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ACCESS TO HEALTHCARE DURING ARMED CONFLICTS IN EASTERN DRC: A BIG CHALLENGE FOR CHILDREN

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Abstract

Millions of children in conflict zones face several challenges such as death, injury, trauma, diseases, sexual abuse, discrimination, stigmatization. In Democratic Republic of Congo (DRC), the protracted armed conflict in east part has been claiming the life of millions of people, especially children, by fighting, starvation and diseases such as malnutrition, malaria, kwashiorkor, respiratory infections, measles and cholera. However, DRC is part to the four Geneva Conventions of 1949, particularly the fourth one which protects civilian from the effects of war – children thereby included – and the Additional Protocol II relating to the non-international armed conflict supplementing and strengthening that protection. This article intends to point out and analyse the Articles of those two last instruments relating to the protection of children in armed conflict particularly about their access to medical care, and the obligations of DRC to assure that protection.

Keywords: non-international armed conflict, eastern DRC, Additional Protocol II, the fourth Geneva Convention, children, medical care.

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INTRODUCTION

In the remote time, the status of children in armed conflict was not taken into account and they were just protected by general rules directing hostilities until the establishment of the four Geneva Conventions (GCs) of 1949. The GCs are the foundation of modern international humanitarian law (IHL). They make a distinction between civilian and military and provide for a particular protection for each category. The Article 3 common to the four Geneva Conventions, states that all people not taking part in the fighting, during non-international armed conflict, are entitled to humane treatment. The Article does not concern directly children but we can extend it to them as civilians. But Children matters in time of war found a concrete protection in the fourth Geneva Convention (GC IV)[1] relative to the protection of civilian persons: despite indirect protection in several other Articles, the Article 24 of this Convention entitled "Measures relating to child welfare" provide for a direct protection for children in armed conflict, but this article is limited only to those who are orphaned or are separated from their families as a result of the war. Following the same idea, the Additional Protocols of 1977 to Geneva Conventions strengthen that protection respectively in the international armed conflict (IAC) and the non-international armed conflict (NIAC). We can find that protection in the Articles 70(1), 77 and 78 of the Additional Protocol related to the international armed

[1] Art. 24 of the fourth Geneva Conventions of 1949 relative to the protection of civilian persons in time of war, 75 UNTS 31.

conflict (AP I)[2] and The Article 4(3) of the Additional Protocol related to the non-international armed conflict (AP II)[3]. All those instruments and Articles above-mentioned constitute today a solid body of international legal protection for children in armed conflict. Regrettably, however, there is still a wide gap between what is stated in the legal instruments and what children are experiencing on the ground during armed conflict.

As far as DRC is concerned, it is party to the instruments which protect civilians (including children) in armed conflict, *inter alia*, the GC IV, AP I and AP II. But the political instability, poverty and corruption that have already ruined the country make the situation more complex for children living in the east – provinces of Ituri, Nord-Kivu, Sud-Kivu and Tanganyika where there is a protracted armed conflict – as a result of their age and the special risk to which they may be exposed. They have trouble having food and live in congested displacement sites favoring outbreaks of diseases. Also, access to healthcare is a real challenge. Some children flee in the forest and the impassable roads make it difficult for health personnel to reach them and for them to have access to medical treatment. As a result of poor living conditions and lack of appropriate healthcare, children confront, besides psychological consequences and trauma –

[2] Art. 70(1), Art 77, Art 78 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflict, of 8 June 1977 (Protocol Additional I), 1125 UNTS 3.

[3] Art. 4(3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflict, of 8 June 1977 (Protocol Additional II, 1125 UNTS 609.

which are inevitable effects of armed conflict – , health complications and diseases such as malnutrition, cholera, respiratory infections, measles, kwashiorkor, malaria and many more[4]. This set of things increases the impact of armed conflict on them and requires a particular attention.

Therefore, it is primarily important to have a look whether the armed conflict in eastern DRC is an IAC or a NIAC on the IHL ground, before a discussion on the obligations of DRC about the access to healthcare for children in such conflict according to the treaties it (DRC) has ratified.

1. IHL AND ARMED CONFLICT IN EASTERN DRC

The question is whether the situation in DRC is an armed conflict. If so, which one, an IAC or a NIAC?

DRC is a party to AP I since 1982 and AP II since 2002[5]. It adhered to those treaties without any reservations[6].

[4] UNICEF, "Children affected by armed conflict: UNICEF actions", p.83, https://reliefweb.int/sites/reliefweb.int/files/resources/893C5BFA8D01FF3CC1256E85004A7F86-Child-Armed.UNICEFAct.pdf, .

[5] *Id.*, p. 3.

[6] ICRC, "Treaties, States Parties and Commentaries: Democratic Republic of the Congo", https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp.

Whether it is an IAC or a NIAC, the definition of an armed conflict is established by GCs and APs. The first paragraph of the Article 2 common to the four Geneva Conventions states that:

"The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties […]".

From this passage, it can be implied that an IAC is when one or more states are fighting against one or more other states regardless of the recognition of the state of war by one of them or the intensity of the fighting.

Concerning the NIAC or 'internal armed conflict'[7], Article 3 common to the four GCs, considered as a mini-convention[8], is a central provision directing the NIAC. It specifies the scope of application, the requirement of human treatment, the care for the wounded and sick, humanitarian activities. The definition of NIAC is given in the Article 3 common to the four Geneva Conventions and Article 1 of the AP II. Those Articles refer to the NIAC as the opposite of the IAC. In other words, the combination of those two Articles makes that a NIAC is an armed conflict not of an international character, or a conflict taking place within the territory of a state between regular forces on one side – state armed group – and one or more irregular forces on the other side – non-state armed groups, or between two or more irregular

[7] UC Jha, *supra* note 4, p.4.

[8] ICRC, The Geneva Conventions of 1949 and their Additional Protocols, https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols.

forces fighting against each other, with a certain degree of organisation and a command over a part of the territory of the state concerned, in a period relatively long[9]. In addition, that situation must be different from internal violence, tensions, riots which are considered as situation of criminality and are regulated by municipal law of each country.

In addition, the doctrine has useful comments concerning the definition of non-international armed conflict. For Marco Sassoli, NIACs are distinguished from AICs by the parties involved rather than by the territorial scope of the conflict. He writes "common Article 3 refers to conflicts 'occurring in the territory of one of the High Contracting Parties,' whereas Article 1 of Protocol II refers to those 'which take place in the territory of a High Contracting Party.' According to the aim and purpose of IHL, this must be understood as simply recalling that treaties apply only to their state parties. If such wording meant that conflicts opposing states and organized armed groups and spreading over the territory of several states were not 'non-international armed conflicts', there would be a gap in protection, which could not be explained by states' concerns about their sovereignty. Those concerns made the law of non-international armed conflicts more rudimentary. Yet concerns about state sovereignty could not explain why victims of conflicts spilling over

[9] Art. 3 (1) Common to the four Geneva Conventions of 1949, 75 UNTS 31; Art. 1 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflict, of 8 June 1977 (Protocol Additional II), 1125 UNTS 609.

the territory of several states should benefit from less protection than those affected by conflicts limited to the territory of only one state. Additionally, Articles 1 and 7 of the Statute of the International Criminal Tribunal for Rwanda extend the jurisdiction of that tribunal called to enforce, inter alia, the law of non-international armed conflicts, to the neighboring countries. This confirms that even a conflict spreading across borders remains a non-international armed conflict"[10]. As there is no unique definition of an armed conflict[11], we agree that the definition of NIAC given by the doctrine fit well the situation in DRC.

Started in the 1996 under the name of first Congo war, the armed conflict in the eastern DRC is one of complex nature and multidimensional. It continued until 2001 and involved armed troops of not only neighboring states – Rwanda, Uganda, Burundi, Angola – but also of other Africa states such as Namibia, Zimbabwe, Chad, Libya etc.[12]. It officially ended in 2002 with the signature of a peace deal between the belligerents[13]. However, the region has never been in peace since then. It became overrun by warlords' and rebels' armed

[10] ICRC, How is the Term "Armed Conflict" Defined in International Humanitarian Law? , p.5, https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf .

[11] ICRC, Scope of the law in armed conflict, panel discussion, 19.02.2015, https://www.icrc.org/en/event/scope-of-law.

[12] International Crisis Group (ICG), Congo at war: A Briefing on the Internal and External Players in the Central African Conflict, https://reliefweb.int/report/angola/congo-war-briefing-internal-and-external-players-central-african-conflict.

[13] Eastern Congo Initiative, History of war, www.easterncongo.org/about-drc/history-of-the-conflict.

groups fighting against one another to vie for local power and against the state for the control of the territory. More than a hundred rebels' armed groups operate in this part of the territory with military and political organizations, some have root in the neighboring countries[14].

Despite the military effort of DRC's government – supported by MONUSCO (United Nations Organisation Stabilisation Mission in the Democratic Republic of Congo) –, those armed groups are still operating in this part of the territory causing unnecessary pain to civilian, particularly to children as they are fragile and vulnerable.

As it is now clear that the armed conflict in eastern DRC is an NIAC, it is better to look into the obligations laying upon DRC about the protection of children in that context.

2. IHL AND CHILDREN IN THE ARMED CONFLICT IN EASTERN DRC

Besides being part to the four GCs and the APs, DRC is also part to the Convention on the Rights of the Child of 1989 (CRC) which is a human rights treaty. It contains several provisions, which guarantee the right to a child to enjoy the access to healthcare, such as the Article 24 stating: "1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to

[14] MONUSCO, The foreign armed groups, https://monusco.unmissions.org/en/foreign-armed-groups.

facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (a) To diminish infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care […]"[15].

On the other hand, during NIAC, children are protected by GC IV and AP II.

The question is which treaty will be applicable in the eastern DRC armed conflict? Is the CRC applicable because it is the main instrument protecting children or are the GC IV and AP II applicable? Or all of them apply at the same time?

Originally, international human rights law (IHRL) was made for peacetime while IHL for wartime. To date, this distinction does not stand because it is recognized that both are not incompatible and IHRL can apply in war time alongside with IHL or in the situation not covered by this latter[16]. Also, the draft articles of International Law Commission (ILC) on the effects of armed conflict on treaties cited the treaties for the international protection of human rights among

[15] Art. 24 of Convention on the Rights of the Child,1577 UNTS 3.

[16] ICRC, Respecting and protecting healthcare in armed conflicts and in situation not covered by international humanitarian law, p.3, https://www.icrc.org/en/document/respecting-and-protecting-health-care-armed-conflicts-and-situations-not-covered.

those treaties that continue in operation during armed conflict[17]. Moreover, in its advisory opinion in the nuclear weapon case, the international court of justice stated that the protection of International Covenant of Civil and Political Rights does not terminate during hostilities […]"[18]. The Court continued that test of what is an arbitrary deprivation of life in war time is determined by the *lex specialis*, namely, the law applicable in armed conflict[19]. This makes us confirm that the rules of human rights treaties may be subject to derogation while those of IHL are non-derogable as they deal with exceptional situation of armed conflict[20].

All things considered, the Article 38(4) of the CRC states that "In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care for children who are affected by an armed conflict"[21]. The Article refers explicitly to the rules of IHL. At this point, it is clear that the treaties applicable about the access of children to healthcare in the eastern DRC conflict are the GC IV and AP II.

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[17] International Law Commission, Draft articles on the effects of armed conflicts on treaties, 2011, p.114 and 126.

[18] International Court of Justice, Legality of the threat or use of nuclear weapons, 8 July 1996, I.C.J. Report 1996, p.18.

[19] International Court of Justice, Legality of the threat or use of nuclear weapons, 8 July 1996, I.C.J. Report 1996, p.18.

[20] ICRC/inter-parliamentary Union, International humanitarian law, p.37, https://www.ipu.org/resources/publications/handbooks/2016-10/international-humanitarian-law.

[21] Art. 38 (4) of Convention on the Rights of the Child, 1577 UNTS 3.

For the sake of this paper, it will be impossible to detail all the obligations underpinning IHL, we shall examine the obligation of *respect, protect children and care for* laying upon DRC about the access of children to healthcare regard to GC IV, Article 3 common to the four GCs and AP II. This obligation is contained in the provisions that directly concern children and in those concern civilian in general.

Respect, protect children and care for

The first point of Article 24 of GC IV establishes this: "the Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances […]"[22].The article talks about "maintenance" which implies access to food and healthcare[23]. But this article is substantially limited because it concerns only under fifteen-year children who are orphaned or separated from their families. However, the Article 4(3) paragraph 1 of AP II broadens the protection stating that "children shall be provided with the care and aid they require […]. The word "care" here means all kinds of care that are necessary for the well-being and development of a child, notably educational care, psychological care, spiritual care as well as

[22] Art. 24 (1) of the fourth Geneva Conventions of 1949 relative to the protection of civilian persons in time of war, 75 UNTS 31.

[23] This is the author's view.

healthcare[24]. Healthcare in war time is the fact of preventing, diagnosing, treating diseases, injuries or disabilities[25]. Concerning "Aid", this word encompasses plenteous definitions, but Aid delivered on humanitarian grounds is defined as "selfless assistance provided to people in serious difficulty"[26].

On the other hand, in the ICRC's study on customary IHL, the Rule 135 argues that "children affected by armed conflict are entitled to special respect and protection"[27].

In fact, the socio-political context of eastern DRC is marred with endless armed conflict including massacres, burning of village and plundering of property. As a result, millions of people fled their home and became internally displaced. They have abandoned farming that was the main source of employment, food, and income. Healthcare system is also decimated because of war, lack of resources and extreme poverty. This is not without consequences on the health of children. The lack of sufficient diet and inadequate healthcare leading

[24] This is the author's view.

[25] ICRC, Health Care in Danger: the responsibilities of health-care personnel working in armed conflicts and other emergencies, p.13, https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4104.pdf.

[26] Rony Breauman, War and humanitarian aid, https://www.msf-crash.org/en/publications/war-and-humanitarianism/war-and-humanitarian-aid.

[27] ICRC, Rule 135. Children affected by armed conflict are entitled to special respect and protection https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule135.

to outbreaks of epidemics such as malnutrition, malaria, kwashiorkor, respiratory infections, measles and cholera[28].

To this end, the government had taken a domestic law to protect children namely the "law on child protection". In the Article 72, it is declared that the state guarantee the protection and the necessary care for children affected by armed conflict[29]. But the fact is that provision suffers from implementation. It is more a wish than a reality. A part from that, there is quasi-absence of the government as a social protection provider at the grass roots level and its programs are characterised by a slow and cross-cutting nature[30]. Instead, it is international organisations and NGOs such as UNICEF, International Committee of Red Cross, *Medecins sans frontières* that are more present on the ground besides the local population, particularly children[31]. Yet, the Article 10 of GC IV states that "the provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may […] undertake for the protection of civilian persons and for their relief". From this provision, it can be implied that the Convention complies with the fact that if a state is unable to fulfill its obligation for the protection of civilians, an

[28] Omba Kalonda JC, Socioeconomic impact of armed conflict on the health of women and children in Democratic Republic of Congo, https://pubmed.ncbi.nlm.nih.gov/21695885/

[29] Article 72 of Democratic Republic of Congo's law on child protection, 2009.

[30] Overseas Development Institute, Child-sensitive social protection in DRC, pp. 22 – 26, https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7620.pdf.

[31] *Id.*, p. 23.

impartial humanitarian may take over humanitarian action for protecting civilians and saving lives.

CONCLUSION

Throughout this article, we talked about the obligation of DRC about the access to healthcare for children in the eastern DRC. For more than two decades, this part of the country is known as an epicenter of endless armed conflicts. Congolese militias and rebel groups are fighting against each other and against the state for the control of the territory. The situation of that region is deteriorating, millions of people fled their home and live in displaced camps with poor sanitary measures and overcrowding. Some are in the zones inaccessible by humanitarian and health workers. They confront outbreaks of epidemics and diseases, therefore children pay the highest price because of their vulnerability. They suffer from malnutrition, cholera, respiratory infections, measles, kwashiorkor and malaria because of lack of appropriate healthcare and delay in the treatment. Yet DRC is part to Geneva Convention of 1949 on the protection of civilian and the Addition Protocol II. Those instruments, through Article 3 common to the four Geneva Conventions, Article 24 (1) of the fourth Geneva Convention and Article 4(3) paragraph 1 of AP II impose on DRC to provide adequate care for children in times of war. But the lack of total control in this part of the territory and the political instability in all the country make it difficult for DRC to fulfill its obligation. So, children are paying the heaviest price.

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