

Revisiting *Michelo Hansungule and others (on behalf of the Children of Northern Uganda) v Uganda*: a case commentary

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ABSTRACT: *Michelo Hansungule and others (on behalf of the Children of Northern Uganda) v Uganda (Children of Northern Uganda)* is an early decision of the African Committee of Experts on the Rights and Welfare of the Child. This case commentary revisits this decision in order to assess how far the protection and assistance of children in situations of conflict in Africa have come. It assesses the decision in terms of broader concerns such as the weight ascribed the evidence obtained during the Committee's fact-finding mission to Uganda. It examines the application of the due diligence standard in the case and two more recent decisions, to determine if the application of this standard has progressed. It determines the extent to which the Committee's most recent General Comment on children in conflict moves beyond *Children of Northern Uganda*. This commentary concludes by examining the lessons learned from revisiting this decision.

TITRE ET RÉSUMÉ EN FRANCAIS:

Retour sur l'affaire *Michelo Hansungule et autres (au nom des enfants du nord de l'Ouganda) c. Le Gouvernement de l'Ouganda*: commentaire

RÉSUMÉ: *Michelo Hansungule et autres (au nom des enfants du nord de l'Ouganda) c. Le Gouvernement de l'Ouganda* est l'une de premières décisions du Comité africain d'experts sur les droits et le bien-être de l'enfant. Ce commentaire revient sur cette décision afin d'évaluer l'évolution de la protection et l'assistance des enfants dans les situations de conflit en Afrique. Il évalue la décision en termes de préoccupations plus larges telles que la valeur des preuves obtenues lors de la mission d'enquête du Comité en Ouganda. Ce commentaire examine l'application de la norme de diligence raisonnable dans cette affaire et dans deux décisions plus récentes, afin de déterminer si l'application de cette norme a progressé. Il détermine dans quelle mesure l'Observation générale la plus récente du Comité sur les enfants dans les conflits va au-delà des enfants du nord de l'Ouganda. Ce commentaire se termine par l'examen des leçons tirées de la révision de cette décision.

KEY WORDS: due diligence, African Committee of Experts on the Rights and Welfare of the Child, children's rights, Uganda, accountability, armed conflict

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1 INTRODUCTION

There is a growing number of communications that have been decided by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee or Committee).¹ Communications provide an avenue for rights holders and other interested parties to hold states accountable for alleged violations, obtain redress for victims, guide the implementation of the African Charter on the Rights and Welfare of the Child (African Children's Charter or Children's Charter) and hold states accountable to their obligations.² Therefore, communications can be classified as implementation or accountability mechanisms as they are tools that promote and monitor human rights.³

*Michelo Hansungule & Others (on behalf of the Children of Northern Uganda) v Uganda (Children of Northern Uganda)*⁴ was the first communication that the Committee received and the second decision that the Committee finalised. This decision considered whether the government of Uganda (the respondent) violated several rights of the children of Northern Uganda from 2001 to 2005.⁵ In *Children of Northern Uganda*, the African Children's Committee found that the respondent violated its obligation under articles 1(1) and 22 of the African Children's Charter, yet it did not find that the other rights alleged by the complainants were violated.⁶ As acknowledged by the

1 The Committee has finalised six decisions to date. See Committee 'Table of communications' <https://www.African-Children's-Committee.africa/table-of-communications/> (accessed 10 October 2020).

2 See African Charter on the Rights and Welfare of the Child (29 November 1999) CAB/LEG/153/Rev. 2 art 44.

3 The term accountability mechanism will be used in this contribution. G Van Bueren *The international law on the rights of the child* (1995) 379; S Parmentier 'The significant of mechanisms to monitor human right at the international level' in A Weyts (ed) *Understanding children's rights: collected papers presented at the seventh International Interdisciplinary Course on Children's Rights*, Ghent University (Belgium) November-December 2004 245-262.

4 Communication 1/2005, 21st ordinary session of the Committee.

5 *Children of Northern Uganda* (n 4) para 5.

6 *Children of Northern Uganda* (n 4) paras 11 & 81. See also African Children's Charter arts 1(1) & 22.

Committee itself, this decision is important as it affects the rights of children in Uganda in the future and the rights of children that are affected by situations of armed conflict on the continent.⁷ Submitted in 2005 and finalised in 2013, there has been quite some time between the outcome of *Children of Northern Uganda* and the present. However, an assessment of the outcome of this decision provides the starting point to discuss the progression of communications as an accountability mechanism under the African Children's Charter,⁸ in light of some more recent decisions and revisit the Committee's position on children in armed conflict based on its 2020 General Comment on article 22.⁹

This contribution examines *Children of Northern Uganda* in light of broader issues such as delay, the responsibility of private actors in the context of armed conflict and the Committee's approach to the rights and needs of children in armed conflict. The evaluation also focuses on how the Committee employed the due diligence standard in *Children of Northern Uganda* and its impact on the outcome of this decision as compared to two more recent decisions, *Minority Rights Group International & SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania (Salem)*,¹⁰ and *Institute for Human Rights and Development in Africa & Finders Group Initiative on behalf of TFA (a minor) v Cameroon (TFA)*.¹¹ The due diligence standard requires a state to prevent, investigate, prosecute, punish and provide remedies for violations of human rights.¹² In international human rights law, the due diligence standard is an important point of inquiry as it provides a way to measure a state's efforts to comply with its duty to 'fulfil its human rights obligations'.¹³ In the words of the African Children's Committee, the due diligence standard means, 'that the compliance of a [s]tate party is assessed against the backdrop of the efficacy of the implementation measures'.¹⁴ Overall, the five elements of this standard provide a holistic means of assessing the acts and omissions of states in the context of international human rights law.

7 *Children of Northern Uganda* (n 4) para 34.

8 (29 November 1999) CAB/LEG/153/Rev. 2.

9 Committee 'General Comment on article 22 of the African Charter on the Rights and Welfare of the Child: children in situations of conflict' (September 2020); see https://www.acerwc.africa/wp-content/uploads/2020/10/General-Comment-on-Article-22-of-the-ACRWC_English_Web_version_final-1.pdf (accessed 10 November 2020) (General Comment on article 22).

10 Communication 7/Comm/003/2015, Thirtieth Ordinary Session of the Committee.

11 Communication 6/Comm/002/2015, Thirty-first Ordinary Session of the Committee.

12 *Velásques-Rodríguez v Honduras*, IACHR (29 July 1988) Ser C No 4, para 174.

13 *Velásques-Rodríguez* (n 12) paras 172-174; *Zimbabwe Human Rights NGO Forum v Zimbabwe*, (2006) AHRLR 128 (ACHPR 2006) para 146; International Law Association (ILA) Study Group on Due Diligence in International Law 'First Report' (7 March 2014) 14 (ILA report).

14 'General Comment 5 on state party obligations under the African Charter on the Rights and Welfare of the Child (article 1) and systems strengthening for child protection' (2018) 15; *Salem* (n 10) paras 53-54.

To evaluate *Children of Northern Uganda*, the commentary is divided into three parts. The first part outlines the findings in the *Children of Northern Uganda* decision to determine what extent the due diligence standard was applied in this decision. The second part examines the due diligence standard and its application in the context of international human rights to provide a foundation for the application of this standard. The third part evaluates the Committee's findings in *Children of Northern Uganda* in light of Committee's reliance on the evidence obtained during its fact-finding mission and its reluctance to consider responsibility on the part of the respondent for the effects of the actions of the LRA; the use of the due diligence standard as compared to the decisions the Committee's decisions in *Salem* and *TFA*; and, the Committee's recent General Comment on article 22 of the Children's Charter. To conclude, the commentary reflects upon the lessons learned by revisiting *Children of Northern Uganda*. The commentary begins with a discussion of the findings in the Committee in the *Children of Northern Uganda* decision.

2 SUMMARY OF THE FACTS AND FINDINGS IN THE CHILDREN OF NORTHERN UGANDA DECISION

2.1 Facts

In *Children of Northern Uganda*, the complainants brought a communication on behalf of the children in Northern Uganda against the respondent. The complainants alleged that between 2001 and 2005, the government violated several of the rights of this group of children provided under the African Children's Charter. During this time, there was an internal armed conflict that was primarily between the Uganda People's Defence Forces (UPDF) and the Lord's Resistance Army (LRA).¹⁵ The Committee considered that such a conflict could negatively affect a state's ability to comply with its obligations under the Charter.¹⁶ The Committee and complainants also acknowledged that the LRA was responsible for violating the rights of children in Northern Uganda, but the Committee focused its decision on the alleged violations of the respondent as a state party to the African Children's Charter.¹⁷ It chose not to consider the respondent's obligation to prevent violations of rights on the part of non-state actors such as the LRA. This choice will be revisited in the analysis. Also, the complainants alleged that the respondent violated its obligations to ensure the right to life, survival and development, to provide the right

15 UN Economic and Social Council (ECOSOC) 'Report of the representative of the Secretary-General on internally displaced persons, Francis M Deng, addendum, profiles in displacement: Mission to Uganda' (3 March 2004) UN Doc E/CN.4/2004/77/Add.1 paras 1-2, 13-27; *Children of Northern Uganda* (n 4) paras 2-4.

16 *Children of Northern Uganda* (n 4) para 36.

17 *Children of Northern Uganda* (n 4) para 35.

to education, to provide the right to the highest attainable standard of health, to ensure protection from recruitment and use in armed conflict, and to ensure protection from sexual abuse, violence and abduction for the children of Northern Uganda.¹⁸

2.2 Findings of the Committee

The African Children's Committee found that the communication was admissible and considered the merits of the case.¹⁹ In addition to the evidence provided by the complainants and the respondent, the African Children's Committee conducted a fact-finding mission in Uganda in 2013.²⁰ These three sources of information formed the basis of the Committee's determination in this decision. The African Children's Committee also refined the articles that are considered in this decision. It determined whether the respondent violated articles 1(1), 22, 11, 14, 27 and 29 of the African Children's Charter.²¹

The African Children's Committee first mentioned the due diligence standard in its consideration of article 1(1) of the African Children's Charter, the duty of state parties to take necessary measures to implement the Charter.²² It stated that 'effective implementation of laws with due diligence is part of [state parties' obligations] under the Charter'.²³ Citing *Commission Nationale des Droit de l'Homme et des Libertés v Chad (Commission Nationale)*,²⁴ it explained that a state could be held responsible for failure to protect persons within its jurisdiction from 'attacks by unidentified militants'.²⁵ Then, the African Children's Committee underscored that the protection of human rights under the African Children's Charter 'should be able to promote and improve the lived reality of children on the ground'.²⁶ The Committee's discussion of article 1(1) introduces the concept of due diligence and introduced some key aspect of the standard, such as state responsibility for violations caused by non-state actors and the importance of result in this decision.

After it discussed article 1(1), the Committee examined whether the government of Uganda violated its obligations under article 22 of the

18 *Children of Northern Uganda* (n 4) para 5. See African Children's Charter, arts 5, 11, 14, 16, 22 & 27.

19 A detailed examination of the admissibility of this communication is beyond the scope of this commentary. See *Children of Northern Uganda* (n 4) paras 18-32.

20 African Children's Charter, art 44 & 45; ACERWC 'Revised guidelines for the consideration of communications' (October 2014) https://www.acerwc.africa/wp-content/uploads/2018/07/Revised_Communications_Guidelines_Final-1.pdf (accessed 7 August 2020) sec XV; *Children of Northern Uganda* (n 4) para 17.

21 *Children of Northern Uganda* (n 4) para 81.

22 *Children of Northern Uganda* (n 4) paras 36-38, 81.

23 *Children of Northern Uganda* (n 4) para 38.

24 (2000) AHRLR 66 (ACHPR 1995).

25 *Commission Nationale* (n 24) para 20; *Children of Northern Uganda* (n 4) para 38.

26 *Children of Northern Uganda* (n 4) para 38.

African Children's Charter. The consideration of article 22 was indeed the focus of this decision. The African Children's Committee specifically assessed whether the government violated its obligation under article 22(2) of the African Children's Charter to ensure that the children in its jurisdiction were not recruited and did not 'take direct part in hostilities'.²⁷ The Committee found that children who were repatriated from the LRA were questioned and used as a means to obtain intelligence rather than immediately returned to civilian life and provided with rehabilitation.²⁸ When addressing this aspect of the violation of article 22, the African Children's Committee stated the importance of providing remedies for those who are victims of violations by third parties for which the state could be held responsible.²⁹ It described remedy 'as an element of the due diligence obligation'.³⁰ Also, it raised its concern that the amnesty legislation that assisted demobilised children could also lead to impunity.³¹ This is another instance where the African Children's Committee mentioned the due diligence standard and raises a concern regarding the respondent's acts and omissions in this regard. Its specific comments regarding the element of remedy indicate that this was an area of concern, but did not specifically state that the respondent failed to demonstrate due diligence regarding remedies for children formerly associated with armed groups.

The other portion of the consideration of article 22 addressed the issue of recruitment. The African Children's Committee found that the recruitment system in addition to challenges with birth registration led to the recruitment of children, especially in local defence units (LDUs).³² The respondent explained that some children voluntarily enlisted in the armed forces. However, the Committee stated that article 22 of the African Children's Charter is unequivocal; no person under the age of 18 years may be recruited or enlisted in the armed forces.³³ In its detailed examination of article 22(2), the Committee found that the respondent had violated its obligations under this article.³⁴

The Committee considered whether the respondent was in breach of its obligation to provide children in Northern Uganda with the right to education. In light of the situation of armed conflict, all parties acknowledged that the provision of education was disrupted.³⁵ The complainants alleged that the respondent violated its obligation regarding the right to education in five ways. First, they alleged the government failed, especially in areas hard hit by conflict, to allocate

27 African Children's Charter, art 22(2).

28 *Children of Northern Uganda* (n 4) paras 49-51.

29 *Children of Northern Uganda* (n 4) para 51.

30 As above.

31 As above.

32 *Children of Northern Uganda* (n 4) paras 47-48, 52-56.

33 *Children of Northern Uganda* (n 4) paras 57-59.

34 *Children of Northern Uganda* (n 4) para 60.

35 *Children of Northern Uganda* (n 4) paras 61-62.

resources toward education.³⁶ Second, they alleged that schools were used for military purposes.³⁷ Third, they alleged that schools were attacked by armed forces.³⁸ Fourth, they alleged that there were no effective measures in place to provide access to education for demobilised children.³⁹ Fifth, they alleged that the respondent failed to provide children in camps for internally displaced persons (IDP camps) with available, accessible and quality education.⁴⁰

In contrast, the African Children's Committee was satisfied overall with the measures taken by the respondent to provide children in Northern Uganda with access to education. It confirmed that the right to education requires that a state takes steps to ensure 'availability, accessibility, acceptability [and] adaptability'.⁴¹ It noted the budgetary measures and partnerships that the respondent used to provide education in IDP camps, to provide bursaries to children in affected areas and to encourage school attendance.⁴² The Committee found no evidence to support the allegation that schools were used for military purposes or targeted for military attacks.⁴³ The Committee found that the respondent took appropriate measures to implement the right to education and in this context found that there was no violation of article 11 of the African Children's Charter.⁴⁴

The African Children's Committee went on to consider whether the respondent complied with its obligation to provide the highest attainable standard of health. It stated that ensuring this right means taking 'immediate steps ... [and employing] the maximum available resources, even when such resources are scarce'.⁴⁵ It explained that discrimination in access to healthcare also would be a violation of article 14 of the African Children's Charter.⁴⁶ In light of these requirements, the Committee acknowledged the difficulties created by the conflict, the actions of the LRA and the government's dependence on humanitarian assistance.⁴⁷ It also highlighted the efforts that the respondent had undertaken to ensure access to healthcare and concluded that there was 'no evidence that the respondent failed to show due diligence in its efforts to comply with article 14 of the

36 *Children of Northern Uganda* (n 4) para 62.

37 As above.

38 As above.

39 As above.

40 As above.

41 This is consistent with the UN Committee on Economic, Social and Cultural Rights (Committee on ESCR). See Committee on ESCR 'General Comment No 13 (Twenty-first session, 1999): the right to education (article 13 of the Covenant)' (8 December 1999) UN Doc E/C.12/1999/10 para 6; *Children of Northern Uganda* (n 4) para 65; *Salem* (n 10) para 76.

42 *Children of Northern Uganda* (n 4) para 66.

43 *Children of Northern Uganda* (n 4) paras 67-68.

44 *Children of Northern Uganda* (n 4) paras 70-71.

45 *Children of Northern Uganda* (n 4) para 72.

46 *Children of Northern Uganda* (n 4) para 73.

47 *Children of Northern Uganda* (n 4) para 74.

Charter'.⁴⁸ In this instance, the Committee assessed the actions of the respondent generally concerning due diligence.

The Committee considered whether the respondent failed to protect the children of Northern Uganda from sexual abuse and violence. The complainants alleged that 'UPDF soldiers were either involved or facilitated ... sexual abuse and violence against children'.⁴⁹ The Committee based its finding on its investigation of the situation.⁵⁰ Furthermore, it stated that it had not found evidence to support that the respondent did not 'investigate, prosecute, and punish perpetrators of sexual abuse [or] violence committed against children by the UPDF or members of the LDUs'.⁵¹ This is another instance where the Committee used elements of the due diligence standard to substantiate that the respondent had not violated its obligations under the African Children's Charter.

The final allegation that the Committee considered was whether the respondent violated its obligation to protect the children in Northern Uganda from abduction. It stated that the LRA was known for abducting children, including children from government IDP camps, which led to the phenomenon of 'night commuters'.⁵² However, the Committee found that the situation of armed conflict and the tactics of the LRA rendered the efforts of the respondent to protect its children from abduction ineffective.⁵³ Therefore, the Committee found that the respondent did not violate article 29 of the African Children's Charter concerning protection from abduction.⁵⁴

In summary, the Committee found that the respondent only violated its obligations under article 22 and by extension article 1(1) of the African Children's Charter.⁵⁵ It found that the complainants could not substantiate some of the other allegations and it was largely satisfied with the measures taken by the respondent.

3 OVERVIEW OF THE DUE DILIGENCE STANDARD

To use the due diligence standard to revisit and assess subsequent decisions, it is important to understand its key elements and application. The International Law Associations Study Group on Due Diligence in International Law (ILA) notes that the due diligence standard is applied in several areas of international law. The ILA states

48 *Children of Northern Uganda* (n 4) para 75.

49 *Children of Northern Uganda* (n 4) para 77.

50 *Children of Northern Uganda* (n 4) para 78.

51 As above.

52 *Children of Northern Uganda* (n 4) paras 3, 79.

53 *Children of Northern Uganda* (n 4) para 80.

54 African Children's Charter, art 29.

55 *Children of Northern Uganda* (n 4) para 81.

that 'due diligence is a fundamental feature of many disparate areas of international law'.⁵⁶

In international human rights law the judgment of the Inter-American Court of Human Rights in *Velásques-Rodríguez v Honduras*,⁵⁷ is noted for introducing the due diligence standard in the context of international human rights law.⁵⁸ The due diligence standard requires a state to prevent, investigate, prosecute, punish and provide remedies for violations of human rights.⁵⁹ Also, a state party can be held responsible for the actions of private actors if it fails to respond to violations caused by private actors.⁶⁰ Failure on the part of a state to comply with these duties when faced with a violation of human rights means that the state did not act with due diligence.⁶¹ Therefore, it is the response of the state to violations of human rights in light of these five elements that determine if it acted with due diligence.

The ILA also examined the application of the due diligence standard in international humanitarian law. The alleged violations in *Children of Northern Uganda* occurred during a time of internal armed conflict between the respondent and the LRA; therefore, international humanitarian law is relevant to this inquiry. The ILA makes an important comment about the application of due diligence in situations of armed conflict. It states:

The standard of due diligence expected of States during peace, including the legal and material resources to ensure fulfilment of its obligations, may become more difficult to meet during conflict, especially during internal armed conflict. Nonetheless, the due diligence requirements of IHL, and in a residual manner international human rights law, continue to apply.⁶²

It is clear that the due diligence standard applies despite the challenges of armed conflict.

The application of the due diligence standard can be summarised by several points. These points have been gleaned from *Velásques-Rodríguez* and a review of key decisions of the African Commission on Human and Peoples' Rights (African Commission) and the African Children's Committee as the focus of this commentary is on the application of this standard in the context on the continent. Each of the points will be considered briefly in turn.

56 ILA report (n 13) 6.

57 IACHR (29 July 1988) Ser C No 4.

58 *Velásques-Rodríguez* (n 12) paras 170-172; *Zimbabwe Human Rights* (n 13) paras 144-145 & 206; TM Kamminga 'Due diligence: a useful tool to combat violence against women?' in I Westendorp (ed) *The Women's Convention turned 40* (15 September 2020) (forthcoming) at SSRN: <http://dx.doi.org/10.2139/ssrn.1831045> (accessed 16 October 2020) 5 & 9.

59 *Zimbabwe Human Rights* (n 13) para 174.

60 *Children of Northern Uganda* (n 4) para 172.

61 As above.

62 ILA report (n 13) 11.

First, there is a link between the duty to protect human rights and the due diligence standard. In its discussion of the duty to protect in *Association of Victims of Post Electoral Violence & Another v Cameroon (Cameroon Electoral Violence)*,⁶³ the African Commission explained that this duty produces a positive obligation on the part of states to prevent private actors from violating the rights provided under the African Charter on Human and Peoples' Rights (African Charter).⁶⁴ In this case, it stated that the measures taken by the government of Cameroon to prevent the violations were a key indicator of whether the government acted with due diligence.⁶⁵

Second, the element of prevention requires a state to use all of the resources at its disposal, identify vulnerable groups and take special measures to protect them from violations of their rights. In *Salem*, the Committee emphasised that prevention required states to 'identify vulnerable groups prone to abuse and take special measures to prevent violence from occurring'.⁶⁶ Furthermore, prevention means that a state utilises the resources at its disposal, including 'means of a legal, political, administrative and cultural nature'.⁶⁷

Third, investigating with due diligence requires a serious, state-driven, exhaustive and effective investigation of all violations of rights.⁶⁸ The Court in *Velásques-Rodríguez* stated that the investigation 'must be undertaken in a serious manner'.⁶⁹ To investigate with due diligence means that there is 'an effective search for truth by the government'.⁷⁰ Due diligence requires an investigation that engages the relevant state organs and is conducted in a serious manner.

Fourth, due diligence is assessed on a case-by-case basis. The application of the due diligence standard requires a critical examination of the situation, the available resources and the action that a state took or failed to take in light of the violation of rights.⁷¹ Overall, examining a state's actions 'on its own merits',⁷² provides for a fair evaluation of the state's action in light of the circumstances and resources.

Fifth, due diligence is assessed by the measures a state takes to implement its obligations and the results it achieves. The African Commission determined that article 1 of the African Charter is an obligation of result. It explained that where there is an obligation of diligence (effort) in the context of a contractual relationship, specific

63 (2009) AHRLR 47 (ACHPR 2009) paras 90-111.

64 1520 UNTS 217 (21 October 1986); *Cameroon Electoral Violence* (n 63) para 88-89.

65 *Cameroon Electoral Violence* (n 63) para 90.

66 *Cameroon Electoral Violence* (n 63) para 52.

67 *Velásques-Rodríguez* (n 12) para 175.

68 para 180.

69 para 177.

70 As above.

71 para 155.

72 As above.

resources must be provided, but there is no obligation to guarantee a particular result.⁷³ An obligation of result, in contrast, means that specific result must be obtained, but the measures used to obtain that result are at the discretion of the party performing the obligation.⁷⁴ Regarding a binding international instrument, the African Commission explained that ‘all obligations ... seek to attain an objective, a purpose or a result’.⁷⁵ This conclusion means that the obligations under article 1 of the African Charter are obligations of result and to satisfy these obligations, a state must implement the provisions of the Charter and create ‘institutions that produce tangible results’.⁷⁶ The Commission explained that due diligence in relation to the obligations under article 1 of the African Charter

has to evolve in relation to the time, space and circumstances, and has to be followed by practical action on the ground in order to produce concrete results ... not only through appropriate legislation and its effective enforcement but also by protecting them against injurious acts which can be perpetrated by third parties.⁷⁷

The findings of the African Commission in *Cameroon Electoral Violence* highlighted that the results achieved by a state’s actions are integral to the due diligence assessment.

Finally, a state has the onus to demonstrate that it acted with due diligence. In *Salem*, the Committee stated that a state has the onus to prove that it acted with due diligence.⁷⁸ While a complainant is required to provide evidence to prove its claim,⁷⁹ the Committee stated that a state is required to provide evidence that it responded to the violations with due diligence.⁸⁰

In summary, due diligence is an accepted standard in international human rights law used to assess whether a state has complied with its obligations to prevent and adequately respond to violations of human rights, even when violations are caused by non-state actors. This standard is not without its weaknesses. Kamminga when writing about the utility of this standard regarding violence against acknowledges the Court in *Rodríguez* used the due diligence standard as a ‘yardstick’⁸¹ when international human rights law was still in its infancy’.⁸¹ However, he states that due diligence ‘... is widely perceived as a weak standard, an obligation of conduct, rather than an obligation of

73 *Cameroon Electoral Violence* (n 63) para 95.

74 paras 101-102.

75 para 107.

76 para 108.

77 para 110.

78 *Salem* (n 10) para 54.

79 For example, the complainants failed to demonstrate substantiate their claim regarding trafficking. See *Salem* (n 10) para 96.

80 *Salem* (n 10) para 54.

81 Kamminga (n 58) 9.

result'.⁸² Despite Kamminga's assertion, human rights decision-making bodies have and continue to apply this standard.⁸³ For this reason, the application of the due diligence standard remains an avenue of assessment in such decisions.

4 REVISITING THE *CHILDREN OF NORTHERN UGANDA* DECISION

The due diligence standard was applied in *Children of Northern Uganda* and the Committee's subsequent decisions in *Salem* and *TFA*. This section of the commentary will engage with the Committee's use of the due diligence standard in all three decisions in order to assess the progression of the communications as an accountability mechanism under the African Children's Charter. This section will also engage with the Committee's 2020 General Comment on children in situations of armed conflict and revisit the Committee's findings in *Children of Northern Uganda*. Before, embarking on this analysis, the commentary will examine some broader issues that arguably had a substantial impact on the overall outcome of *Children of Northern Uganda*.

4.1 Examining the utility of the Committee's fact-finding mission and other considerations

The African Children's Committee based its decision in *Children of Northern Uganda* on three sources of evidence: the submissions of the complainants, the submissions of the respondent and its fact-finding mission. Sloth-Nielsen notes that the Committee undertook this mission as it was '[u]nable to decide on the merits of the matter with the written and oral evidence at hand'.⁸⁴ While fact-finding missions provide an important tool in the adjudication of communications, the over seven-year delay between the complaint and the mission generates concerns that the conditions observed and the information available to the Committee did not accurately reflect the conditions in Northern Uganda in the 2001 to 2005 period.⁸⁵ The relevance and the weight given to the information obtained during this mission are two issues that may have affected the outcome in *Children of Northern Uganda*.

The relevance of the information obtained by the Committee during its fact-finding mission can be contrasted with the report of the country

82 Kamminga (n 58) 10.

83 See for example *Velásques-Rodríguez* (n 12); *Zimbabwe Human Rights* (n 13); *Cameroon Electoral Violence* (n 63); *Children of Northern Uganda* (n 4); *Salem* (n 10); *TFA* (n 13).

84 J Sloth-Nielsen 'Children's rights litigation in the African region: lessons from the communications procedure under the African Children's Charter' in T Liefwaard & JE Doek (eds) *Litigating the rights of the child: the UN Convention on the Rights of the Child in domestic and international jurisprudence* (2015) 254.

85 Sloth-Nielsen (n 84) 264.

visit to Uganda by the Representative of the UN Secretary-General on internally displaced persons. The then representative, Francis Deng, visited Uganda in August 2003.⁸⁶ The information in Deng's report was obtained during the period under consideration in *Children of Northern Uganda*. The timing alone supports the greater relevance and accuracy of this report as compared to that of the African Children's Committee.

A notable area of difference between the two reports is Deng's concern that the UPDF did not adequately protect the IDP camps. He states: 'Children were at constant risk of being abducted and recruited as child soldiers and a number of interlocutors also mentioned other abuses such as rape.'⁸⁷ This information can be contrasted by the African Children's Committee findings regarding the alleged violation of article 29 of the African Children's Charter and the obligation to protect children from abduction by the LRA. It stated that the efforts were rendered ineffective due to the circumstances of armed conflict and the LRA's 'inhuman methods of operation'.⁸⁸ The African Children's Committee's assessment is that it confirmed that the abductions occurred but it did not interrogate the measures that were in place in IDP camps to protect children from abduction.⁸⁹ The brutality of the LRA should not be overlooked; however, the findings of the African Children's Committee regarding article 29 can be challenged based on Deng's report. This example provides a basis to question the weight that the African Children's Committee ascribed to the information obtained so long after the alleged violation. This approach, while it may have been the only choice available to the Committee does not assist in holding states accountable for their violations under the Charter.

Another issue of concern is the Committee's reluctance to hold the respondent responsible for its obligation to prevent violations of rights perpetrated by non-state actors, in particular, the LRA. Despite its reference to *Commission Nationale* and acknowledging that a state could be held responsible for its failure to protect individuals within its jurisdiction from non-state actors.⁹⁰ This position runs counter to the jurisprudence as well as the position of the ILA, which stated when discussing *Commission Nationale*:⁹¹

This clearly establishes the principle that in situations of armed conflict a State has [a] duty to take action even in situations where they do not control the armed groups and that this extends to not only the protection of civilians but also investigation of criminal acts and violations of IHL.

86 ECOSOC (n 15) para 2.

87 ECOSOC (n 15), para 24.

88 *Children of Northern Uganda* (n 4) para 80.

89 *Children of Northern Uganda* (n 4) para 79.

90 *Commission Nationale* (n 26) para 20; *Children of Northern Uganda* (n 4) para 38.

91 ILA Report (n 13) 13-14.

The Committee chose not to hold the respondent accountable for the full extent of its obligations. While the African Commission stated in *Social and Economic Rights Action Center & Another v Nigeria (SERAC)*⁹² that it 'does not wish to fault governments that are labouring under difficult circumstances to improve the lives of their people'.⁹³ The Commission also took the position in *Commission Nationale* and *SERAC* allowing impunity by private actors is a clear violation of its duty to protect and by extension the due diligence standard.⁹⁴ The Committee's choice not to consider the respondent's actions to prevent violation on the part of LRA is a shortcoming in *Children of Northern Uganda*.

4.2 Evaluating the use of the due diligence standard in *Children of Northern Uganda*

The Committee's findings in *Children of Northern Uganda* demonstrate that the Committee did utilise the due diligence standard in various part of this decision. However, there are aspects of the decision when using the due diligence standard are not consistent with the jurisprudence on due diligence. This section will highlight some key examples.

The Committee mentioned the due diligence standard in its consideration of article 1(1) of the African Children's Charter. Regrettably, it did not use this opportunity to outline the five elements of the due diligence standard or highlight key aspects regarding the assessment of these elements. Such a discussion would have laid the foundation for a consistent application of the due diligence standard to guide the Committee's determination of the other alleged violations.

In its consideration of article 22 of the African Children's Charter, the primary weakness is that it did not explicitly outline how the respondent failed to discharge all of the elements of this standard. The Committee outlined how the respondent failed to prevent, investigate, prosecute and punish the recruitment of children into its armed forces. For example, it noted the constitutional protections in force at the time of the alleged violation did not protect children over that age of 16.⁹⁵ The jurisprudence is clear; enacting legislation alone is insufficient to discharge the obligation to prevent violations of rights.⁹⁶ This requirement also demonstrates that a lack of legislation is an indication that a state failed to act with due diligence and prevent violations. Regarding the requirements to investigate, prosecute and punish, the Committee stated that there was no evidence to support disciplinary actions taken against members of the armed forces that were

92 (2001) AHRLR 60 (ACHPR 2001).

93 *SERAC* (n 92) para 69.

94 *Commission Nationale*(n 24) para 20; *SERAC* (n 91) para 57.

95 Sloth-Nielsen (n 84) para 46.

96 *Velásques-Rodríguez* (n 12) paras 182-183.

responsible for recruiting children.⁹⁷ From a due diligence perspective, the Committee could have stated that this omission demonstrates that the respondent failed to investigate, prosecute and punish and overall act with due diligence to respond to the recruitment of children. The discussion regarding the article 22 violation does incorporate aspects of the due diligence standard. It could have been more effective by linking the acts and omission of the respondent to the specific elements of the due diligence standard.

One example where the Committee did link an element of the due diligence standard concerning article 22 of the African Children's Charter is the issue of remedies. Here, the Committee stated that a state must provide reparations to child victims of armed conflict when the violations 'can be attributed to the State, [or] even when substantive breaches originate in the conduct of private persons'.⁹⁸ The Committee highlighted that domestic legislation could lead to impunity rather remedy for children formerly associated with the LRA.⁹⁹

Perhaps the most disappointing conclusion was the Committee's determination of the alleged violation of the right to be protected from sexual abuse and violence. The Committee discussed the seriousness of sexual abuse and violence against children in the context of armed conflict.¹⁰⁰ It also noted the documented violations of the LRA, especially regarding the abuse of girl children.¹⁰¹ When it considered whether members of the UPDF and LDUs took part or enabled sexual abuse and violence against children, the African Children's Committee based its assessment on the results of its investigation.¹⁰² As a result, the Committee stated that there was no evidence to support the argument that the government did not act with due diligence, specifically the requirements to investigate, prosecute and punish.¹⁰³ Deng notes in his report that abuses by UPDF soldiers were reported and he recommended that the UPDF be trained in particular on international human rights and humanitarian law standards regarding sexual abuse and exploitation.¹⁰⁴ This alternate report is no conclusive proof the children did experience sexual abuse and exploitation at the hands of the UPDF, but it does weaken the Committee's assertion that there were no credible allegations of sexual abuse that the respondent should have investigated.

Therefore, the failure of the Committee to at least evaluate the measures that that respondent took to investigate such serious allegations is inconsistent with the due diligence standard. Under this

97 *Children of Northern Uganda* (n 4) para 56.

98 *Children of Northern Uganda* (n 4) para 51.

99 As above.

100 *Children of Northern Uganda* (n 4) para 76.

101 *Children of Northern Uganda* (n 4) para 77. See also M Denov 'Girl soldiers and human rights: lessons from Angola, Mozambique, Sierra Leone and Northern Uganda' (2008) 12 *International Journal of Human Rights* 819-821.

102 *Children of Northern Uganda* (n 4) para 78.

103 As above.

104 ECOSOC (n 15) 25 & 57(f).

standard, investigations must be state-driven, exhaustive and conducted seriously.¹⁰⁵ The Court in *Rodríguez* stated that every situation where there is a violation of rights must be investigated.¹⁰⁶ In *Children of Northern Uganda*, it is not clear that this was the case. This is an unfortunate outcome in light of the serious nature of the allegations.

It is clear that the Committee did use the due diligence standard as its 'yardstick'¹⁰⁷ in *Children of Northern Uganda*. What is also clear is that the standard was not applied in a consistent and deliberate manner. Overall, the discussion highlighted instances in this decision where due diligence was not explicitly applied, instances where only some elements of the standard were considered and others where the Committee could have required more of the respondent to discharge its onus to demonstrate due diligence.

4.3 The application of the due diligence standard after *Children of Northern Uganda*

The application of the due diligence standard in *Children of Northern Uganda* can be contrasted with the Committee's more recent decisions in *Salem* and *TFA*. In *Salem*, brothers Said Ould Salem and Yarg Ould Salem were born into Mauritania's slave class and worked as slaves despite legislation that prohibited slavery.¹⁰⁸ They brought a case against individuals that held them as slaves, but only one individual was convicted of an offence and was sentenced to two years in prison or a fine.¹⁰⁹ The other individuals were either acquitted or received suspended sentences with minor fines.¹¹⁰ The inability to locate the convicted individual and the absence of the President of the Criminal Chamber of the Court of Appeal led to the continued postponement of the appeal of this decision in the domestic courts and the impunity of a convicted slave-owner.¹¹¹ The complainants submitted a communication to the African Children's Committee on behalf of the Salem brothers in an effort to hold the government of Mauritania accountable for its failure to protect the rights of these children. The Committee found that the government of Mauritania violated its obligations pursuant to articles 1, 3, 4, 5, 11, 12, 15, 16 and 21 of the African Children's Charter.¹¹²

The Committee discussed the due diligence standard in its assessment of the article 1 violation.¹¹³ Article 1(1) of the African

105 *Velásques-Rodríguez* (n 12) paras 177, 180-181.

106 para 176.

107 *Kammainga* (n 58) 9.

108 *Salem* (n 10) paras 5-8.

109 para 9.

110 As above.

111 *Salem* (n 10) paras 9-10.

112 para 97.

113 paras 52-58.

Children's Charter requires state parties 'to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter'.¹¹⁴ It requires state parties to take steps to implement the provisions of the African Children's Charter. The Committee explained that the enactment of legislation that prohibited slavery was insufficient to comply with its obligations under article 1(1) of the African Children's Charter.¹¹⁵ Legislative measures must be implemented and reviewed on a consistent basis.¹¹⁶ The Committee explained that other measures included administrative and judicial measures.¹¹⁷ The Committee outlined that overall, implementation required a holistic approach that engages many sectors and focuses on children's rights, including child protection, making children visible in budgeting and access to justice for children.¹¹⁸ In addition to legislative and other measures, the Committee explained that the obligation to implement the provisions of the African Children's Charter under article 1(1) must be viewed in light of the due diligence standard.¹¹⁹

The *Salem* decision improved upon the application of the due diligence standard as compared to *Children of Northern Uganda* by specifically using this standard to assess all of the alleged violations in the Communication.¹²⁰ The African Children's Committee stated that its 'decision should hence be based on the assessment of the due diligence of the respondent state'.¹²¹ For example, it considered whether the government of Mauritania violated its obligation to protect the Salem brothers from discrimination. In this determination, it clearly linked the obligation to protection with the five elements of the due diligence standard.¹²² It found that the government failed to prevent discriminatory treatment and provide adequate remedies.¹²³ Therefore, the Committee used the due diligence standard to determine that the government of Mauritania had breached its obligation to ensure non-discrimination in the realisation of the rights of the Salem brothers.

In *TFA*, the complainants alleged that the government of Cameroon failed to adequately investigate, prosecute, punish and compensate a ten-year-old girl who was a victim of rape.¹²⁴ The victim, with the assistance of her aunt, filed a complaint with the police, yet there were delays in the submission of the police investigation report and filing charges against the accused, which resulted in the dismissal of the

114 African Children's Charter, art 1(1).

115 *Salem* (n 10) para 47.

116 As above.

117 *Salem* (n 10) para 49.

118 paras 48-51.

119 para 52.

120 paras 59-96.

121 para 53.

122 paras 62-64.

123 para 64.

124 *TFA* (n 11) para 6.

case.¹²⁵ The complainants submitted a communication to the Committee stating that the government of Cameroon had violated its obligation to investigate the rape of *TFA*.¹²⁶ Following the example of *Salem*, the Committee applied the due diligence standard to each alleged violation of the African Children's Charter in this decision. The Committee found that the government of Cameroon violated its obligations to implement the African Children's Charter, ensure non-discrimination and prevent abuse and torture.¹²⁷

Due to the circumstances, the decision focused on the elements of investigation and remedies. The Committee emphasised that compliance with the due diligence standard requires 'effective investigation'.¹²⁸ The Committee also found that the government of Cameroon failed to act with due diligence 'by failing to ensure effective remedy to the victim'.¹²⁹ Notably, the Committee recommended that the government of Cameroon pay non-pecuniary damages to the victim.¹³⁰ The overall importance of the *TFA* decision provides another example of the application of the due diligence standard in the context of alleged violations of the African Children's Charter.

Both *Salem* and *TFA* demonstrate that the Committee has evolved its application of the due diligence standard in a clear and deliberate manner. The outcomes of these decisions contributed to holding the states accountable for their violations of the African Children's Charter and providing the children with remedies that address violations of their rights. In *Children of Northern Uganda*, the Committee provided recommendations that responded to the violation of article 22 of the African Children's Charter. It is indeed possible that the deliberate application of the due diligence standard by the Committee in *Salem* and *TFA* led to better outcomes for the children affected by these decisions.

However, when comparing these decisions with *Children of Northern Uganda*, there are important differences to take into consideration. First, *Salem* and *TFA* dealt with situations affecting one or two children rather than a large cohort. Second, these decisions dealt specifically with the operation of domestic criminal justice systems rather than their shortcomings. Third, the time between the submission of communications and the decisions is much less than in *Children of Northern Uganda*. *Salem* and *TFA* demonstrate that when there is sufficient evidence, applying the due diligence standard to a process that already includes elements of protection, investigation, prosecution, punish and remedy can be straightforward and produce outcomes that hold states accountable for violations of the African Children's Charter.

125 *TFA* (n 11) paras 11-17.

126 para 18.

127 *Salem* (n 10) para 83.

128 paras 45, 51, 52, 54.

129 para 57.

130 para 84(b).

Accountability provides a means to control power.¹³¹ Vandenbogaerde states that accountability can be understood as a three-part process, which includes standards, information and sanctions.¹³² Communications under the African Children's Charter fit the definition of the process with the African Children's Charter as the standards, the parties to the communication and any fact-finding missions providing the information and the recommendations of the Committee as the sanctions. Reflecting on the outcomes of *Children of Northern Uganda* in relation to the outcomes of *Salem* and *TFA*, the latter decisions produced outcomes that held the state accountable for the majority of the violations brought forward by the complainants. *Children of Northern Uganda* in contrast held the respondent accountable concerning one violation. The discussion to this point has highlighted several of challenges that many have negatively affected the outcome in *Children of Northern Uganda*, with the application of the due diligence standard being just one of them. The point is that application of due diligence standard in subsequent decisions of the Committee, specifically *Salem* and *TFA* have in principle contributed to better outcomes of the children affected these decisions. This development is at least one indicator of improvement in this accountability mechanism under the African Children's Charter.

4.4 The African Committee of Experts on the Rights and Welfare of the Child's General Comment on article 22

Another motivation to revisit *Children of Northern Uganda* is the Committee's 'General Comment on article 22 of the African Charter on the Rights and Welfare of the Child: Children in Situations of Conflict'.¹³³ It takes a holistic approach the rights and needs of children in situations of armed conflict as it incorporates all of the alleged violated addressed in *Children of Northern Uganda*, namely recruitment, sexual abuse and exploitation, health, education and abduction.¹³⁴ The Committee advocates overall for article 22 of the Charter to 'be interpreted through a child-rights-focused and child-centred lens'.¹³⁵

131 A Vandenbogaerde *Towards shared accountability in international human rights law: law, procedures and principles* (2016) 13.

132 As above 26-28. See also A Schedler 'Conceptualizing accountability' in A Schedler, L Diamond & MF Plattner (eds) *The self-restraining states: power and accountability in new democracies* (1999) 13 14-18; RW Grant & RO Keohane 'Accountability and abuses of power in world politics' (2005) 99 *American Political Science Review* 29 29-30; J Rubenstein 'Accountability in an unequal world' (2007) 69 *Journal of Politics* 616 at 618-620.

133 General Comment on article 22 (n 9).

134 As above.

135 General Comment on article 22 (n 9) para 43.

The due diligence standard is also mentioned in this document.¹³⁶ Most notably, the Committee states: 'It is, therefore, incumbent on the State to exercise due diligence in relation to violations or potential violations of IHL and the African Children's Charter by any actor in conflict on the territory of the state party'.¹³⁷ It explains that the due diligence requirement may arise in relation to a state's obligation or out of a general duty to protect.¹³⁸ What is consistent with the decision in *Children of Northern Uganda* is the use of the due diligence standard. However, the General Comment requires that this standard be engaged if there are violations by any actor. In contrast, the reluctance to consider the respondent's obligations regarding the violations of the LRA is an unfortunate hallmark of *Children of Northern Uganda*. The General Comment highlights a specific aspect of the due diligence standard, namely investigation. The Committee states: 'Justice systems should be adequately resourced to investigate violations against children in armed conflict, and ensure that the perpetrators responsible are brought to justice'.¹³⁹ Reflecting on the discussion of sexual abuse and violation in *Children of Northern Uganda*, the Committee opted to rely upon the results of its investigation rather than interrogating the steps that the respondent had taken to investigate allegations of sexual abuse and violence against children by the UPDF.

The General Comment provides guidance to states to respond to the rights and needs of children in situations of armed conflict in a comprehensive manner. Reflecting on *Children of Northern Uganda*, one lesson that the Committee incorporated into this document is that it should address all of the areas where it was unable to determine violations due to the passage of time and inadequate evidence.

5 CONCLUSION

The outcome in *Children of Northern Uganda* left much to be desired, but there are several lessons to be gleaned from revisiting this early decision of the African Children's Committee. One lesson is the weight ascribed to the information obtained from the Committee's delayed fact-finding mission and its reluctance to consider the government of Uganda's response to the LRA had a negative impact on the outcome of this decision. The lack of clear and deliberate application in *Children of Northern Uganda* also contributed to its unsatisfactory outcome. Another lesson is the Committee improved its application of the due diligence standard in *Salem* and *TFA*. The findings in these decisions demonstrate that despite its shortcoming, the due diligence standard continues to be an important benchmark to assess the acts and omissions of states. This improvement can be said to have contributed to the accountability provided by communications under the African Children's Charter at least in a modest way. Finally, the African

136 General Comment on article 22 (n 9) paras 53 & 62.

137 General Comment on article 22 (n 9) para 53.

138 As above.

139 General Comment on article 22 (n 9) para 26.

Children's Committee moved beyond its decision in *Children of Northern Uganda* to produce a General Comment that overall responds to the rights and needs of children in conflict in a holistic and child-centred manner that *Children of Northern Uganda* could not. In summary, revisiting *Children of Northern Uganda* has demonstrated that the mechanisms around the rights of children on the continent in situations of conflict have moved forward.