Persons (IDPs) camps with the aim of protecting civilians, especially children, from rebel attacks. The Complainants allege that while the camps were being guarded by the army to minimize attacks and abduction of children and adults, Government did not do enough to prevent abductions, and also violated its obligations in relation to education and health care as provided for in the Charter.²

8. In relation to the right to education and health care, some of the allegations relate to indiscriminate attacks by the UPDF during the armed conflict which negatively affected learning institutions and health facilities. It is further alleged that there were instances where UPDF soldiers occupied schools and/or health facilities and used them as barracks, which occasionally endangered not only the right to education and health care, but also the right to life of children.

¹ The Uganda Human Rights Commission's annual reports provide of the time provide statistics as to the

² The Government acknowledges by saying that "Incidents of abduction may have happened in the IDP camps but the numbers were fewer and mainly due to the people who failed to follow the established regulations and the changing tactics of the rebels. For example, in the case of Bar Lonyo Internally Displaced People's camp, where massacres happened due to the negligence of the forces, the Camp Commander was prosecuted and severely punished".

9. The Complainants also allege a violation of the rights enshrined in Articles 16 or 27 by the Government of Uganda. These allegations include that UPDF soldiers were involved in sexual exploitation, and in few occasions they either facilitated or did not take appropriate action in relation to the sexual abuse of children in the region that was affected by the armed conflict.

10. In sum, the Complainants allege a violation of five of the so-called “six grave breaches” which are the recruitment and use of children, sexual violence against children, the killing and maiming of children, the abduction of children, and attacks on schools and hospitals, in contravention of applicable international law, in particular the African Children’s Charter.

The Complaint

11. The Complainants alleged that a number of rights of children in Northern Uganda that are guaranteed in the African Children’s Charter were violated as a result of the action or omission of the Government of Uganda. It should be noted that these rights include protection of children from being involved in armed conflict in Article 22; the right to education in Article 11; the right to life, survival and development in Article 5; and the right to enjoy the best attainable state of physical, mental and spiritual health in Article 14; and the right to be protected from sexual abuse and violence in Articles 16 and 27.

Procedure

12. In 2005, the Secretariat of the African Committee of Experts on the Rights and Welfare of the Child (African Committee) received a Communication brought by Michelo Hunsungule and Others (the Complainants) on behalf of children in Northern Uganda, against the Government of Uganda. This same Communication was updated and submitted in 2010.

13. Notably some time has elapsed since this Communication was lodged in 2005. The reasons for this delay are mainly technical, prime of which is the fact that the Communication was lodged before the African Committee adopted its Guidelines for the Consideration of Communications, and as a result, few years lapsed before the African Committee was fully engaged with the matter. Once the Guidelines were adopted, there was a need to re-submit the Communication in a manner that complies with the Guidelines, which the Complainants have done so.

14. Subsequently, the consideration of the admissibility of the communication had been planned for the 15th session of the African Committee, but the Complainants requested on 23rd February 2010 that the Committee postpone the consideration of the admissibility to allow them with time to submit documentation in both English and French. During its 15th session the Committee agreed to postpone the consideration of the communication until its next session in order to allow the authors to submit the translated documents. A letter was sent to the Complainants on 30th July 2010 informing them that the Committee postponed the consideration of the admissibility of the Communication to its 16th session.

15. A note verbal was also addressed to the Respondent State to present its written arguments on the Communication to allow the Committee to consider the Communication. The Respondent State submitted its written arguments both on admissibility and the merits of the Communication.

16. In addition, the Committee extended an invitation to both the Complainants and the Respondent State to make oral arguments before the Committee. Both the Complainants and the Respondent State (a high level delegation led by the Minister of Youth) have presented their oral arguments before the Committee during the 18th Session of the African Committee held in Algiers, Algeria in November 2011.

17. After the oral arguments, the Respondent State kindly invited the African Committee to undertake an investigative mission to Uganda, in particular to Northern Uganda in order to assess the current, but also past situation on the ground (then current situation on the ground and also the situation of the past). By Note Verbal Ref XC/AD/27/12 dated 21st May 2012, the Republic of Uganda has officially authorized the ACERWC to undertake the visit. The mission, which lasted a week, was conducted in February 2013, and the African Committee had the opportunity to meet and discuss with a number of Government officials, civil society organizations, the Uganda National Human Rights Commission, UN agencies, and other stakeholders who were able to provide information relevant to the Communication. The African Committee is grateful for the manner in which the Respondent State facilitated the investigative mission into the country.

Admissibility decision

18. The Communication is submitted pursuant to Article 44 of the African Charter on the Rights and Welfare of the Child which allows the African Committee to receive and consider communications from "any person, group or nongovernmental organization...". The Guidelines for the Consideration of Communications provides, under Chapter II Article 1, that the admissibility of a communication submitted pursuant to Article 44 is subject to seven conditions relating to both Form and Content.

19. The African Committee, after a detailed consideration of the Communication, has decided on the Form and Content of the Communication for the purposes of admissibility.

20. On the issue of Form, the Communication at hand is not anonymous, is written, and the authors have stated that the Communication is against the Republic of Uganda, which has ratified the Charter on August 17, 1994. As a result, the Committee declares the Communication is compliant with the Form as provided in the Guidelines.

21. Content wise, it is clear from the record that the Communication is related to the alleged violation of a number of rights of children that are affected in the context of armed conflict in Northern Uganda. While the Communication refers to information circulated by the media, it uses such information in a supplementary manner to support some of the arguments, and does not exclusively rely on such information. As a result, the Committee is of the view that the Communication is not based exclusively on

information disseminated by the media. After preliminary enquiries conducted by the Committee, it has become apparent that the case has not been the subject matter of another investigation, procedure or international regulation/adjudication.

22. Moreover, it is the view of the Committee that the Communication, which was initially submitted in 2005, and further consolidated/updated in 2010 (with a French translation and a submission on admissibility) was brought within a reasonable period of time after the Authors decided that the exhaustion of local remedies in the Communication at hand would not be available, effective and adequate. The Committee has also gone through the Communication in detail, and has not found any wording used in the Communication that can be considered to be offensive.

23. The Committee also applied its mind in determining whether the exhaustion of local remedies, as required by the Guidelines, has been met.

24. As was already highlighted by the Committee's decision in the children of Nubian descent Communication,³ while the rationale behind the rule that local remedies must be exhausted is mainly to respect state sovereignty and also to give the State concerned the opportunity to address alleged violations, it is not without exceptions, especially in order to promote and protect children's best interests. Such remedies should be available, effective, and adequate.

And Article 46 of the African Charter allows the African Committee to draw inspiration, amongst others, from the African Charter on Human and Peoples' rights and the African Commission.

25. The Authors have argued, by relying on jurisprudence from the African Commission, that a remedy "can only be said to be 'available' if it can be utilized as a matter of fact 'without impediment', is 'effective' if it 'offers a prospect of success', and 'sufficient' if it is capable of 'redressing the wrong' complained of". As a result, the Authors argue that while it might have been possible to exhaust local remedies theoretically, the practical application is impossible as a result of the fact that security is a serious concern.

26. The Authors have also indicated that, despite their skepticism about the availability, effectiveness and adequacy of remedies in Uganda, they have attempted (in collaboration with CSOs) to approach national courts, but the prospect of success of doing so were reportedly impossible due to the impact of the conflict on relevant state institutions in the region, as well as security concerns which also would make evidence gathering extremely risky and difficult.

27. The Authors have also argued that the fact that the alleged violations can be categorized as massive/large scales of violations of children's rights and involve

³ *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya*, Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011.

thousands of children, should also make the case benefit from the exception to the rule that requires exhaustion of local remedies. There is jurisprudence from the African Commission that violations of rights on a large scale that were well documented over a long period of time in the international community need not necessarily exhaust local remedies as the state has presumed awareness of the serious human rights violations in the country/region.

28. In the presence of these facts and arguments, and jurisprudence supporting the arguments, the Committee is of the view that the case should benefit from an exception to the rule of exhaustion of local remedies. It is therefore declared admissible.

29. In its written submission, and during the oral arguments, the Respondent State has raised a number of points objecting to the admissibility of the Communication. For instance, the Respondent State argued that while the violations of rights alleged to have been committed are provided for under the Charter, and the notion of imputing responsibility of private persons onto the Government could be made as an argument the Government has undertaken various measures in addressing the alleged rights violated under the Charter(is not a clear sentence; may be it would be better if put this way "for instance the respondent state argued that the government has undertaken various measures in addressing the alleged violations even if the rights are provided under the charter and the notion of imputing private persons' responsibility onto the government could be raised as a violation. . The Respondent State also contended that since "the authors also say that the northern part of Uganda was very insecure thereby making the gathering of information impossible...one wonders that if this was the case, then this evidence being used came from nowhere but from rumors, sensational media reports, publications and the CSOs which already had pre-conceived views against the positive measures that Government was taking".

30. An argument has also been made that due to the fact that a case against the LRA was referred to the International Criminal Court (ICC) by the Government of Uganda on 16th December 2003, and since the subject matter of this Communication is related to the matter before the ICC in the above case against the LRA, there are two parallel processes, and that the Communication does not comply with the requirement on admissibility.

31. The Respondent State has also challenged the assertion by the Complainants that there were no available, effective and adequate channels of redress in Uganda due to the impact of the war and that the area was very insecure to move by road and that due to the big number of victims involved, the Government of Uganda and its channels of redress would not have been able to handle the magnitude of the case. Among others, the respondent State contended that it is not true that the only means of transport was by air because several people were moving by road and security forces were put at intervals; at no time in this episode was any part of Northern Uganda

declared ungoverned or ungovernable; and that the Government machinery never stopped operating in Northern Uganda.⁴

32. The African Committee closely considered these and other arguments made by the Respondent State challenging the admissibility of the Communication. However, based on the submission of the Complainants, and the Committee's own information (part of which was further substantiated during the investigative mission), the Committee has not found reason to amend or reverse its decision on admissibility made on 23 March 2011.

Decision on the merits

A. Some preliminary and cross-cutting considerations

33. Since 2006, the situation of the armed conflict in Northern Uganda, and generally the situation of children's rights in the area, has significantly improved. For instance, the LRA is no more operating in Uganda. The Government of Uganda has made significant steps in upholding children's rights in the context of armed conflict, including through its collaboration with the United Nations, and the country's de-listment from the UN list of countries that have child soldiers in their army are some examples. The Local Defence Units (LDUs) have been disbanded, and the IDP Camps have been dismantled too making way for children and communities to return back to their localities and homes. Accountability mechanisms for alleged violations of human rights, including children's rights have also been strengthened. For instance, on 11 July 2011, the first war crimes trial of the Ugandan High Court's new International Crimes Division began operations in Gulu.

34. These developments are welcomed by the African Committee. However, while they may inevitably affect the kind of remedies the African Committee will provide, and may make some of the issues raised in the Communication moot, they do not serve as an obstacle for the Committee to remain seized of the matter, and decide both on the admissibility and merits of the issues raised in this Communication. In fact, the Committee has the obligation under the Charter to pronounce on the matter, because its decision will have implications on the current and future best interests of children in Uganda, and those that are affected by armed conflict.

35. On a different note, while this Complaint is lodged against the Government of Uganda, the Complainants as well as the African Committee rightly acknowledge and

⁴ In an effort to substantiate its points, the Respondent State gives examples that the courts of law in Uganda remained operational in the North during the insurgency and more so since the war ended in 2006; Uganda has handled cases involving big numbers of complainants before and its system allows class action suits; and the Uganda Human Rights Commission had offices opened in the North in 1999 and never closed since then and more recently, the War Crimes Division within the High Court of Uganda was set up pursuant to the enactment of the ICC Act (2010).

condemn in no uncertain terms that the LRA has violated and still is (as far as children in some countries in the region are concerned) violating children's rights in a massive scale. This armed group continues to commit violations against children outside Uganda, namely in South Sudan, the Democratic Republic of Congo and the Central African Republic. Even to date, repeated calls made to the LRA to unconditionally release children in its ranks have mostly gone ignored.

36. In addition, the African Committee is also duly aware of the fact that the ability of a State to fulfill its human rights obligations can be severely undermined by its involvement in hostilities. As a result, the decision in this Communication give due consideration to this reality.

37. Article 1(1) of the African Children's Charter stipulates the "fundamental duty" of States Parties. This Article provides the general State Parties' obligation by stating that

Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

In principle, this general obligation that States undertake is subject neither to progressive realization, nor to available resources.

38. The African Committee is of the strong view that effective implementation of laws with due diligence is part of States parties obligation under the Charter. This position is also supported by jurisprudence from the African Commission, where for instance in a case concerning Mauritania, the Commission found that, although slavery had officially been abolished in that country, this was not effectively enforced by the government.⁵ In a Communication against the Government of Chad, the Commission likewise held that the state's failure to protect people under its jurisdiction during a civil war against attacks by unidentified militants, not proven to be government agents, constituted a violation of the right to life.⁶ In Addition, the full title of the African Children's Charter- which is on the rights and *welfare* of the child - according to the African Committee, this in part indicates that protection of rights should lead to the wellbeing and welfare of children. In other words, the recognition of rights should be able to promote and improve the lived reality of children on the ground.

39. While the primary mandate of the African Committee is to interpret and monitor the implementation of the African Children's Charter, there are a number of other instruments that Uganda is a State Party to that are directly relevant to the Communication at hand [The sentence is not coherent (there is no link between the first

⁵ Org. of African Unity, African Comm'n, Communications 54/91, 61/91, 98/93, 164-196/97, & 210/98, *Malawi African Ass'n & Others v. Mauritania*, 13th Annual Activity Report (1999).

⁶ Org. of African Unity, African Comm'n, Communication 74/92, *Commission Nationale des Droit de l'Homme et des Libertes v. Chad*, 9th Annual Activity Report (1995-96) [hereinafter Org. of African Unity, Commission Nationale]; see also Org. of African Unity, African Comm'n, Communication 155/96, *The Social & Economic Rights Action Center & Another v. Nigeria*, 15th Annual Activity Report (2001-02).

limb and the second limb of the sentence). It might be putted as; In addition to the African's Children Charter, Uganda is Party to other instruments that are directly relevant to the Communication at hand. These include the Convention on the Rights of the Child (CRC) and its Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (OPAC, 2000),⁷ the four Geneva Conventions (1949), the 1977 Additional Protocols to the Geneva Conventions,⁸ the ILO Convention No. 182 on the Worst Forms of Child Labour (1999),⁹ and the Statute of the International Criminal Court (1998).¹⁰ In support of the potential relevance of other instruments, Article 1(2) of the Charter provides that "[n]othing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State".

Alleged violation of Article 22(2) (children recruitment and use in armed conflict

40. The African Charter on the Rights and Welfare of the Child is the first regional treaty to establish 18 as the minimum age for all [compulsory] military recruitment and participation in hostilities. The Charter, in Article 2, defines a child as "every human being below the age of 18 years". In Article 22(2), States Parties are obliged to "...take *all necessary measures* to ensure that *no child* shall take a direct part in hostilities and refrain in particular, from recruiting any child".

41. Emerging international jurisprudence and practice points that "direct part in hostilities" should cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints.¹¹ The implication of this is that a wider definition is being offered for the notion "child soldier" than one who has a combatant status only.

42. Children's recruitment in armed conflict is either by force (conscription) or voluntary (enlistment).¹² Therefore the concept of "voluntary recruitment" exists in international human rights law. For instance, Article 3(3) of the Optional Protocol to the CRC on the involvement of children in armed conflict (OPAC) (which Uganda has ratified) obligates States to maintain safeguards with respect to voluntary recruitment by

⁷ This raises the age to 18 for compulsory recruitment and also pays attention to recovery and social reintegration of children.

⁸ Mainly imposes an obligation to refrain from recruiting and using children under the age of 15 in hostilities

⁹ Defines as one the worst forms of child labour the forced or compulsory recruitment of children under 18 for use in armed conflict

¹⁰ Defines as a war crime the recruitment and use for active participation in hostilities of children under the age of 15

¹¹ See draft Statute for the ICC, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Part One, A/Conf.183/2/Add.1 (14 April 1998) 21 as cited in H Hebel and D Robinson, "Crimes within the jurisdiction of the Court" in R S Lee (ed.), *The international Criminal Court, The making of the Rome Statute, issues, negotiations, results* (1999) 118.

¹² Even though voluntary recruitment is often coupled with hidden forms of coercion

ensuring that such recruitment is genuinely voluntary.¹³ Unlike the OPAC that sets a minimum age of 16 for voluntary recruitment, the African Children's Charter is the first regional treaty to establish 18 as the minimum age for all [compulsory] military recruitment and participation in hostilities. Fortunately, there is no room within the provisions of the African Children's Charter to accommodate the concept of voluntary recruitment.. As a result, all voluntary recruitments constitute a violation of Article 22 of the Charter.

43. The Complainants allege that children were recruited into the UPDF. In addition it was contended that some children who escaped or were captured or rescued from LRA captivity, were sometimes recruited into the armed forces or forced to take part in military operations. Furthermore, it was alleged that, against its own guidelines of not keeping rescued children in military barracks for more than 48 hours, sometime for the purpose of intelligence gathering by the UPDF, children are kept for more than 48 hours before being released to child protection agencies/NGOs. Furthermore, some children were allegedly used as guides to indicate LRA positions or weapons caches. It was also argued by the Complainants that the criteria established by law that was meant to verify the age of a person was not always followed, and even in instances where systemic irregularities in the recruitment process that allowed children to be recruited was found out, commensurate disciplinary and other appropriate measures were not taken on perpetrators.

44. The UPDF Act of 2005 explicitly introduced for the first time a legislative framework establishing 18 as the minimum age for enrollment/recruitment in the armed forces. In this respect, Section 52 of the UPDF Act states that "...no person shall be enrolled into the Defence Forces unless he or she has attained 18 years of age." This is indeed a commendable legislative measure by the respondent State. However, as a result of its obligations under Article 1(1) read with Article 22, for the time between ratification of the Charter and 2005 that the Government of Uganda did not have a specific provision banning the recruitment of children. This constitutes non-compliance with the State's obligations under the African Children's Charter in particular Article 1(1) of the Charter.

45. As far as legislative gaps are concerned, the Committee also wants to draw the attention of the Government to Article 34 (4) of the 1995 Constitution which states that, "Children...shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development." Though this provision would have gone a long way to ensure that children are not involved in the army, there are certain set-backs in the same provision i.e. article 34 (5) states that the children being referred to in article 34 (4) are those below 16 years. This implies that those children

¹³ By requiring informed consent of the person's parents or legal guardians; by informing recruits of the duties involved in military service; and by requiring reliable proof of age prior to acceptance into military service.

between the ages of the 16 to 18 years do not benefit from the provision, and might legitimately be seen as being allowed to get into the army.

46. During its onsite visit in relation to this Communication, the African Committee has found evidence, and re-confirmation, about the recruitment and use of children in armed conflict by the UPDF (in particular within the 105th battalion) . A number of credible reports, including from the United Nations confirmed the presence of children in the UPDF during the material time. For instance, reports that indicated the presence of around 120 recruits out of a sample 1,200 in Lugore training centre that were probably under the age of 18 were made by UNICEF in November 2003.

47. Until 2007, the respondent State appeared on the Security Council list of States that have children in their armed forces. It is indeed a welcome and notable development that, based on the action plan regarding children associated with armed forces signed between the Government of Uganda and the United Nations in August 2007, the country task forces on monitoring and reporting conducted onsite visits of UPDF facilities to verify the implementation of its recruitment policies and ensure compliance in ending child recruitment and use. Government commitment in this regard is commendable as there were no reported cases of recruitment and use of children by UPDF or the LDUs in the years after 2007. Notably, the LRA has been listed in the annex of the UN Secretary General's reports on children and armed conflict as a party that commits grave violations against children since 2003.

48. The African Committee has noted the increasingly transparent recruitment process that is undertaken by the UPDF to avoid manipulation of the system; measures including informing district authorities about the conditions that only a person above 18 years and recommended by his/her respective LCs shall be eligible for recruitment, and the presence of medical doctors to verify the ages of recruits. Despite these measures, the absence of a universal and well functioning birth registration system, in line with Article 6 of the Charter, which is crucial for the process of age verification, had created a big gap for the recruitment of children into the UPDF.

49. In this respect, it should also be mentioned that the African Committee notes the effort undertaken by the Government to repatriate and handle children formerly associated with LRA to Uganda through the Chieftaincy of Military Intelligence or through UPDF child protection units. Unfortunately, for some of the children, escape or rescue from the LRA did not always translate into a return to civilian life, at least immediately. The Committee also notes that such a process of repatriation was followed instead of having the children immediately placed under the care of appropriate civilian child protection actors. In addition, incidents where children overstayed (according to some reports for about two months) with UPDF/Chieftaincy of Military Intelligence before being handed over to child protection agencies does not in principle comply with the obligation to ensure children's best interests as the paramount consideration.

50. Moreover, unfortunately, both in its submissions, oral arguments, and also during the investigative mission undertaken by the Committee, the Government has not been

able to provide detailed and concrete evidence about the legislative and other measures, such as the use of child-sensitive procedures to protect children from hardship during questioning, including by the use of child-sensitive methods of questioning; and by reducing the number of interviews, statements and hearings. As a result, children that were separated from the LRA and have gone through a questioning process might not have had their right to have their best interests respected fulfilled.

51. States Parties to the African Children's Charter also need to effectively implement the right to a remedy which includes a right to reparation,¹⁴ as an element of the due diligence obligation. This entails providing reparation to victims for acts or omissions that can be attributed to the State, or for their failures to meet their international obligations even when substantive breaches originate in the conduct of private persons. In this respect, it is important to mention that the African Committee, while recognizing the contribution of the Amnesty Act of 2000 to the return, demobilization and reintegration of thousands of children forcefully recruited by the LRA, it is concerned about the fact that the same Act does not necessarily follow the criteria for granting amnesties under international legal obligations of the State. As a result, such law may have led to impunity of those that would have been involved in the recruitment and use of children in hostilities.

52. One response to the instability experienced by the citizenry was the establishment of local militias drawn from the community to supplement the defence capacity of the UPDF. Some have argued that the establishment of such units by local communities to protect themselves against LRA is a consequence of the weakness or absence of State security forces and the judiciary in the areas affected by the conflict. The Government of Uganda provided recognition and support to the local militias (known as local defence units or LDUs). It has been argued that the establishment and control of the LDUs was not well thought through. The LDUs fell *de facto* under the responsibility of the UPDF, it appears. Evidence of Government support to LDUs in the form of training, munitions, direct financial support and basic foodstuff were presented.

53. In principle, members of the LDUs (also known as "home guards") were supposed to be at least 18 years of age, be in good health, have completed their level S4 or above, and present a recommendation letter from a Local Councilor (LCI). While reportedly, the responsibility for the recruitment process of LDU members fell on the shoulders of the Local Council IIs (sub-county leaders), local leaders were responsible for age verification of candidates, as they are presumed to know the person and his or her family. However, the "unofficial" recruitment process, largely condoned as a result of the poverty of some of the candidates, often bypassed the Local Councilors, and did not require education and age verification. Reports where children directly approached

¹⁴ This right has become firmly enshrined in the corpus of international human rights and humanitarian instruments. See for instance, The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005).

military barracks for recruitment, without the need for producing a recommendation letter, have been confirmed.

54. The UHRC has also indicated its concerns and observations by stating that it witnessed “young boys within the ‘Amuka’, a local militia fighting the LRA in Lira. In its conclusion, the UHRC stated that while “[the] UPDF may not have been directly responsible for recruiting children into the Amuka militia...they owe a duty to ensure that they are detected and removed”.¹⁵

55. During the material time covering this Communication, concern has also been raised by the United Nations and its bodies and agencies on the presence of children in the LDUs. For instance, it has been reported that concern has been raised “over reports indicating the presence of children in LDUs and over the lack of information regarding children who have been demobilized from these units and reintegrated into society”.¹⁶

56. Again, evidence to support the assertion by the State Party that it has taken appropriate, consistent, and systemic disciplinary action against those military officers, officials, and community members who knowingly have recruited children into the LDUs has not been convincing.

57. It has also been reported, and also argued, that some of the children that joined the UPDF or LDUs did so out of their own voluntary volition. As a matter of principle, the African Committee supports children’s participation in matters that affect them, and their views being given due consideration. The African Committee also recognizes children’s evolving capacities. However, as far as consent to join the armed forces, or armed groups is concerned, the African Committee and the Charter take a more protectionist approach than one that promotes children’s participation. The African Committee is of the view that children cannot give “informed” consent to actively participate in activities related to armed conflict. This is due to the fact that they generally lack a nuanced and comprehensive understanding of the long-term and short-term impact of their involvement, as well as because their participation rights need not compromise their protection rights.

58. As a result, the African Committee supports the view that “the line between voluntary and forced recruitment was both legally irrelevant and practically superficial in the context of children in armed conflict”.¹⁷ Since the African Children’s Charter does not leave room for the voluntary recruitment of children in armed conflict, every State party to the Charter has the obligation to undertake all necessary legislative, administrative and other measures to prevent and address such a situation.

59. Under Article 31 of the African Children’s Charter; “Responsibility of the Child”, it is provided that every child shall have the duty, among others, “to preserve and

¹⁵ UHRC, 2003, 6th Annual Report to Parliament of Uganda, Kampala, page 54.

¹⁶ CRC Committee, Concluding Obs, Para 22.

¹⁷ Report of the Special Representative of the Secretary-General for Children and Armed Conflict (A/67/256) (6 August 2012), para 11.

strengthen the independence and the integrity of his country”.¹⁸ However, the application of this Article is subject to the child’s “age and ability, and such limitations as may be contained in the present Charter”. As a result, in the presence of Article 22 of the Charter that absolutely prohibits the recruitment and use of children in armed conflicts, there is no legally and textually sound argument that can be made to support the involvement of children in armed conflict. In this context, the African Committee would like to reiterate its position made in the *Nubian Children case* that children’s rights are not contingent upon them fulfilling their “duties”, since duties are given their rightful place in children’s rights lexicon if they are viewed as inter-dependently co-existing with and as reinforcing rather than invading rights.¹⁹

60. As a result, the African Committee finds a violation of Article 22, in particular Article 22(2) on the recruitment and use of children in armed conflict during the material time covered by this Communication (2001-2005)

Alleged violation of Article 11 (the right to education)

61. As the Communication underscores, and the Respondent State acknowledges, the war severely disrupted the education system in Northern Uganda. Globally, especially in the last decade, concern for the specific protection of education has emerged from the broader desire to improve the protection of civilians, and particularly children. Some recent reports rightly call this situation a “hidden crisis”.²⁰ Notably, education is an example of a vital socio-economic sector where the consequences of armed conflict may be felt long after the fighting is over.²¹

62. The Complainants have alleged a number of violations pertaining to the right to education. These alleged violations relate to, among others, the inadequate budgetary allocation for the education sector, particularly for the conflict affected areas, the use of schools for military purposes and indiscriminate military attacks on schools, lack of effective measures to facilitate access to education for demobilized children, and the availability, accessibility, and quality of education for children in the IDP camps.

63. The drafters of the African Children’s Charter, being fully aware of the important role of education for creating an Africa fit for children, have crafted a very comprehensive and detailed provision on the right to education. For instance, Article 11(3)(e) of the Charter is peculiar in that it requires that “States Parties to the Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular...take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the

¹⁸ Article 31(e).

¹⁹ See J Sloth-Nielsen and BD Mezmur “A dutiful child: The implications of Article 31 of the African Children’s Charter” (2008) 52 *Journal of African Law* 159; See too F Viljoen *International human rights law in Africa* (2012) (2nd Edition) 393-394, for further discussions on this matter.

²⁰ The 2007 and 2010 UNESCO studies *Education under Attack*, and the 2011 Education For All (EFA) Global Monitoring Report dedicated to the theme of *Armed Conflict and Education* are few examples of this concern. See too, in general, *Protecting education in insecurity and armed conflict: An international law handbook* (2012).

²¹ R. Quinn, ‘Attacks on Higher Education Communities: A Holistic, Human Rights Approach to Protection’, in UNESCO, *Protecting Education from Attack: A State-of-the-Art Review*, UNESCO, Paris, 2010, p. 109.

community". Children that are affected by armed conflict and insecurity indeed fall within the category of children in disadvantaged situations and in order to ensure their right to education "special measures" are required. In all the 10 occasions where the word "special" is used in the African Children's Charter, it is in the context of children who find themselves in a disadvantaged and vulnerable situation.

64. In addition, according to Article 11(2), education shall preserve and strengthen, for example, "African morals, traditional values and cultures, ... national independence and territorial integrity, ... African Unity and Solidarity". As a result, it is important to consider and make education an indispensable element towards promoting tolerance, cessation of conflict and rebuilding of communities. Furthermore, even though Article 77 of Additional Protocol II does not make explicit reference to education, it requires that children in armed conflict should be provided with facilities which are necessary for their normal development "as far as possible".²²

65. The reading of Article 22(1) which provides for the duty to "...ensure respect for rules of international humanitarian law...", in conjunction with Article 11 of the African Children's Charter, shows that the obligations of State Parties to a conflict are crucial to preserving the core components and essential features (availability, accessibility, acceptability, adaptability) of the right to education in the circumstances of armed conflict. In a situation of armed conflict, adaptability would require, among other things, the setting up of *ad hoc* centers of learning as well as an urgent resumption of educational activities.²³

66. In this regard, the African Committee takes note of the efforts of the Government of Uganda including the building/setting up of schools/learning centers in the camps so that children can continue their education and preserve some sense of normalcy, despite the war and turmoil that surrounded them. Other measures include the Government initiated Peace Recovery and Development Program (PRDP), bursary schemes (for instance the Acholi Bursary Scheme for Education in Pader, Kitgum, Amuru and Gulu districts), as well as the budgetary increases for the education sector made by Government, some of which have directly targeted and benefitted children in the conflict affected areas. Even though it is not directly in contention in this Communication, the African Committee also lauds the post-conflict education efforts of the Government and partners, such as the post - conflict and peace recovery

²² Considered to be customary international law, and in line with Article 11 of the ACRWC, Article 4(3)(a) of Additional Protocol II, which applies to non-international armed conflict, states that children shall be provided with the care and aid they require, and that, in particular, they shall receive an education, including religious and moral education, in keeping with the wishes of their parents or, in the absence of parents, of those responsible for their care.

²³ In *World Organisation Against Torture, Lawyers' Committee for Human Rights, Jehovah Witnesses, Inter-African Union for Human Rights v Zaire*, the African Commission on Human and Peoples' Rights found that the closure of universities and secondary schools for two years constituted a violation of Article 17 of the African Charter on the right to education. As a result, when a State closes a school, it has to make other options available, however makeshift or problematic these alternative arrangements might be. 25/89, 47/90, 56/91, 100/93, *World Organisation Against Torture, Lawyers' Committee for Human Rights, Jehovah Witnesses, Inter-African Union for Human Rights v Zaire*, para.48.

programmes, involving bursaries, vocational skills training and capital provided to start Income Generating Activities (IGAs) and the “Go to school, back to school, stay in school” campaign, that were aimed to help 1.3 million children get primary education in the country’s conflict-affected north and northeast. As observed first hand by the Committee, this does not mean that there is no room for improvement. For instance, in 2004, the Uganda Human Rights Commission identified that providing sufficient facilities for the education of disadvantaged communities including those affected by conflict²⁴ as one of the main challenges in providing a universal free and compulsory primary education.

67. The use of schools for military purposes (for instance, as recruitment grounds, military barracks, command centres, weapons storage facilities, firing and observation positions, and detention and interrogation sites) puts children at risk of attack and hampers children’s right to education.²⁵ This is because, as a result of these actions, schools may be considered legitimate targets for attack. Attacks against schools may constitute crimes against humanity and war crimes, and the Rome Statute extends explicit jurisdiction for criminal accountability for these actions (or failures to protect). In addition, as part of customary international law, the principle of distinction under international humanitarian law demands that educational facilities are protected as long as they are civilian objects.²⁶

68. Despite the alleged violations argued by the Complainants highlighting incidents where the UPDF allegedly occupied and used schools for military purposes, the African Committee has not found evidence to support these allegations. After a detailed look into the allegation of indiscriminate attacks on schools by the UPDF, the Committee has not found evidence (oral, physical and written) to fault the margin of appreciation with which the State planned and conducted its military operations that could qualify as an “indiscriminate attack on schools”.

69. Furthermore, the African Committee subscribes to the view that while the right to education, particularly in the context of armed conflict, entails that a “State has a duty to be continually taking measures to build, maintain, improve and when attacked, repair its educational system”, it also confirms that, based on the African Children’s Charter, and international law, the threshold under which the fulfillment or violation of these obligations are to be assessed should be based on a “reasonableness” standard.²⁷

70. Therefore, before establishing whether the Government of Uganda has violated its

²⁴ UHRC, 2004, *7th Annual Report to Parliament of Uganda*, 138, Kampala.

²⁵ In its resolution 1998 (2011), the Security Council expressed deep concern over attacks and threats of attacks against schools and educational personnel, calling upon all parties to cease such violations.

²⁶ The word ‘object’ is used by the Geneva Conventions and Additional Protocols to mean something that is visible and tangible. For further details on this see, Education Above All and British Institute of International and Comparative Law “Protecting education in insecurity and armed conflict: An international law handbook” (2012), pp 192-196. Although not mentioned in the text of Common Article 3 nor Additional Protocol II, the concepts of civilian and military object apply to non-international armed conflict as part of customary international law.

²⁷ UNESCO, *Protecting Educational from Attack: A State-of-the-Art Review* (UNESCO, 2010), 165.

obligations under the Charter, the African Committee had to ask the question “did the Government of Uganda take all reasonable steps necessary to fulfill its obligations under the Charter?”. The African Committee has not found evidence to answer this question in the negative.

71. In conclusion, the African Committee takes note of, and is manly satisfied with, the information provided by the Respondent State that a number of legislative, administrative, and other appropriate measures were put in place to facilitate the realization of the right to education of children, especially those affected by the conflict, (both during and after the conflict). As a result , the Committee does not find a violation of the rights to education by the Respondent State in the circumstances alleged by the Complainants.

Alleged violation of Article 14 (the right to the highest attainable standard of health)

72. Article 14 of the African Children’s Charter provides for children in Africa to enjoy the right to the highest attainable standard of health. The African Committee acknowledges that this right is to be achieved in a progressive manner within available resources, as already highlighted in the Committee’s *Nubian children case*. However, a minimal access to health facilities, a lower level of contact with health promoting measures and medical assistance, and a lack of provision of primary and therapeutic health resources and programmes is inconsistent with child’s right to the highest attainable standard of health. Like other economic, social and cultural rights, the right to the highest attainable standard of health must be fully guaranteed as soon as possible and thus States Parties are required to take immediate steps to ensure this right. States must thus use the maximum available resources, even when such resources are scarce.

73. Any kind of discrimination in providing access to health facilities, and access to goods and services related to health would constitute a violation of Article 14 of the Charter.²⁸ Jurisprudence from the African Commission has also confirmed that the underlying condition for achieving a healthy life is the protection of the right to health, and failure by a Government to provide the basic health services can amount to a violation of the right to the highest attainable standard of health.²⁹

74. The Government of Uganda has made it known, among other things, that it did set up health clinics in the camps, and mobile clinics manned by qualified medical doctors and that it provided services throughout the difficult period which is the subject matter of this communication. Training was also provided from primary health care level to Village Health Teams and immunization efforts had continued as much as possible. Due to the prevailing conflict, food insecurity was extremely high and the local population was almost exclusively dependent on humanitarian and nutritional

²⁸ See *Purohit and Moore v. The Gambia*, Communication 241/2001, para 80.

²⁹ See *Free Legal Assistance Group and Others v Zaire*, Communications No 25/89, 47/90, 56/91, 100/93

assistance to children. In many instances, access to safe drinking water was furthered through boreholes in the camps, but due to the prevailing insecurity occasioned by the raids and destruction of property by the LRA, services were not easily provided. The population of the camps was very large, and health and sanitation services were stretched. Farmlands could largely not be accessed due to the limited security outside the confines of the IDP camps which diminished the local supply of food. Psycho social support to returning children was reportedly provided in reception centers.

75. Throughout the investigation of this Communication, the African Committee found no evidence that the Government of Uganda failed to show due diligence in its efforts to comply with Article 14 of the Charter, or that it mismanaged public finances for health, or withheld medicines and medical treatment even if it had the means to provide it, or indiscriminately attacked health facilities, or curtailed the efforts of non-governmental organizations or other partners to contribute towards the realization of Article 14, or discriminated in any way in its efforts to comply with Article 14 of the Charter. The information available to the Committee does not provide a sufficient basis to determine a violation of Article 14 of the African Children's Charter. As a result, the Committee does not find a violation of Article 14 by the Government of Uganda.

Alleged violation of Articles 27 and 29 (Sexual abuse and violence)

76. In armed conflicts, sexual violence is increasingly committed against civilian populations including boys and girls. Children who experience sexual violence suffer from long-term psychological trauma, stigma, health consequences and early pregnancies. The African Committee agrees that "sexual violence" in international criminal law encompasses a broad range of offences relating to non-consensual acts of a sexual nature. Indeed there are various forms of sexual abuse/violence that would constitute as war crime. As a result, the *Rome Statute of the ICC* states that rape, enforced prostitution, sexual slavery, enforced sterilization, forced pregnancy, or 'other forms of sexual violence of comparable gravity' may constitute war crimes and crimes against humanity. It is also notable that the *SCSL* established that "forced marriage" is also an offence under international criminal law when it rendered three militia leaders guilty of crimes against humanity for forcing girls into marriage. All these [and other comparable] acts would constitute a violation of the African Children's Charter.

77. The abuse and torture of children abducted and recruited into the LRA are acknowledged, and the Committee is hopeful that the leadership of the LRA will ultimately be forced to face criminal charges for the war crimes it perpetrated. Given the special protection girl children are offered by the Charter (in article 1 for instance), the systematic use of abducted girls as 'bush wives' as well as raping and sexually abusing them is of particular concern to the Committee since the LRA leadership accounts for these extreme violations of the rights of girl children.

78. However the Communication alleges that there were incidents where UPDF soldiers were either directly involved or facilitated the sexual abuse and violence against children. The Committee has investigated these allegations during its mission to

Northern Uganda. Apart from unconfirmed reports/ and incidents, the Committee has not found evidence to substantiate these allegations that UPDF soldiers were involved either in sexual exploitation, or facilitated sexual abuse of children. It has also not found evidence to support the argument that Government did not undertake its obligations to investigate, prosecute, and punish perpetrators of sexual abuse/violence committed against children allegedly by the UPDF or members of the LDUs.

Alleged violation of Article 29 (the right to be protected from abduction)

79. There has been no doubt that children were the primary victims of the atrocities of the LRA in relation to their right to be protected from abduction. The fact that children were abducted from IDP camps, and forced to flee at night for safety has been well documented in authoritative sources and was confirmed by interviews, including with parents of abducted children.

80. However, the Committee does not find a violation of the duty to protect as set out in the Charter due to the prevailing conflict and inhumane methods of operation of the rebels which rendered the Ugandan Government's efforts towards the protection of children not entirely successful until 2006, when the enemy forces lost sway.

Decision of the African Committee

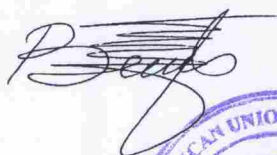
81. For the reasons given above, the African Committee finds a violation of Article 22 (and, as a fundamental duty, Article 1(1)) of the African Charter on the Rights and Welfare of the Child by the Government of Uganda. The African Committee does not find a violation of the other Articles (Articles 11, 14, 16, 27 and 29) as alleged in the Communication. The African Committee therefore:

1. Recommends that the Government of Uganda should, in the interest of curbing an environment that perpetuates impunity and limits accountability for violence against children, provide an explicit and comprehensive provision in its Penal Code providing for the criminal responsibility of anyone who recruits or use persons below the age of 18 in situations of hostilities, tension or strife, in line with its obligations under the African Children's Charter, and other applicable instruments.
2. Recommends that the Government of Uganda should implement fully the standard operating procedures (SOPs) for the reception and handover of children separated from armed groups or forces, as well as undertake comprehensive DDR programmes, in collaboration with African Union, United Nations, and other partners, in a child-centered manner so as to promote children's best interests.
3. Recommends that the Government of Uganda takes all necessary legislative, administrative, and other measures to ensure that children are registered immediately after birth and that they and their parents or guardians have prompt and free access to their birth certificates. Comprehensive measures,

including legislative and administrative measures, should be put in place as a matter of urgency to improve the birth registration system in such a way as to ensure that it is universally accessible to all children on the basis of non-discrimination. The African Committee further recommends to the Government of Uganda to prepare and effectively implement a national action plan to proceed with the registration of those children who have thus far not been registered, and to issue full birth certificates, free of charge, to those who have registered but have not been able to access a birth certificate.

4. Recommends that the Government of Uganda establishes administrative procedures and practices in relation to all armed forces and units of defence, including private security operations, which ensure that, in instances where there is no credible proof of age, or in the case of conflicting or inconclusive evidence of age, the person alleged to be or alleging to be a child shall not be recruited or used in any situations of hostilities, tension or strife until conclusive proof of age is provided to confirm that the person is aged over 18 years.
5. Recommends that, while acknowledging the need for some form of accountability for children who might be accused of violations of rights in the context of armed conflict, the Government of Uganda should rely on forms of accountability other than detention and criminal prosecution, that take the best interest of the child as the primary consideration and promote the reintegration of the child into his or her family, community and society, including the use of restorative measures, truth-telling, traditional healing ceremonies, and reintegration programmes.
6. Recommends to the Government of Uganda to report on the implementation of these recommendations within six months from the date of notification of this decision. In accordance with its Rules of Procedure, the Committee will appoint one of its members to follow up on the implementation of this decision.

Done at the 21st Ordinary Session held in Addis Ababa, Ethiopia, from 15-19 April 2013



Dr Benyam Dawit Mezmur
Chairperson of the African Committee of Experts
on the Rights and Welfare of the Child

