

A COMPARATIVE ANALYSIS OF THE RIGHTS OF THE CHILD WITH PARTICULAR REFERENCE TO CHILD SOLDIERS

By

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DECLARATION

I Joel Olanukanmi Anwo hereby declare that this thesis, A Comparative Analysis of the Rights of the Child with Particular reference to Child Soldiers, is my own work except where reference has been made to published literature and I further declare that it has not been previously submitted for any degree at any university.

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Signature:

Date:

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DEDICATION

This work is dedicated to my Parents Chief Otolorin and Mrs. Moyoade Anwo; my wife, Lola and my children Ifeoluwa, Itunun and Ibunkun.

ABSTRACT

The recruitment, enlistment and forceful conscription of children as soldiers is a cause for grave concern all over the world and most especially in Africa, where years of factional fighting, civil wars and cross border conflicts have raged, children and youth have been pulled into violence not only as victims, but also as perpetrators.

The involvement of children in war poses a severe challenge to prevailing moral and legal norms of the conduct of modern warfare. A major problem and most controversial issue, among others, is on the age at which children should be eligible to become combatants. Children, who may be viewed as a valuable resource due to their often inherent malleability, wish to avenge family member(s) killed in war, sense of immunity to danger, and or feeling of power in participating in the violence. Can the use of children as soldiers be effectively regulated in Africa?

All efforts to assist child soldiers in recovering from the devastating effects of wars often unwillingly helped promote the growing number of child soldiers. This is in part because wars are now more fought internally among rebel armies and factions vying for power with the government and thus enlist children into their various armies.

The study comes to a conclusion that drastic steps need to be taken to ameliorate this unfortunate situation. This formed the basis of the recommendations offered in the thesis to assist the African continent.

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LIST OF ABBREVIATIONS

AFRC	Armed Forces Revolutionary Council
AIDS	Acquired Immuno-deficiency Syndrom
AJIL	American Journal of International Law
AI	Amnesty International
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CDF	Civil Defence Forces
Charter UN	Charter of the United Nations
CONADER	Commission Nationale pour la Demobilisation et la reinsertion
CRC	Convention on the Rights of the Child
DCI	Defence for Children International
DDR	Disarmament, Demobilization and Reintegration
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of Congo
ECOMOG	Economic Community of West African States
ECOWAS	Economic Community of West African States
ECHR	European Convention on Human Rights

ECtHR	European Court of Human Rights
ETS	European Treaty Series
EU	European Union
FRY	Federal Republic of Yugoslavia
FARC	Fuerzas Armadas de Colombia
FAO	Food and Agriculture Organization
HVO	Bosnian Croat Forces
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	The International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
ISS	Institute for Security Studies
HIV	Human immuno-deficiency virus
ILC	International Law Commission
ILO	International Labour Organisation
LRA	Lord's Resistance Army
MDRP	Great Lakes Region of Central Africa
NGO	Non-governmental organisation

NATO	North Atlantic Treaty Organisation
MONUC	United Nations Mission to the Democratic Republic of Congo
OAS	Organisation of American States
OAU	Organisation of African Unity
PCIJ	Permanent Court of International Justice
RTS	Radio-Television Serbia
RUF	Revolutionary United Front
UK	United Kingdom
UN	United Nations
UNTS	United Nations Treaty Series
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCR	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
UNOMSIL	United Nations Observer Mission in Sierra Leone
UNOGBIS	United Nations Peace-building Support Office in Guinea-Bissau
UNAMSIL	United Nations Peacekeeping Mission in Sierra Leone
UNDP	United Nations Development Programme
WHO	World Health Organisation
USA	United States of America
UDHR	Universal Declaration of Human Rights
VCLT	Vienna Convention on the Law of Treaty

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Prosecutor v. Kunarac and others. Case No. IT-96-23-T and IT-96-23/I-T, judgment of the Trial Chamber, 22 February 2001, paras 523.

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CHAPTER ONE

INTRODUCTION AND HISTORICAL BACKGROUND

1.1 Introduction

The participation of children as soldiers either by persuasion or coercion to fight in or otherwise provide support for state or non-state parties in armed conflict is a disturbing and challenging global development. This is historically unprecedented both in terms of its scope and the almost inconceivable levels of abuse of children. The trend is becoming increasingly apparent with non-state armed groups, most of which operate well outside of, and in flagrant disregard for, any notion of human rights or international humanitarian law.¹ Addressing non-state cases is more problematic because non-state entities exist and operate beyond the reach of the law. It may appear advantageous that both the human rights and humanitarian traditions do have applications to minors in cases of international and non-international armed conflict. However, there are shortcomings within them as well as discrepancies between them. Because both branches of the law were historically unprepared for the emergence and growth of the child soldiers, they evolved as patchwork developments, resulting in inconsistencies, and contradictions; legal lacuna and lack of clarity which beset the phenomenon even today.²

Any conflict leaves children and youth orphaned, displaced, or responsible as heads of household when one or both parents are killed or away fighting. Schools which might otherwise occupy their time are destroyed or closed; fields they might otherwise plant are off-limits because of combat or mines; relatives and neighbours are arbitrarily arrested, humiliated, abused, or tortured. Such youth are at risk for recruitment or in their desperation, become receptive to ideological propaganda encouraging them to enlist for combat. Often a gun is a meal-ticket and a more attractive option than sitting at home afraid and helpless.

¹ Adam Robert & Richard Guelff, Documents on the Laws of War. Oxford University Press, 2000, p. 1.

² Mary- Jane Fox, Child Soldiers and International Law: Patchwork Gains and Conceptual Debates, HRR, Oct 2005, Vol.1, p. 27.

Youth have trained for battle throughout history, but the weight of the weapons often limited their actual involvement. Today, arms technology is so advanced that even small boys and girls can handle and operate common weapons like M16 and AK47 assault rifles. More children can be useful in battle with less training than ever before, a factor that makes them attractive as recruits.³

Growing international concern has resulted in significant legal developments, including the conclusion of new treaties on this topic.⁴ Many of the treaties seek to regulate the recruitment and use of child soldiers. More recently, however, individual recruiters themselves have been targeted.⁵ Child recruitment is now a crime under international law.⁶

1.1.2 Historical Background to the prohibition of child soldiers

Although historically children have taken part, both directly and indirectly, in hostilities, the instances are few and far between, and bear little resemblance to the late twentieth century. Cited examples include the children's crusade of the thirteenth century, boys and youth selected as squires to knights in the Middle Ages, drummer boys in the eighteenth century and combatants in the Hitler Youth in World War II. These and other examples that are mistakenly referred to as evidence of "children's engagement in military activity" is not new.⁷ On the contrary, it is important to stress that the contemporary child soldiers'

³ Guy Goodwin-Gill and Dr Ilene Cohn. *Child Soldiers: The Role of Children in Armed Conflict*, Clarendon Press Oxford, 1994, p. 23.

⁴ Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977). Entered into force on 7 December 1978; Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977). Entered into force on 7 December 1978; Convention on the Rights of the Child (1989), United Nations, Treaty Series, Vol. 1577, p. 3. Entered into force on 2 September 1990; African Charter on the Rights and Welfare of the Child (1990). Entered into force on 29 November 1999 and Optional Protocol to the Convention on the Rights of the Child on the involvement of the children in armed conflict (2000), A/RES/54/263. Entered into force on 12 February 2002.

⁵ Norman's indictment. Available at <http://www.sc-sl.org/Documents/SCSL-03-08-PT-002.pdf> (Accessed and last visited on 27 April 2006).

⁶ Ibid.

⁷ Michael Wessells, "How We Can Prevent Child Soldiering", PR, 12:3 (2000), p.407; Frank Faulker, "Kindergarten Killers: morality, murder and the child soldier problem", TWQ, Vol. 22 No.4, p.494 and Peter W. Singer, "Fighting Child Soldiers", MR, May- June 2003, pp. 28-29.

phenomenon is very new indeed. In the post-cold war era it has reached proportions that stretch far beyond any previous occurrences in human history.

The child soldiers issue now occurs globally, both across continents and throughout cultures. It is estimated that 300,000 children are active militarily at any time, which may well seem extreme to some and insignificant to others. However, the usefulness is not so much a matter of numbers as it is the distribution, excesses, and rising frequency, which together suggest the possible birthing of a new and monstrous conflict norm. This trend promotes the idea that children are fair game for recruitment, that they are expendable commodities, and that they are entitled to special rights protections.⁸

Until the adoption of the United Nations Convention on the Rights of the Child (CRC) in 1989⁹, there was no universal definition of a 'child'. Article 1 of CRC provides that: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier".

The Article uses the age 18 years to differentiate between children and adults on the basis of the voting age reported in most of the countries of the world. It must be acknowledged that considerations of the child's maturity and independence have evolved over centuries and have differed widely across cultures and beliefs. Given the variety of religions and cultures, the use of another criterion, such as the legal age for marriage would have made the consensus on Article 1 difficult.¹⁰

At a major conference held in Geneva in 1949, the assortment of customs, treaties and declarations governing the conduct of hostilities was defined, extended and codified in four conventions, later known as Geneva rules. The Geneva rules did not set out to guarantee non-combatants immunity from the violence of war for child soldiers. Rather, the aim was to shield persons

⁸ Jane Fox, n. 2 above, p. 27.

⁹ United Nations, *Treaty series*, Vol 1577, p.3. Entered into force on 2 September, 1990.

¹⁰ Barbara Fontana, 'Child Soldiers and International Law', *African Security Review* 1997, Vol.6 no 3, p.1.

belonging to one belligerent party from the arbitrary exercise of power by another party. Hence, the principal purpose of the four Geneva Conventions was to protect certain categories of people who fell into the hands of an adversary during an armed conflict.¹¹

The Fourth Geneva Conventions of 1949 was concerned with the Protection of Civilian Persons in Time of War. Parts II and III contains an extensive catalogue of rules intended to protect civilians from the physical and psychological suffering of hostilities, mainly by isolating them from the conflicts. Part II makes certain protections available to all civilians, whether or not they happen to be national of states party to the Convention.¹² Of these provisions, some are explicitly aimed at children, such as those allowing the creation of hospitals and safety zones¹³ and those providing for free passage of relief consignments.¹⁴ The most comprehensive safeguards are found in Article 24, which provides that children under 15 years who are orphaned or separated from their families should be protected. States parties are obliged to facilitate their maintenance, education and exercise of their religion.

Part III of the Convention contains an even more extensive set of protections, but it has a narrower field of application, since it applies only to “protected person”. This category is defined to mean those individuals who find themselves, in case of a conflict or occupation, in the hand of a Party to the conflict or Occupying Power of which they are not nationals¹⁵.

¹¹ T.W. Bennett, “Criminalizing the Recruitment of Child Soldiers”, Institute for Security Studies (Pretoria) Monograph No 32; Using Children in Armed Conflict: A Legitimate Africa Tradition? December 1998, p. 6.

¹² Article 13 Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949), United Nations, Treaty Series, Vol. 75, p. 287. Entered into force on 21 October 1950.

¹³ Ibid., Article 14.

¹⁴ Ibid., Article 23.

¹⁵ Ibid., Article 4.

The Fourth Convention is applicable in any case of armed conflict or war and in situations of partial or total occupation.¹⁶ This, however, applies to conflicts of an “international character”, with the implication that the safeguards outlined above do not apply to “non-international” or internal conflicts. Given the fact that since the Second World War most conflicts have been “non-international”, this provision severely restricts the ambit of the Geneva Conventions. Though the Geneva Conventions appreciated that internal conflicts could not be left unregulated, Article 3 which is common to all the four Conventions extends certain minimum protections derived from customary international law to non-combatants, the sick and the wounded.

However, the bulk of Child-specific articles can be found in the Fourth Geneva Convention, the Protection of Civilian Persons in Time of War. These relate to maintenance and education entitlements for orphans, punitive restrictions, and military exemption.¹⁷ It does not consider the prospect of child soldiers as it is known today.

The 1949 Geneva Conventions only protected children as members of the civilian population and therefore, by definition, as non-participants in armed conflicts. This appears to have served as a precedent for subsequent legal developments pertaining to children in situations of conflict.

It was not long before the Geneva Conventions were seen to be insufficiently comprehensive, and in the 1950s and 1960s, conflicts relating to liberation movements fighting for independence and the new post-colonial states came on the rise. Two Additional Protocols were adopted in 1977 in order to supplement the Four Geneva Conventions.¹⁸ Additional Protocol I applied to certain types of internal armed conflict, namely, those in which people were fighting against

¹⁶ Ibid., Article 2.

¹⁷ Ibid., Articles 50, 51 and 68.

¹⁸ Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977). Entered into force on 7 December 1978; Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977). Entered into force on 7 December 1978.

colonial domination, alien occupation and racist regimes to assert their right to self-determination.¹⁹ In this instrument, the first attempt was made to address the problem of children participating in hostilities. The Fourth Geneva Conventions had prohibited a belligerent from recruiting “protected persons” which included children of an adversary to its armed forces,²⁰ but this was an unexceptional provision taken from customary international law. The Protocol went further by requiring states to refrain from recruiting children who were their own nationals.

However, the Additional Protocol I is extensive, consisting of 102 articles. Both Spain and the United Kingdom entered reservations to Protocol I, which reflected their problems respectively with the Basques and the Irish Republican Army (IRA) at that time. Article 77(2) of Protocol I provides:

“The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of 15 years but who have not attained the age of 18 years, the Parties to the conflict shall endeavour to give priority to those who are oldest.”

Paragraph 3 provides:

“if in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of 15 years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.”²¹

¹⁹ Articles 1(4) and 44(3) Protocol I.

²⁰ Article 51 Protocol I.

²¹ Article 77 (1) Protocol I, 1977 requires “special respect” for children and protection “against any form of indecent assault.” If arrested or detained, Articles 77 (4) and (5) require that children must be held in quarters separate from adults and those who are under 18 years may not be subjected to the death penalty.

The phrase “take all feasible measures” was a diplomatic compromise that allowed states party considerable freedom to evade a general prohibition. No minimum age limit was attached to the term “children” in Article 77 (2). Admittedly, this omission was deliberate, partly to evade any debate about what the minimum age for recruitment should be and partly to accommodate the diversity of national laws defining a child at a different age. Nonetheless, the absence of any definition of childhood left a potentially troublesome area of ambiguity that states could exploit and have exploited to their own advantage.

Finally, parties to the Protocol were obliged only to ensure that children did not take a “direct” part in hostilities. Qualifying the nature of participation in this manner had the immediate effect of opening up a debate about what constituted “direct” or “indirect” participation, with the corollary that states could allow children to take part in an intermediate range of “indirect activities”.

The term “direct”, which is repeated elsewhere in the Protocol²², was no doubt intended to denote some form of active engagement in hostilities alongside the regular armed forces. According to the International Committee of the Red Cross (ICRC), it meant a causal connection between the acts of participation and its immediate result in military operations.²³ Hence, “direct” participation would imply any attempt to kill, injure and capture enemy soldiers or any attempt to damage military materials and installations. It would probably also include conveying arms and equipment to regular troops, artillery spotting, spying and sabotage. “Indirect” participation, on the other hand, would probably denote support activities, such as gathering and transmitting information, manufacturing munitions or performing minor service tasks, such as cooking food and cleaning.

Recent evidence shows that children who start their military engagement in a support role usually graduate to becoming active combatants.²⁴ Whether

²² In Articles 43 (2) and 51 (3) of Protocol I, 1977 provide that civilians enjoy protection unless and until they take a direct part in hostilities.

²³ H. Man, *International Law and the Child Soldier*, ICLQ, 36, London, 1987, p. 32.

²⁴ R. Brett, *Child Soldiers: Law, Politics and Practice*, IJCR, 4, Kluwer, Netherlands, 1996, p. 115.

children participate directly or indirectly, they are placed in danger. In the first place, even a low level of involvement as a messenger or menial camp attendant exposes children to attack by the enemy. In the second place, association with a war effort means that if captured, a child could be treated as a spy, saboteur or illegal combatant.²⁵

It was partly to cater for the last possibility that paragraph (3) was added to Article 77. This unusual provision seeks to regulate what was already seen as being a likely infraction of the general rule. If children under 15 years were in fact to participate directly in hostilities, they would stand to lose their entitlement to prisoner of war status under the Third Geneva Convention. Article 77 (3) therefore provided that such children would still be deemed “protected persons.”

Additional Protocol II was intended to supplement the common Article 3 provisions in the Four Conventions on “non–international” armed conflicts, but it is applicable to conflicts not covered in Protocol I. They are defined as conflicts between state armies and organized armed groups which operate under a responsible command structure and exercise sufficient control over a portion of a state’s territory to enable them carry out sustained military operations.²⁶ Although Protocol II regulates the most serious and prevalent type of internal conflict, it does not apply to lesser forms of disorder, namely, “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence.”²⁷ Protocol II listed in Article 4 (3), certain fundamental protections for non–combatants including what are probably still the most comprehensive regulations on the recruitment of child soldiers today.

Human rights law in general can be understood as having become highly developed in a relatively short period of time. The recognition of the child as a person needing special legal consideration was already evident in the early

²⁵ Y. Sandoz (eds.), *Commentary on the Additional Protocols*, ICRC, Martinns Nijaoff Geneva, 1987, p. 901.

²⁶ Article 1 (1) of Protocol II.

²⁷ Article 1 (2) of Protocol II.

nineteenth century when child labour laws began to be established. The plight of young people working in textile factories up to 16 hours a day with little or no pay and under hazardous conditions became increasingly evident in both Europe and the United States, leading to increasing legal improvements for children as the century moved on.

The adoption of CRC is considered, therefore, to be a ground-breaking development.²⁸ This is not only due to the fact that it is the first significant international instrument specifically applying to children, or for the admirably wide range of issues it addresses, but also because, to date, it has been “almost universally ratified”.²⁹ It prioritizes the interests of the child³⁰ by clearly defining a child as every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier”³¹

The purpose of the Convention is to secure special care and protection for children. Thus, Article 3 (1) provides that the child’s interests are to be given primary consideration and Article 6 (2) obliges states parties to ensure “to the maximum extent possible for the survival and development of the child. Other Articles recognize a child’s right to health and care services,³² a standard of living adequate for his/her development,³³ and a right to education.³⁴

Certain provisions deal specifically with the position of children caught up in around conflicts. These were an innovation for human rights law, because previous treaties in the field had included special rules only by reference. The

²⁸ Two years after the CRC came into force; the Organization of African Unity promulgated African Charter on the Rights and Welfare of the Child (1990). Entered into force on 29 November 1999.

²⁹ Coalition to stop the use of Child Soldiers, Child Soldiers Global Report 2001, p. 39; only Somalia and the United States of America have not yet signed and ratified the CRC.

³⁰ Article 3 and 6 are particularly relevant in this regard.

³¹ Article 1 of Convention on the Rights of the Child, 1989.

³² Ibid., Article 24.

³³ Ibid., Article 27.

³⁴ Ibid., Article 28.

CRC, however, directly obliges state parties to respect the rules of humanitarian law relevant to children³⁵ and to promote the “physical and psychological recovery and social reintegration” of children who have been war victims.³⁶

The Convention has a special provision on using children in armed conflict. Article 38 (2) provides that “State Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities”.³⁷ The Article transcends the technical distinctions bedeviling the application of the Geneva Protocols. Thus Article 38(2) applies whether a situation qualifies as an international conflict, an internal conflict for exercising the right of self-determination (under Protocol I) or a high-intensity conflict between a government and organized groups (under Protocol II).

However, Article 38(2) can hardly be considered as a full or satisfactory answer to the problem of children becoming involved as combatants in hostilities. It merely repeats the terms of Article 77(2) of Protocol I, with all ambiguities and failings of the Article.³⁸ While the CRC was being drafted, attempts were made to improve on the Geneva Protocol, both by raising the minimum age to 18 years and by requiring states to take “all necessary measures” or adopt “legal, administrative and other measures” to prevent children from participating in hostilities. These proposals were defeated by the need to achieve consensus. The United States argued that the CRC was not the proper vehicle for rewriting humanitarian law.³⁹

One of the most contentious provisions is Article 38(2). Although, for the other purposes in the Convention, a child is defined as any person below the age of 18

³⁵ Ibid., Article 38.

³⁶ Ibid., Article 39.

³⁷ S. Detrick (ed.), the United Nation Convention on the Rights of the Child: a guide to the “*travaux Préparatoires*”, Kluwer, Netherlands, 1972, p. 502.

³⁸ Article 41, Convention on the Rights of the Child, 1989.

³⁹ C. Hamilton and T. Abu El- Haj, Armed Conflict: The Protection of Children under International law, International Journal of Children’s Rights, 5, Kluwer, Netherlands, 1997, p. 36.

years, Article 38(2) specifies 15 years. The final version of this Article was the result of a protracted debate.⁴⁰ When the Working Group began to discuss proposals way back in 1986, no age was mentioned, for it was assumed that the general age of 18 years would be applicable. The British, Soviet, Canadian and American among other delegates, argued for 15 years because it was in line with the provisions of international humanitarian law and their national legal systems. On the other hand, Sweden, Switzerland and the Red Cross, argued for 18 years to keep the Article in harmony with human rights. From the final session of the Working Group, the age of 15 years eventually emerged.⁴¹

Therefore, states in favour of 18 years are free to interpret Article 38(2) in the light of Article 41 which provides that any conflict between the provisions of the Convention and states obligations under municipal or international law must be settled in favour of which rule gives a child the greatest protection. To this end, when certain states, such as Argentina and Austria ratified the CRC, they made special declarations that they would enforce the age of 18 years.⁴²

Precisely two years after the CRC came into force, the Organization of African Unity (now the African Union), promulgated the African Charter on the Rights and Welfare of the Child, 1990. This instrument met some of the objections to Article 38(2) of CRC. Article 22(2) of the former Convention requires parties simply 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”.⁴³ Unfortunately, the Charter is a regional treaty open to members of the African Union only.

The two final concerns about the CRC involve the possibility of states derogating from its provisions in times of internal unrest and the problem of enforcing the Convention against rebel groups. In the Convention itself, room is made for

⁴⁰ L.J LeBlance, *The Convention on the Rights of the Child: UN Lawmaking on Human Rights*, University of Nebraska Press, Lincoln and London, 1995, p. 150.

⁴¹ T.W. Bennett, n. 11 above, p. 6.

⁴² Goodwin-Gill et al, n. 3 above, p. 187.

⁴³ Article 2, African Charter on the Rights and Welfare of the Child 1990.

derogation from the freedoms of expression, religion and association in the interests of national security, public safety or public order.⁴⁴ On an analogy with systems of constitutional law, the application of other provisions might also be suspended for similar reasons. Once it is conceded that governments may limit the rights enshrined in the Convention, they may have a justification for starting to recruit child soldiers.⁴⁵

The other problem is posed by a general breakdown of state authority. If through external aggression or internal unrest a government loses its ability to maintain law and order, can the government still be held responsible for failing to enforce all the prescriptions of human rights law? In particular, can that government be considered responsible for the actions of rebel forces? As a human rights document, it is limited to addressing states to a conflict and not other parties such as non-state armed groups. By definition it is the latter groups that place themselves beyond the reach of state power.

This shortcoming was quickly recognised, and by 1992 the UN Committee on the Rights of the Child convened a Theme Day on Children in Armed Conflict to remedy this defect and to extend the scope of Article 38(2) of the Convention. This necessitated drafting an Optional Protocol on the Recruitment of Children into Armed Forces. The main point of the improvement was to modify the age criterion so that the Article is in harmony with the rest of the Convention. The idea was therefore to raise the age of any form of enrolment to the age of 18 years.

The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict⁴⁶ consists of just thirteen Articles, the first four of which are most notable. As at 31 May 2006, it had been signed by 107 states,⁴⁷ including the United

⁴⁴ Ibid., Articles 13, 14 and 15 respectively.

⁴⁵ Hamilton et al, n. 39 above.

⁴⁶ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (2000), A/RES/54/263. Entered into force on 12 February 2002.

States.⁴⁸ In regard to a state's armed forces, Article 1 instructs states to "take all feasible measures" to ensure that any under-18 year olds within its armed forces do not take a direct part in hostilities. This is a leap from Article 38 of the CRC, which prohibits only those under the age of fifteen from taking a direct part in hostilities. However, the "direct part" proviso is maintained. Article 2 prohibits the compulsory recruitment of under-18 years-olds into a state's armed forces. This is an improvement over the CRC, which does not specifically include restrictions on compulsory recruitment.

With no distinction made between "direct" or "indirect" participation in hostilities, restrictions and safeguards concerning under-18 voluntary recruitment is covered in four paragraphs of Article 3.⁴⁹ As mentioned above, Article 3 (1) requires States Parties to raise the minimum age for voluntary recruitment in States armed forces, but it does not specify to what age it must be raised to. This resulted in the minimum age increasing by one year, from 15 year to 16 years.

Article 4 refers to arm groups "that are distinct from the armed forces of a state", a category which also was not specified in the CRC. In the later Article, non-states armed groups "should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years". This is a substantial step towards weakening the long-existent trend of a two-tiered age division within the under-18 years age group. Although human rights instruments are only directed to states, and therefore difficult to enforce against non-states actors, the inclusion of this aspect in the Optional Protocol reflects a long sought-after norm awaiting codification.⁵⁰

⁴⁷ See Vladimir Volodin, 'Human Rights, 'Major International Instruments' Status as at 31 May 2006, UNESCO 2006'.

⁴⁸ Michael Southwick, "Political Challenges Behind the Implementation of the Optional Protocol to the Convention on the Rights of the Child, *Cornell International Law Journal* Vol. 37 no.3 (2004) p. 544.

⁴⁹ The restrictions and safeguards include such provisions as the informed consent of parents or guardians, full disclosure of what duties are expected, and proof of age.

⁵⁰ Fox, Mary-Jane, *Child Soldiers and International Law; Patchwork Gains and Conceptual Debates*, HRR, October 2005, Vol.7 1, p. 27.

The remaining Articles⁵¹ concern such issues as non-derogation, the responsibilities of States Parties in terms of implementation and enforcement⁵², the promotion of demobilisation, disarmament and reintegration programs, reporting on implementation, and the final clauses⁵³ of the Protocol.

Conclusively, the Optional Protocol complements the CRC. Even though it may not have achieved the desired end, it does create awareness of the special needs of child soldiers in situation of peace or conflict.

The African Charter on the Rights and Welfare of the Child is the only regional human rights treaty specifically concerned with children's rights. It is also the only regional human right treaty which deals with children's involvement in armed conflict. The Charter was adopted by the member states of the Organisation of African Unity on 11 July, 1990⁵⁴ followed the Declaration on the Rights and Welfare of the African Child adopted by the Assembly of Heads of State and Government of the then OAU in 1979⁵⁵. This Declaration did not make any specific reference to children and armed conflict.

Nevertheless, the African Charter provides additional protection for children under 18, requiring States Parties to implement "all necessary measures" to prevent such children from participating directly in hostilities. By prohibiting all the recruitment of children, the African Charter went further than the Optional Protocols and ILO Convention 182.⁵⁶ Although ratification was slow and the Charter only entered into force on 29 November 1999, thirty two out of the fifty three Members States of the African Union are now parties to it. Indeed, the

⁵¹ Article 6 Optional Protocol.

⁵² Ibid., Articles 7 and 8.

⁵³ Ibid., Articles 10, 11 and 12.

⁵⁴ OAU DOC. CAB/ LEG/ 24.9/ 49 (1990), available at <http://www.unhcr.ch/reformed>. In March 2001, the OAU become the African Union (AU).

⁵⁵ OAU Doc. AHG/ ST.4/ Rev.1 (1979).

⁵⁶ ILO Conference, 87th Session, Geneva, June 1999. Report of the Committee on Child Labour (Corr.) p. 6.

African Charter seems to be the only one that conforms to “straight-18” ban on the recruitment and use of children to participate in hostilities.

1.1.3 The Phenomenon and Recruitment of Child Soldiers

The vast majority of young soldiers are not forced or coerced into participating in conflict, but they are subject to many subtle manipulation and pressures that are all the more difficult to eliminate.⁵⁷ The abduction and forced conscription of children into conflict as soldiers and combatants, first gained prominence in Africa during 1980, when Museveni’s resistance force had recruited an estimated 3,000 *kadogos* (Figurative word adopted from Ki-Swahili and used in Uganda to mean ‘a child’ or ‘a small child’). All *Kadogos* were under the age of 16 years and approximately one-sixth were young girls. It is difficult to form an accurate account of how these children were treated, because little documentation and few verbal accounts exist. Studies undertaken suggest that beyond insufficient training and exposure risk, most children were treated as adult soldiers.⁵⁸ The history of conflict in Uganda has been tainted with brutality aside from forced recruitment.

In many instances, recruits are arbitrarily seized from the streets or even from schools or orphanages. This form of press ganging, known in Ethiopia as “afesa”, was prevalent in the 1980’s, when armed militia, police and army cadres would roam the streets picking up anyone they encountered.⁵⁹ Children from poorer sectors of society are particularly vulnerable. Adolescent boys, who work in the informal sector selling cigarettes or gum or lottery tickets, are a particular target.

In Myanmar, whole groups of children from 15 to 17 years old have been surrounded in their schools and forcibly conscripted. Those who can

⁵⁷ Guy Goodwin-Gill et al, n. 3 above, p. 30.

⁵⁸ Angela Veale and Aki Stavrou, “Violence, Reconciliation and Identity.” The Reintegration of Lord’s Resistance Army Child Abductees in Northern Uganda, ISS Monograph No 92 November 2003, p. 10.

⁵⁹ Brett, Rachel, Margaret McCallin and Rhonda O’ Shea, “Children; The invisible Soldiers”, Geneva, Quaker United Nations Office and International Catholic Child Bureau, April 1996, p. 23.

subsequently prove that they are under-age may be released, but not necessarily. In all conflicts, children from wealthier and more educated families are at less risk. Often, they are left undisturbed or are released if their parents can buy them out. Some children whose parents have the means are even sent out of the country to avoid the possibility of forced conscription.

In addition to being forcibly recruited, youth also present themselves for military service which may not always be considered as voluntary. While young people may appear to choose military service, the choice is not exercised freely. They may be driven by several forces, including cultural, social, economic or political pressures.⁶⁰

One of the most basic reasons why children join armed groups is economic. Hunger and poverty may drive parents to offer their children for service. In some cases, armies pay a minor soldier's wages directly to the family.⁶¹ Children themselves volunteer where they believe that this is the only way to guarantee regular meals, clothing or medical attention. In some instances, parents encourage their daughters to become soldiers if their marriage prospects are poor.⁶²

As conflicts persist, economic and social conditions worsen and educational opportunities become more limited or even non-existent. Under these circumstances, recruits tend to get younger and younger. Armies begin to exhaust the supplies of adult manpower and children may have little option but to join. Until recently in Afghanistan and Liberia, approximately 90 percent of children have had no access to schooling; the proportion of soldiers who are children is thought to have risen to roughly 45 percent.⁶³

⁶⁰ Graca Machel, *The impact of Armed Conflict on Children*, A/51/306, UN Department of Information, New York, (1996). p. 12.

⁶¹ Brett et al, n. 59 above. p. 33.

⁶² Ibid., p. 3.

⁶³ Ibid., p. 29.

Some children feel obliged to become soldiers for their own protection. Faced with violence and chaos all around, they decide they are safer with guns in their hands. Often such children join armed opposition groups after experiencing harassment from government forces. Many children joined the Kurdish rebel groups, for example, as a reaction to scorched earth policies and extensive human rights violations during the Saddam Hussein regime. In El Salvador, children whose parents had been killed by government soldiers joined opposition groups for protection.⁶⁴ Moreover, the lure of ideology is particularly strong in early adolescence, when young people are developing personal identities and in search for a sense of social meaning. The case of Rwanda⁶⁵ shows that the ideological indoctrination of youth can have disastrous consequences. Children are very impressionable and may be lured into cults of martyrdom. In Lebanon, Sri Lanka, Iran and Afghanistan, for example, adults have used children to their own advantage, recruiting and training adolescents for suicide bombings.⁶⁶ However, it is important to note that children may also identify with, and fight for, social causes, religious suppression, self-determination or national liberation. This happened in South Africa during the Soweto uprising or in the occupied territories of Palestine where children joined the struggle as combatant in pursuit of political freedom.

Conclusively, this research will focus on practical steps to be taken to prevent future recruitment and to stop this outrage. What can be done in Africa to stop children from being recruited into the army against their will and all reasoning and laws?

Firstly, African Union should work for the enforcement of Articles 2 and 22 of the Declaration of the African Child and Optional Protocol to the CRC. Secondly, she must pay much closer attention to the methods of recruitment, and in particular, renounce the practice of forced recruitment. She should ensure that all children are registered at birth and received documentation of age; establish effective

⁶⁴ Graca Machel, n. 60 above, p. 25.

⁶⁵ Ibid., p. 12.

⁶⁶ Ibid.

monitoring systems and back them up with legal remedies and institutions that sufficiently take care of abuses. AU should educate her community leaders or create awareness of the law governing the age of recruitment. She should ensure that major actors and perpetrators of these abuses are not covered up or protected but prosecuted as deterrence for others.

The case of Sierra Leone is a good example. In 2002, once the ceasefire was established and efforts went underway to rebuild the country, the Special Court for Sierra Leone commenced proceedings.⁶⁷ Although it was argued that the Special Court is a national and not an international court, its Appeals Chamber ruled that it is “an International Criminal Court properly constituted under international law”.⁶⁸ More importantly the Appeal Chamber ruled that the prohibition of recruitment of children as soldiers “had crystallised as customary international law”.⁶⁹ This had been argued otherwise by the defence lawyers of Sam Hinga Norman, who was in the custody of the Court and had been accused of recruiting children as soldiers.⁷⁰ In defence he argued that during the time in question, the recruitment of children was not a crime under international law. Although the Court is mandated to try individuals for offences taking place after 30 November 1996, it held that the prohibition on child recruitment had crystallised as customary law before this date. It cited “the widespread recognition and acceptance of the norm” in several international legal instruments, including the 1990 African Charter on the Rights and Welfare of the Child. With the World’s attention turning on the offenders of child recruitment, the easiness with which they escaped accountability in the past no longer guaranteed. Therefore, a blanket protection of the rights of children might not be far off.

⁶⁷The Special Court was created by the United Nations and the Government of Sierra Leone in the year 2000.

⁶⁸www.sc-sl.org/pressrelease-060104.html (Accessed and last visited on 27 April 2007).

⁶⁹Norman’s indictment, n. 5 above.

⁷⁰Ibid.

1.2 Rationale and Justification for the study

The research will provide in-depth analysis of the phenomenon of child soldiers and the norms that have evolved to prohibit their recruitment in particular, and protect children in general. Some children are conscripted, others are press-ganged or kidnapped and still others are forced to join armed groups to defend their families or themselves. Who is a child and what rights does a child have? Consideration will be given to the notion of rights and origin of children's rights in the society. There is need to expand the definition of 'child soldier' to include children up to 18 years old so as to protect a large number of casualties usually recorded with in this age group.

Many African countries effectively protect children against military recruitment and their use as soldiers but others fail to meet the standards they themselves have set.⁷¹ The use of children as soldiers is the result of deliberate action, or in some cases, deliberate inaction. Having succeeded in abolishing the evil practice of slave trade and slavery, the use of child soldiers, child trafficking and child labour are other manifestations that must be confronted. The research will reveal the abuses and violations of the child soldiers rights' by the very governments that are suppose to protect them.

An attempt will be made to find out the reasons why governments and rebel groups embark recruit child soldiers, and how this practice can be stopped. Countries with weak administrative systems do not conscript systematically from a register. In many instances, recruits are arbitrarily seized from the street or even from schools and orphanages.

It is important to point out that reality does not always conform to the standard set forth in international treaties and other regulatory frameworks. Commanders of armed groups are usually illiterates, unaware of those standards, and out of the reach of state authority. Even when the standard are understood, they are often deliberately flouted without repercussions because the enforcement mechanisms available to the international community are weak, consisting mainly of diplomatic and international pressure, and at most "naming and shaming" by

⁷¹ The Use of Children as Soldiers in Africa in Coalition to Stop the Use of Child Soldiers, 1st edition, March 1999.

the UN General Assembly. That is why the international community should be commended on the establishment of a Special Court, to try and convict some of the perpetrators in Sierra Leone.

The phenomenon advances made in science and technology should ordinarily be beneficial to society. However, modern inventions and improvement on munitions, war instruments and growing international arms trade, readily enable children to carry and operate a range of armaments which are cheap and widely available. In Uganda, an AK-47 automatic machine gun can be purchased for the cost of a chicken, and, in northern Kenya, it can be bought for the price of a goat.⁷²

The following international and regional conventions protect children in hostile situations: the Four Geneva Conventions (1949), the Additional Protocols I and II of (1977), the Convention on the Rights of the Child (1990), Regional agreements (such as the African Charter on the Rights and Welfare of the Child (1990), Convention 182 of the International Labour Organisation concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000).

The Geneva Conventions regulate the legal position of members of the civilian population who fell into the hands of an enemy. The Conventions apply to conflicts of an international nature, except common Article 3, which regulates the minimum humanitarian rules in non-international armed conflicts, such as the prohibition of violence to life and persons or the taking of hostages. Seventeen provisions of the Geneva Conventions are explicitly aimed at children. For example, children laying down their arms are entitled to the protection given to all non-participants, and they may not be forced to participate in hostilities against their own country. It is prohibited to change their personal status or to hinder preferential measures in favour of children regarding food or medical care. A power that takes possession of a country must address the educational needs of

⁷² Angela Veale and Aki Stavrou, Violence, Reconciliation and Identity. The Reintegration of Lord's Resistance Army Child Abductees in Northern Uganda, ISS Monograph No 92 November 2003, p. 10.

children of the occupied country's population ⁷³ Although the Conventions' definitions of children differentiate between those under the age of 15 and those who are under 18 years old ⁷⁴, it does not give attention to the recruitment of children into armed forces or groups.

The participation of children in non-international armed conflicts is regulated by the Additional Protocols to the Geneva Conventions of 1949 (1977). The Contracting Parties of Protocol I agree to take all feasible measures to prevent children under the age of 15 from taking a direct part in hostilities. This rule prohibits recruitment into the armed forces, but the vague phrase "take all feasible measures" at the same time allows the issue of general prohibition to be evaded. In recruiting young adults between the ages of 15 and 18, priority shall be given to those who are the oldest (Article 77 of Protocol I). This means, youths between the ages of 15 and 18 are no longer called children and could be understood as legitimate targets of war.⁷⁵

Additional Protocol II applies to conflicts between a government and an organised armed group, which means civil war.⁷⁶ It absolutely prohibits all forms of direct and indirect participation of children under the age of 15 and lists certain essential protections for non-combatants. But both Additional Protocols still leave gaps: There is no minimum age limit for childhood, no definition of the terms "direct" and "indirect participation" and no application to lesser forms of disorder as riots or isolated acts of violence.⁷⁷ Proposals to make an agreement on the age of 18 were rejected in order to achieve consensus.

The CRC provides the basic principle of the best interests of the child and, for example, obliges states parties to guarantee the physical and psychological

⁷³ Goodwin-Gill et al, n. 3 above, p. 123.

⁷⁴ T.W. Bennett, n. 11 above, p. 33.

⁷⁵ Ibid.

⁷⁶ Goodwin-Gill et al, n. 3 above, p. 57.

⁷⁷ T.W. Bennett, n. 11 above, p. 37.

recovery and social reintegration of children who have been victims of war⁷⁸ But although a child is generally defined as a person under 18 years, the article related to children in armed conflicts restates the 15-years-rule. It repeats the Additional Protocol I to the Geneva Conventions with all its failings. For example, there is no definition of the words "to take all feasible measures to prevent children from taking a direct part in hostilities". However, countries such as Sweden and Switzerland made separate declarations that guarantee the age of 18 as a minimum for recruitment into the armed forces.⁷⁹

The declarations of the African Charter on the Rights and Welfare of the Child takes up the minimum age for child soldiering and prohibits the recruitment and direct participation of children under the age of 18 in armed conflicts. The African Charter is open to members of the African Union (formerly Organisation of African Unity) and came into force in 1999. Recently, a number of similar regional declarations emerged, bringing to an end the use of children under 18 years in hostilities, for example, the Capetown Principles adopted by the participants in a symposium organised by UNICEF.⁸⁰

The International Labour Organisation (ILO) adopted in 1999 a Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, such as pornography, prostitution and child soldiering. The treaty forbids forced or compulsory recruitment, but not voluntary enlisting of children under the age of 18 into an armed conflict.

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict prohibits all recruitment of children by armed groups but allows governmental forces to recruit volunteers under the age of 18. The Protocol requires governments to deposit a binding declaration stating

⁷⁸ Article 39 of Convention on the Rights of the Child, 1989.

⁷⁹ Volker Druba, The Problem of Child Soldiers Int'l Review of Education, Vol. 48, No. 3/4, Educational and Human Rights. (Jul., 2002), pp. 273.

⁸⁰ Cape Town Principles and Best Practices, adopted at Symposium on The Prevention of Recruitment of Children into Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa, 27-30 April, Cape Town, South Africa, UNICEF, 1997.

the minimum age they will respect. The Optional Protocol is doubtless an innovation with its adoption by the United States of America who had refused to ratify the CRC.

However, one of the most urgent priorities is to remove everyone under-18 years of age from armed forces. The process of reintegration must help children to establish new foundations in life based on their individual needs and capacity. Reintegration programmes must re-establishes contact with the family and the community. In many cases, reunification may be impossible. Families may have perished in the conflict or may be untraceable. For some children, a transitional period of collective care may be necessary. Education, and especially the completion of primary schooling, must be a high priority. For a child soldier, education is more than a route to employment. It also helps to normalise life and to develop an identity separate from that of a soldier.

1.3 Aims and Objectives

The study seeks to examine the phenomenon of child soldiers, identify the reasons behind the recruitment of children as soldiers, and, uncover practical steps to be taken to prevent their future recruitment. It will analyse and explain, as far as possible, the legal and cultural gaps and deficiencies in the scope and substance of the law with respect to the participation and the protection of child combatants, identifying the psychological, social, cultural, religious, materials and coercive factors that lead to the participations of children in hostilities.

It endeavours to use the experiences of child soldiers in other countries in order to highlight the implications for post conflict reconstruction and peace building. Lastly, it will examine whether the existing law, even if fully implemented, is sufficient to deal with the problems posed by child soldiers, or whether new rules are to be called for.

1.4 Statements of the Problem

The involvement of children in modern combat poses a severe challenge to prevailing moral and legal norms on the conduct of modern warfare. The research will investigate the problematic areas with regard to the rights of the child soldier and the effectiveness of existing regional and international instruments, declarations, norms and standards in addressing the problems affecting child soldiers. The problems include the following:

Firstly, the definition of child soldiers varies between countries and cultures. Most scholars define child soldiers to include persons under the age of 18 years who are recruited to a country's armed forces or to rebel armed groups, whether in war or in peace time⁸¹. The term is used heterogeneous and it includes all children and young adults, whether they are legally conscripted, voluntarily enlisted or recruited by force.

Secondly, a major problem and most controversial issue is on the age at which children should be eligible to become combatants. The 1998 Statute of International Criminal Court specifically made it a war crime to conscript or enlist children under 15 years into armed forces, or use them to participate actively in hostilities.

Thirdly, in today's world, especially in African countries involved in hostilities, the number of child soldiers is estimated between 300,000 and 500,000⁸². It is extremely rare for wealthier children from urban areas to be recruited. Most of the child soldiers come from the poor and marginal sectors of the society or from the actual conflicts zones themselves. They are in fact "child labourers" working under appalling conditions. Few of them have the ability to cope with the identity crises involved.

⁸¹ Volker Druba, 'The Problems of Child Soldiers', *International Review of Education*, Vol. 48, No. ¾, July 2002, p. 271.

⁸² Franklyn kargbo, 'International Peacekeeping and Child Soldiers: Problems of Security and Rebuilding', *Cornell International Law Journal* Vol. 37 No. 3 (2004) p. 487.

Fourthly, there is need to have special rules for the protection of the child soldier. Children are more vulnerable and, consequently, more deserving of protection than adults. This lead to the question of the level of protection by society or the extent to which rights of child soldiers' are protected by the society. It is important at this stage that the African Union Protocol on peace and stability explicitly authorises the Union to "intervene in a member state in respect of grave circumstances, namely: war crimes, which includes recruiters of children for soldering, and crime against humanity.

Fifthly, can the use of children as soldiers be effectively regulated at the international level? The main business of the UN is the maintenance of world peace and security. The UN Charter calls upon the organisation to "save succeeding generations from the scourge of war." Within this context, the UN continues to lead the fight to contain conflicts through peacekeeping operations. Relating to the problem of child soldiers, the UN has led in the development of a legal framework to protect children from engaging in the conduct of war and from the harmful effects of war. This has resulted in the establishment of international legal standards regulating the recruitment and use of children in armed conflict. It has also sought to focus the attention of the UN Security Council, regional political bodies, intergovernmental organizations as well as non-governmental organizations on this problem.

Sixthly, part of the problem is the level of civility, that is, prevailing attitudes and perceptions towards children and childhood. This aspect is important because it is only by understanding our own attitudes that it will be possible to determine what solutions can be introduced and how far they could bring a meaningful change.

Seventh, all possible efforts should be made to maintain education systems during and after conflict. The international community must insist that governments or non-state entities involved in conflicts do not target educational facilities, and indeed promote active protection of such services. Therefore the re-establishment and continuity of education must be a priority strategy for governments, donors and NGOs in conflict and post conflict situations. Training

should equip teachers to deal with new requirements. This will include recognising signs of stress in children as well as impacting vital survival information on issues such as land mines, health, including promoting respect for human rights. This will go a long way in changing the mind set of children and the people generally.

Lastly is the challenge of reinsertion and integration into main stream society that would create an environment for the ex-child soldier to find and live a life of civility and social responsibility.

1.5 Basic Assumptions

Children are in a special position, in that they are generally more vulnerable than adults and therefore entitled to certain distinct rights in accordance with their needs and level protection. This is widely recognized in both national and international law. This is important particularly in situations such as armed conflict, where children are politically powerless and where they are normally denied any other participatory role except when used cheaply as child soldiers. In order to examine this topic, the major assumptions put forward are:

Firstly, children are more vulnerable, and consequently, more deserving of protection than adults. Children are very important to any society and they represent an important age group of the population that must be well brought up physically, morally and mentally.

Secondly, without adequate protection, children interest will be deplorably abused especially when trapped in a conflict or war situation. The rights and freedoms of a child soldier should not be left at the mercy of parents, guardians

and states alone but under the supervisory role of United Nations and regional organization such as the African Union.

Lastly, an adequate regulatory framework exists at the national and international level but its implementation is fraught with difficulties of bringing state and non state actors to comply.

1.6 Research Methodology

In order to create a framework within which the research problems stated above can be applied and the hypotheses tested, the research method that will be used is the literature study. Legal Instruments; these will take the form of Conventions, Charters and local legislations. Legislations obtaining in African Countries and elsewhere will be used to determine the regulatory framework on child soldiers.

Judicial Decisions; decisions of courts and tribunals will form an important component of the research. Decisions that will be considered will include decided cases in African States' courts, decided and pending cases at International tribunals concerning the interest of the child soldier.

Textbooks and Journals; the most recent textbooks and journal articles will be used for this research study, including relevant research reports on the subject from various Research Institutes and Centres.

Historical Method; the nature of the research problem further necessitates a historical research component. However, this component will merely consist of a historical overview and not an in-depth legal-historical approach. The main purpose is to expose concepts relating to the rights of child soldier and the development of the practice.

Comparative Law; this method will assist in applying and evaluating domestic legislations and decision relating to the rights of the child soldier in African countries and also relevant comparative legislation in other countries.

1.7 Limitation of the study

The research study has limitations necessitated by its scope, geographical coverage and limited financial resources. The study is confined to the rights of the child soldier. Limited financial resources have also implied that the study relied heavily on literature review and internet resources.

1.8 Outline of the Thesis

The research will be presented in 9 chapters. Chapter 1 deals with the introduction, historical background, rationale for the study, statement of the study and research methodology. Chapter 2 looks at the children's rights movements on the basis of the CRC and other regional instruments. A study of the theoretical aspects of the protection of children's rights is of the utmost importance for the study. It will also discuss the level of self-determination or autonomy that should be accorded to children and the extent to which the state and parents should be allowed to actively 'interfere' in their life.

Chapter 3 describes the activities of the UN with regard to the child soldier phenomenon. Over the past decade or so, the issues of war or conflict-affected children in general, and child soldiers in particular, featured high on the UN's agenda. Consideration of children's rights and welfare has been 'mainstreamed' into the UN's peacemaking and peacekeeping activities. The Security Council in particular has increasingly acted to put pressure on both the states and non-state groups to cease the illegal recruitment and use of child soldiers.

Chapter 4 and 5 will examine the legal regulation of the recruitment and use of children in hostilities. The relevant international and human rights treaties are discussed. This is the issue which has received most attention with the adoption of new instruments such as the Optional Protocol to the Rights of the Child on the Involvement of Children in Armed Conflict (2000) and ILO Convention 182 on the Worst Forms of Child Labour (1999). Indeed, efforts continue to encourage a 'straight 18' consensus prohibiting all recruitment and use of children in armed conflict. However, it will be shown that although international law regulates the recruitment and use of child soldiers, owing to the plethora of treaties on the subject, states' commitments still differ and children can still 'lawfully' be recruited and used to participate in armed conflict.

Chapter 6 will examine how, once recruited into armed forces or armed groups, international law treats child soldiers. The chapter will consider the position of child soldiers as combatants and as persons in the power of an adverse party in

international law and internal conflicts. It will also focus on states' obligations with regard to disarmament, demobilization and reintegration of child soldiers.

The extent to which the recruitment and use of child soldiers is an international crime will be examined in Chapter 7. This is an area which has seen considerable recent developments and is evidenced by the first prosecutions and conviction for child recruitment before the Special Court for Sierra Leone. It will be argued that child recruitment is not only a war crime but also constitutes a crime against humanity.

Chapter 8 considers the issue of the criminal responsibility that may arise for certain intentional crimes committed by child soldiers. Child soldiers are immature, wrongly fed and drugged by their commanders, and are coercively recruited and forced to participate in atrocities. Accordingly, special attention is placed on the extent to which child soldiers might be able to avoid liability for their actions by pleading legal defences. The chapter concludes by considering ways of preventing the recruitment of child soldiers while at the same time enhancing monitoring and enforcement of international law.

In the concluding chapter, recommendation for reform and policy intervention will be made at the national level, and also to regional and international agencies bodies. This will be followed by a bibliography of the sources used in the text.

CHAPTER TWO

Childhood and Status of a Child in International Law

2.1 Introduction

The purpose of this Chapter is to explore various theories that have been propounded by scholars and others on children. Although each one of the theory may not specifically relate to the phenomenon of child soldering, nonetheless, it offers a framework for understanding the predicament and complexities on which children find themselves.

The notion of the rights of children is not an old one.⁸³ Originally, children had the lowest status in the society, below that of women.⁸⁴ Indeed, they were not even considered as persons. A child was regarded as property which, on the basis of the paternal power, was freely at the disposal of its owner, generally the father.

Besides, children were considered to have obligations towards their owners. These included, in addition to the “normal” demonstration of obedience and respect, primarily the performance of various services, and working for pay. Children were therefore put to work at a very early age, although their value in production was at first naturally rather small.⁸⁵

The family as such (as noted above, the male head of the family) held a dominant position not only in production, but also in all other respects. Society could not, nor did it want to, intervene in relationships within the family. Against this background, it is not surprising that the protection of the family against society in general was one of the first rights to be realized.⁸⁶ Even in the Western European countries, it was not until the eighteenth century that the basic

⁸³ On the historical development of the notion of children’s rights, see Freeman, *The Rights and Wrongs of Children*, 1983, pp. 6-31; Weisberg, *Evolution of the Concept of the Rights of the Child in the Western World*, *The Review of the International Commission of Jurists*, 1978, No. 21, pp. 43-50.

⁸⁴ Among children, in turn, girls and illegitimate children had the lowest status.

⁸⁵ Arto Kosonen, *The Special Protection of Children and Child Soldiers, A principle and its application*, Publications of the University of Helsinki, C.22, 1987, p. 2.

⁸⁶ *Ibid.*, p. 4.

insecurity of children - on the one hand that of dependence, and on the other hand that of independence or separation in relation to their parents - was recognized, and their position began to develop.⁸⁷

This development was a consequence of several factors, such as the growing general opinion that there was a need to prevent cruelty against children, the early development of the rights of women, and the concentration of production from families to factories. The first two factors lessened the absolute power of the father over his children and over the family generally. A third factor that indirectly contributed towards this development is the decreasing significance of the family as a productive unit and decisive element in the society which accounted for a shift of power primarily to society itself. The above notion was however, of no great concern until the beginning of the 19th century. The rise in the status of children in any case created the preconditions for the development of the legal rights of children in general.⁸⁸

2.2 The History of Childhood

Philippe Aries book, *L' Enfant et la vie familiale sons l'ancien regime*,⁸⁹ claimed that prior to the seventeenth century, the idea of childhood did not exist. There was no recognition of childhood as a particular state distinct from adulthood. From the age seven years onwards, a child was seen as an adult. From then onwards, children lived with adults, played with adults and worked alongside adults. Children under 7 years, on the other hand, were hardly seen as persons at all. Given the high rate of infant mortality, the death of a young child was largely a matter of indifference to his or her parents.⁹⁰ A little later, Lloyd de Mause equally proclaimed that "The history of childhood is a nightmare from which we have only recently begun to awaken".⁹¹ Only from the eighteenth

⁸⁷ Freeman MDA, The Rights of Children in the International Year of the Child, 1980 Current Legal Problem 1, p. 12.

⁸⁸ Ibid., pp. 32-65.

⁸⁹ Translated into English as *Continues of Childhood*, New York, Vintage, 1962.

⁹⁰ Matthew Happold, *Child Soldiers in International Law*, Manchester University Press, 2005, p. 23.

century had parents any true empathy with their children. Prior to that, the history of childhood was a history of abuse; the further back in history, the worse the abuse. In this regard, de Mause differed from Aries, as the latter, did not consider that the lack of recognition of childhood necessarily meant that children were treated worse in the Middle Ages than they were later. Despite the differing views, the two writers argued that the modern concept of childhood only began to emerge during the 17th or 18th centuries.⁹² However, some writers argue that childhood is, ultimately, a relative concept which changes according to historical time⁹³, geographical environment, local culture, and social economic conditions.⁹⁴

Children's rights advocates have viewed the history of childhood as one that is dynamic, progressing from widespread abuse and neglect towards an ever-greater recognition of childhood and of children's rights. This development is thought to be self-evidently a good thing. However, from the time of their publications, Aries and de Mause's conclusions have been controversial, and to a large extent, discredited. Two things seem clear.

Firstly, to use David Archard's terminology,⁹⁵ it is necessary to make a distinction between the 'concept' of childhood and 'conceptions' of childhood. For there to be a concept of childhood, children must be seen as distinguishable from adults in respect of an unspecified set of attributes. A conception of childhood, on the other hand, specifies what those distinguishing attributes are. One has a concept of childhood if one views and treats them differently from adults. How one views and treats them differently, however, depends upon one's conception of

⁹¹ Lloyd de Mause, *The Evolution of Childhood*, in Lloyd de Mause (ed.), *The History of Childhood*, New York: Harper, 1976. p. 1.

⁹² J. Kuper, 'International Law Concerning Child Civilians in Armed Conflict', Clarendon Press Oxford, 1997. p. 13.

⁹³ V. Fox, 'Historical Perspectives on Children's Rights', in Verhellen and Spiesschaert (eds.), 1989, pp. 297-311.

⁹⁴ L. Dasberg, 'What is a Child and What are its Rights', in Verhellen and Spiesschaert (eds.), 1989, p. 35; B. Franklin, 'The Rights of Children', Oxford, 1986, pp. 7-12.

⁹⁵ D. Archard, *Children; Rights and Childhood*, London: Routledge, 1993, pp. 21-22.

childhood.⁹⁶ Contrary to Aries' conclusions, it seems that all societies at all times have had a concept of childhood but their conceptions have differed.⁹⁷

Archard suggests three basic ways in which conceptions of childhood can differ; in their boundaries, dimensions and divisions.⁹⁸ Firstly, childhood is a relational concept. What a child is can only be understood in relation to what an adult is. The boundary of childhood is when it is deemed to end; that is, when a child becomes an adult.⁹⁹ Secondly, the dimensions of childhood originate in the different perspectives from which childhood is viewed. What society sees as the significant differences between childhood and adulthood determines how it thinks children should be treated and when it considers childhood ends. Thirdly, the divisions we hold on childhood depend on how a society sub-divides childhood into periods, such as infancy and adolescence. The manner in which the boundaries, dimensions and divisions of childhood are perceived determines how a society thinks about the extent, nature and significance of childhood.¹⁰⁰ However, to say that past societies had different conceptions of childhood from those held today is not to say that they had no concept of childhood.¹⁰¹

The second criticism of deMause in particular is based on the work of historians who have found copious evidence of the affection that parents have had for their children in the past.¹⁰² Much of what has been condemned as child abuse resulted either from economic necessity or from misplaced belief that the suffering inflicted on children was for their own good, for example, corporal punishment, swaddling etc. A major problem with both Aries and deMause's works is its failure to see the past in its own terms. Both authors saw past

⁹⁶ Ibid., p. 22.

⁹⁷ Happold, n. 90 above, p. 23.

⁹⁸ Archard, n. 95 above, p. 24.

⁹⁹ Happold, n. 90 above.

¹⁰⁰ Archard, n. 95 above, p. 27.

¹⁰¹ Happold, n. 90 above, p. 24.

¹⁰² Linda Pollock, *Forgotten Children: Parent-Child Relations from 1500 to 1900*, Cambridge University Press, 1983.

attitudes to childhood through the prism of present attitudes and found the former wanting. Although not purporting to write history, their perspective was fundamentally ahistorical. Indeed, one might speculate that it was precisely this perspective that rendered their conclusions attractive to some children's rights advocates.¹⁰³

However, one of the problems encountered when studying the global history of childhood is the paucity of work on the subject, as rightly identified by Matthew Hoppold.¹⁰⁴ Though the past thirty years have seen an explosion of literature on the subject, it remains concentrated on the history of childhood in Europe and North America. Historians of childhood in South America, Africa and Asia are very thin on the ground. Up into 19th century, most children in the West were brought up in rural environments. In Europe childhood went through a movement from agrarian, rural societies to industrialized, urban societies accompanied by the establishment of increasing private and state surveillance over the activities of families and children. Although large differences in cultural and religious traditions exist, currently similar developments are occurring gradually in Africa.

Perhaps most importantly, the role of the family has changed in the West. Until the mid-nineteenth century, the family had several functions; providing for the subsistence of its members, their education, vocational training, health, entertainment and old age.¹⁰⁵ Families served as economic as well as emotional units. In many cases, sending children to work was necessary for the family's survival, as the parents' wages alone were insufficient for the family to live on.¹⁰⁶ Even if they were not sent out to work, children might perform useful roles in the household and perform useful functions in the household and deputise for absent parents. Families were not child centered. Children worked to support adults and

¹⁰³ Hoppold, n. 90 above, p. 24.

¹⁰⁴ Ibid., p. 24.

¹⁰⁵ Colin Heywood, *A History of Childhood: Children and Childhood in the West from Medieval to Modern Times*, Cambridge Polity, 2001, p. 88.

¹⁰⁶ Ibid., pp. 134-135.

vice versa. As Zelize puts it, in the West today, children are seen as economically 'worthless' but emotionally 'priceless'.¹⁰⁷

Childhood was shorter and less defined. Children were expected to take on adult roles earlier. This was not the modern idea that an individual's working life only begins when his or her schooling ends. From around 7 years old, children were expected to help around the house, the farm or the workshop. Their tasks would not be the same as those of adults, but increasing responsibilities would be placed upon children as they grew older, where they would work alongside adults by their early teens. Education and employment were not alternatives. A child might be sent to school or receive instruction at home, but education often took second place to children's work at home, on the farm or in the factory. As a result, the move from childhood into adulthood was less of a break and more of a continuum.¹⁰⁸

Children were not always anxious to remain in school. Studies¹⁰⁹ of children's responses to schooling in the nineteenth and twentieth centuries show that for many children school was a chore to be avoided. Classes were large, teachers barely trained, lessons based on rote learning and discipline maintained by copious application of corporal punishment. There was often little interest shown for the bright child, and no support for the slow student either. Studies show that these conditions are frequently replicated in many schools in the developing world today¹¹⁰ even though education has been made compulsory at the elementary level.

Historically, most societies have recognized the fundamental obligation to the protection of children from harm, even in times of conflict.¹¹¹ However, the scope

¹⁰⁷ Viviana A Zelize, *Pricing the Priceless Child: The Changing Social Value of Children*, Princeton, Princeton University Press, 1986, p. 2.

¹⁰⁸ Happold, n. 90 above, p. 25.

¹⁰⁹ Human Rights Watch, *Spare the Child Corporal Punishment in Kenyan Schools*, New York: HRW, 1999.

¹¹⁰ An interesting study, from a children's rights perspective, Human Rights Watch, *Spare the Child Corporal Punishment in Kenyan Schools*, New York: HRW, 1999.

and content of those obligations seem to vary from place to place, depending not least upon how a society perceives the boundaries, dimensions and divisions of childhood. Thus, many reasons why we are concerned about children rather than adults serving as soldiers arise out of our conceptions of what a child is and what childhood should involve. Childhood is a long process of gestation and is generally seen as ending only with the attainment of voting rights, usually at 18 years of age. Children are seen as 'innocent incompetents', and their innocence, frailty and vulnerability require protection from adults and states.

2.3 The Definition of 'a child' in International Law

Until the adoption of CRC in 1989, there was no universally accepted definition of a 'child'. Article 1 of CRC provides that: "For the purposes of the Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."¹¹² This possibility of a patchwork definition in international law is striking and not altogether satisfactory. It must be acknowledged that considerations of the child's maturity and independence have evolved over the centuries and have differed widely across cultures and beliefs. The 'age of majority' is a social, religious, cultural or legal device by which societies acknowledge the transition to adulthood, and there is no necessary correlation between any of the levels. For the purpose of participating in religious ritual, for example, a child may become an adult at the age 13.¹¹³ For legal purposes, however, such as contracting obligations, including marriage, giving evidence under oath, being criminally liable, or voting in elections, other age requirements may prevail. On other occasions, the child's actual capacity to understand will be determinative, for example, in appreciating the meaning of evidence under oath. In other cases, the legislator will make

¹¹¹ See, Report of the Secretary-General: Children and Armed Conflict, 19 July 2000 (A/55/163-S/2000/712), para. 11.

¹¹² Article 1, The 1990 African Charter on the Rights and Welfare of the Child likewise includes every human being to the age of 18 years.

¹¹³ This is the case in Judaism and other religions. In Islamic law, the age of majority tends to be related to puberty. See Ilene Cohn and Guy S. goodwill-gill, n. 3 above, p. 7.

assumptions as to the capacity and understanding at a certain age, for example, in setting eligibility to vote.¹¹⁴

Although state practice displays some variation, participation in the political process is nevertheless a reasonably accurate indicator of the moment at which the community as a social-political body recognizes the intellectual maturity of the individual. The Inter-Parliamentary Union recently reviewed the electoral systems of 150 of the world's 186 sovereign States,¹¹⁵ and noted:

“The right to vote supposes that electors should have reached an age at which they are able to express an opinion on political matters, as a rule coinciding with the age of legal majority... The norm today is eighteen years; an overwhelming majority of 109 States has opted for this minimum age limit, with most other States having a slightly higher limit (19- 21 years). The lowest limit – 16 years - is practiced in four countries: Brazil, Cuba, Iran and Nicaragua”.¹¹⁶

There is again no necessary correlation in national legislation between voting age and ability to hold certain key offices. Likewise, there is no correlation between voting age and liability to or eligibility for military service. In Brazil, Nicaragua and Iran, the voting age is 16 years, but liability to military service starts at 19 in Brazil, 17 in Nicaragua, and is subject to no apparent age limit in Iran.¹¹⁷ Disparities also occur among states as concerns ‘military age’,¹¹⁸ but there is a strong tendency towards 18 years or later as the minimum age for military obligations.

¹¹⁴ Ibid., p. 7.

¹¹⁵ Inter-Parliamentary Union, *Electoral Systems: A World-Wide Comparative Study*, Geneva, 1993.

¹¹⁶ Ibid., p. 4.

¹¹⁷ *International Children's Rights Monitor*, Vol. 1, No. 2, Spring 1983, p. 5.

¹¹⁸ ‘Military age’ is used here to signify the age at which an individual is liable to be called up (conscripted) for military service, and/ or the age, usually one or two years less, at which an individual may volunteer for service, with or without parental consent. In national practice, the term ‘military age’ is also used to describe the whole period during which an individual may be called on to serve; for example, between the age of 17 and 30 years.

The idea of the child as a person under 18 years thus enjoys a wide measure of support even if different terminology such as “youth” or “young person”, may describe better those in the crucial 15 – 18 years age bracket, whose physical and intellectual maturity is evident. If the age of eighteen year reflects a general rule, with certain limited exceptions traceable to specific political, religious or cultural factors, the question is when and in what circumstances those under eighteen can lawfully be conscripted for military services or permitted to participate in hostilities.¹¹⁹

However, the Coalition to stop the use of child soldiers does offer a working definition, and promotes a “straight-18” approach. The latter opposes anyone under the age of 18 years engaging in any kind of armed hostilities. The coalition defined a child soldier as “any person under 18 years of age who is a member of or attached to the armed political forces or an armed political group, whether or not there is an armed conflict”.¹²⁰ The coalition careful to stress that this includes a child participating in direct combat as well as in extensive range of military-related activities, including: scouting, acting as messengers, and any sort of military preparedness training, as well as in a support capacity, ranging from carrying weapons, camp maintenance, or those suffering the above of forced labour or sexual slavery.¹²¹

The all-inclusive definition indicated above runs counter to developments in law, which has demarcated the boundary between direct and indirect participation. Although this might suggest that the definition amounts to no more than a “norms wish-list”, it is in fact based on the realities of child soldiers in the field. The simple truth is that duties assigned to minors often overlap, so it can be difficult to separate direct from indirect participation. Both human rights law and international humanitarian law have maintained the direct/indirect dichotomy

¹¹⁹ Guy Goodwin-Gill, n. 3 above, p. 9.

¹²⁰ See www.childsoldiers.org, the official website of the coalition to stop the Use of Child Soldiers.

¹²¹ Ibid.

throughout their development, and in doing so, are unable to reflect on the actual circumstances of the very minors they seek to protect.¹²²

2.4 The Philosophical Underpinnings of Children's Rights Theory

The question whether legally recognized rights should be afforded to children, and what the nature and extent of such rights should be, has been a topic of vigorous debate in courts, among legislators and scholars, and popular journals since the sixties.¹²³ The children's rights movement can be attributed to increased societal concern over individual rights, the recognition of child abuse as a major problem, the loss of faith by many in courts, schools and other institutions dealing with children, and the changing structure and role of families in modern society.¹²⁴

The idea of children having legally recognized rights is a revolutionary one in many ways. Historically, children have been under the control of their parents. Since children are presumed by law to lack the legal capacity of adults, they are denied full participation in the political, legal and social processes. In lieu of most rights, children are afforded special protection by the state. Today, however, many consider this control (and the special protection that accompanies it) to be harmful, and even oppressive, to children.¹²⁵

There is an immense volume of scholarship regarding the various ways of giving expression to the notion that children can have rights, and the actual formulation and content of these rights.¹²⁶ At the extreme, some children's rights advocates, for example, B Farson¹²⁷, call for a total change in policy, giving children total

¹²² Mary- Jane Fox, n. 2 above, p.30.

¹²³ Freeman in Freeman & Veerman (eds.), *The Limits of Children's Rights in Ideologies of Children's Rights*, Martinus Nijhoff Publication, London, 1992, p. 3; Wald ,1979 (UCDLR) University of California, Davis Law Review , p. 255.

¹²⁴ Wald, 1979 UCDLR, pp. 255-256.

¹²⁵ Ibid., pp. 256- 257.

¹²⁶ Fortin J, *Children's Rights and the Developing Law*, Butterworth London, 1998, p. 3; S. Human, *The Theory of Children's Rights in Davel CJ (ed.), Introduction to Child Law in South Africa*, (2000) Juta, Cape Town, p. 150.

freedom to decide for themselves what is best for them. However, not everyone shares the views advanced on children's rights advocates. Goldstein, Freud and Solnit¹²⁸ are some of the most prominent proponents of limited rights for children and expanded parental authority. Others, for example Hafen¹²⁹ have expressed similar views for fear that the notion of children's rights will undermine the family structure to the detriment of children and society as a whole.

Lack of a coherent theory of children's rights is hardly surprising. The demand for the recognition and enforcement of children's rights calls into question certain basic beliefs of our society. The implementation of many of the rights being claimed on behalf of children could substantially alter the role of the state towards parents and children, and the role of parents towards children.¹³⁰ The protection of children's rights could create the perception that parental authority and family values are suppressed, and that the state abdicates its role as protector of children in favour of total freedom to a child.¹³¹

One fundamental hurdle in the formation of a coherent theory of children's rights is the fact that in giving meaning to children's rights, it is important to accommodate the status of the child both as an individual and as a member of the family group. This presents a challenge to the inability of the law in formulating legal principles that apply to a group of people, such as family members, as well as to other members of such a group like individuals.¹³²

Another difficulty in establishing a theoretical model for the concept of children's rights is the fact that the nature of the proposed rights of children goes well beyond what is normally understood as legally recognized and protected rights. Foster and Freed, for example, include the right "to receive parental love and

¹²⁷ Farson Birthrights, (1974), as analysed by Wald, 1979 UCDLR p. 257.

¹²⁸ Goldstein J, Freud A & Solnit AJ, *Before the Best Interest of the Child*, Burnett Books in association with Andre Deutsch Limited, London, 1979.

¹²⁹ Hafen B.C, *Children Liberation and the New Egalitarianism: Some reservation about abandoning youth to their rights*, 1976 Brigham Young University Law Review, p. 605.

¹³⁰ Wald 1979 UCDLR p. 259.

¹³¹ Human 2000 THRHR p. 394.

¹³² Human in Davel (ed.), *Introduction*, p. 150.

affection” in their proposed “Bill of Rights for Children”.¹³³ Many of the “rights” claimed for children are merely claims or entitlements, as opposed to personal rights based on ideas concerning the way children should be treated.¹³⁴ To complicate matters, there is considerable uncertainty regarding the content of such individual claims. The right to adequate care of a baby, for example, differs vastly from the right to adequate care of an adolescent.¹³⁵

The CRC is the most widely ratified human rights treaty having received 192 ratifications as at 31 May 2006. This “thesis” of adherence to children’s rights, however, has to be seen in the context not only of widespread disregard of the rights guaranteed by the CRC, and its Optional Protocol, but also of continuing uncertainty over how children’s rights can be justified, and the nature, content and implications of the rights to which children are entitled.¹³⁶

2.4.1 The Will Theory of Rights

Philosophers of the 17th and 18th centuries taught that because of their incapacity for reasoned decision-making, children could not be the bearers of rights. This viewpoint is still found in modern children’s rights theory. It forms the basis of the “will theory” of rights, also called the “power theory” of rights.¹³⁷ Simply put, it is the refusal to award rights to children merely because they do not have the capacity for reasoned decision-making. Capacity means the “capacity for reasoned decision-making”, which is a core concept in modern children’s rights theory. If it is assumed that the majority of children do not have the competence to make choices and claim rights, it follows that children cannot be said to have rights.¹³⁸ The origin of the “capacity principle”, which forms the basis of the “will

¹³³ Foster H.H & Freed D.J, A Bill of Rights for Children, 1972 Family Law Quarterly, p. 347.

¹³⁴ Human in Davel, (ed.), Introduction, p. 151.

¹³⁵ Ibid.

¹³⁶ Happold, n. 90 above, p. 29.

¹³⁷ Fortin J, Children’s Rights and the Developing Law, Butterworth London, 1998, p. 15; Jones M & Marks LAB, The Dynamic Development Model of the Rights of the Child: a feminist approach to rights and sterilization, 1994, International Journal of Children’s Rights (IJCR), p. 271.

¹³⁸ Human in Davel (ed.), Introduction, p. 151.

theory” of rights, and denies or limits the existence of children’s rights, is investigated by Hobbes and others.

Hobbes, who wrote in the 17th century, argued that children are only protected because they can serve their fathers. The relationship between father and child is seen as one of mutual benefit. According to Hobbes¹³⁹, the relationship between father and child is based on fear, children being in a position of extreme dependence. Since Children do not have the capacity to conclude contracts with other members of society or to understand the consequences of these contracts, they have no natural rights or rights in terms of the social contract.

John Locke, who wrote later in the same century, argued that freedom, and the liberty to act according to one’s own free will depended upon reason. Children are temporarily under the control of their parents until they can cast off their dependency when they become adults. This temporary state of inequality exists in the interest of the child. In direct contradiction to Hobbes, Locke refuses to accept that parents have an absolute power of control over their children. The latter accepts that children, like adults, have certain natural rights which need to be protected.¹⁴⁰

In the 19th century, John Stuart Mill¹⁴¹ espoused a different kind of paternalism.¹⁴² The liberal/libertarian persuasion usually associated with Mill did not extend to his thinking about children. Paternalism is acceptable in the case of children because they are incapable of deciding what is in their own and society’s best interest and parents must do so and act on their behalf.

¹³⁹ Thomas Hobbes, *Leviathan* (1651), as analysed by De Villiers B, “The Rights of Children in International Law: Guidelines for South Africa, 1993 *Stell LR*, p. 291; Federle KH, On the road to reconceiving rights for children: a post feminist analysis of the capacity principle, 1993 *Depaul Law Review* pp. 987-990; Worsfold V.L, A Philosophical Justification for Children’s Rights, 1974 *Harvard Educational Review*, p. 144.

¹⁴⁰ John Locke, *Second Treatise of Civil Government*, 1689, as analysed by De Villiers, 1993 *Stell LR* p. 291; Federle 1993 *Depaul LR* pp. 990-993; Worsfold 1974 *Harvard ER*, pp. 144-145.

¹⁴¹ John Stuart Mill on liberty (1859), as analysed by De Villiers 1993 *Stell LR* p.292; Federle KH, 1993 *Depaul LR*, pp. 997-999; Jones & Marks 1994 *IJCR* p.268; Worsfold, 1974 *Harvard ER*, pp. 145-146.

¹⁴² Paternalism is based on the view that an adult person is in a better position to take care of the interests of a child, and to act on behalf of a child in a way that serves the child’s interest. Haupt LC & Robinson JA, 2001, *THRHR* p. 25.

Worsfold's reaction to these three philosophers' attitude towards children is seen as negative, albeit coherent. As one progresses from Hobbes' theory through Locke's to Mill's, the strict paternalism of Hobbes is replaced by an emphasis on benevolence in the treatment of children. Despite this, Worsfold points out that all the three philosophers regard the child as someone to be molded according to adult preconditions. None of these philosophers would have considered seriously the perspective of children themselves in determining their own best interest. None accorded to children rights of their own.

2.4.2 An emerging theory of children's rights

Worsfold¹⁴³ identifies three essential features which are necessary in any scheme justifying children's rights. These features were first proposed by Maurice Cranston in justifying individual rights in general.¹⁴⁴

Firstly, children rights must be practicable, which means that they must be theoretically possible, or acceptable within some larger conception of the good society.

Secondly, they must be genuinely universal - in other words appropriate for all children everywhere. However, there may be misunderstandings about the implications of this characteristic for different age groups. All persons do not enjoy the same legal rights, but all are presumed to have the same capacity for rights.

Thirdly, children's rights must be of paramount importance. When fear treatment is accorded to children as a right, it must override all other considerations in society's conduct towards children, for example, the consideration that children should have fun. This feature serves to override the utilitarian objection that when we act in children's best interests we should be concerned less with their protection and more with their pleasure or satisfaction.

¹⁴³ Worsfold, 1974 Harvard ER p. 146.

¹⁴⁴ Maurice Cranston, Human rights, real and supposed in Raphael (ed.) Political theory and the rights of man, (1967), as analysed by Worsfold 1974 Harvard ER, pp. 149-151.

Worsfold eventually finds an adequate philosophical justification for the children's rights in John Rawls' theory of justice. According to Rawls' ideal system of justice, each individual should be permitted to act according to a personal conception of his or her own best interests, but not at the expense of others. Rawls' just society is based on two fundamental principles of justice.¹⁴⁵ Firstly, each person should have a personal liberty compatible with a like liberty for all others (no one should be any freer than anyone else in society to pursue his or her own ends). Secondly, societal inequalities should be arranged in such a way that all individuals share whatever advantages and disadvantages that inequalities bring. This principle is intended to preclude discrimination against those who are born into poverty and disability.

According to Rawls, children are participants in the formation of the initial social contract to the extent that they are capable of participating. In order to participate fully in this process, a child must be rational, that is, he or she must have attained the "age of reason". Rawls does not attempt to define this age rigidly, but imply that as children's competencies develop, their participation should increase. Until fully developed, children's interests are protected by adults or parents acting on their behalf. This last element is unacceptable to Freeman. He finds unacceptable the proposition that children, who cannot participate fully in generating the principles necessary for a just society because their capacity for a sense of justice has not yet fully developed, should nevertheless be accorded the same rights as adult participants.¹⁴⁶

Worsfold points out that even though Rawls' scheme is more libertarian than its predecessors, it still has one possible problem:¹⁴⁷

"Whenever adults act on behalf of a child, doing for the child, what they would wish done for them if they were in the child's place, they do so without any mechanism available for children to question their

¹⁴⁵ John Rawls, *A Theory of Justice* (1972), as analysed by Worsfold 1974 Harvard ER p. 151.

¹⁴⁶ Freeman, n. 87 above, p. 20.

¹⁴⁷ Worsfold, 1974 Harvard ER p. 155.

judgment or dispute the correctness of their decisions.”

An analogous objection is raised on the ‘best interests of the child’ standard applicable in legal proceedings and emphasized in paragraph of the Vienna Declaration of Human Rights, 1993. Rawls anticipated this objection, and addresses the problem directly.¹⁴⁸

Firstly, he states that “paternalistic intervention must be justified by the evident failure or absence of reason and will”. By this he means that there is a presumption of rationality which is of the full ability to decide for oneself. Only when this presumption has been rebutted is it fair to act on another’s behalf.

Secondly, he suggests that any paternalistic intervention must be guided by the principles of justice and by what is known about the subject’s more permanent aims and preferences. This suggests that children should be consulted about their wishes and preferences. These preferences should weigh more heavily if the child is old enough to think rationally about the choices presented.

2.4.3 The interest theory of rights

Many authors have written on the interest theory of rights. This theory can be summarized as follows:¹⁴⁹

“...The interest theory of rights has the advantage that it does not hold that rights are to be determined by the moral capacity to act rationally. This theory argues that children, as humans, have rights if their interests are the basis for having rules which require others to behave in certain ways with respect to these rules”.

Freeman¹⁵⁰ is of the opinion that Worsfold’s attempt to find the philosophical justification for children’s rights in Rawls’ principles of justice is unsuccessful. He argues convincingly that any “will theory” of rights is inadequate to explain the

¹⁴⁸ Ibid., pp. 155-6.

¹⁴⁹ Jones M & Marks LAB, The dynamic developmental model of the rights of the child: a feminist approach to rights and sterilization, 1994 International Journal of Children’s Rights (IJCR), p. 271.

¹⁵⁰ Freeman n. 87 above, p. 20.

basis of children's rights, since children who still lack the capacity to form a will are not in a position to assert these rights at all. As Freeman correctly points out, children have interests that justify protection before they develop wills to assert their rights. He turns to Brian Barry's theory, which he finds more acceptable¹⁵¹. Barry¹⁵² argues that one acts in another's interests if one helps that person to get what he or she wants. He argues further that one is not justified in frustrating children's present wants, just as one is not justified in trying to alter their character. Children should thus be given the opportunity to develop their rational powers.

Freeman focuses on the child's potential capacity, which they possess, but not animals. He argues that a child has rights whether or not he or she is capable of exercising them. Freeman's viewpoint is that "to bring children to a capacity where they are able to take full responsibility as free, rational agents for their own system of ends, children must be accorded two types of rights, namely, "the right to equal opportunity and the right to liberal paternalism".¹⁵³

It must be conceded that rights require the imposition of duties, but for MacCormick the existence of a right precedes the imposition of such a duty.¹⁵⁴ It is because children have a right to be cared for and nurtured that parents have the duty to care for them. MacCormick also deals with moral rights. A moral right is defined as the right to treatment which is "a good of such importance that it would be wrong to deny, or withhold it from, any member of a given class".¹⁵⁵ However, as Fortin argues,¹⁵⁶ it is difficult to conceive how one will be able to determine what interest will lead to moral rights and what moral rights can be

¹⁵¹ Ibid., p. 58.

¹⁵² Brian Barry, *Political Argument* (1965), as analysed by Freeman 1980 CLP, p. 21.

¹⁵³ As cited by Jones & Marks, 1994 IJCR p. 275. Also see Fortin J, *Children's Rights and the Developing Law*, Butterworth London, 1998, pp. 7&12.

¹⁵⁴ As pointed out by Bainham A, *Children: the modern law 2nd* (ed.), 1998, Family Law, an import of Jordan Publishing Limited, p. 84.

¹⁵⁵ MacCormick N, *Legal Rights and Social Democracy*, Clarendon Press Oxford, 1982, p. 160.

¹⁵⁶ Fortin J, *Children's Rights and the Developing Law*, Butterworth London, 1998, pp. 15-17; Jones M & Marks LAB, *The Dynamic Development Model of the Rights of the Child: a feminist approach to rights and sterilization*. 1994, *International Journal of Children's Rights (IJCR)*, p. 271.

translated into legal rights. Adoption of MacCormick's theory would inevitably lead to controversy over the "wrongness" of denying the importance of many potential interests, particularly the right to autonomy or self-determination.

In Raz's theory, "...a law creates a right if it is based on and expresses the view that someone has an interest which is sufficient ground for holding another to be subject to a duty....."¹⁵⁷ Raz's theory requires a subtle examination of the public perception of the purpose of the law when he argues that "to be a rule conferring a right it has to be motivated by a belief that the rightholder's interest should be protected by the imposition of duties on others"¹⁵⁸.

Relying on Raz's analysis of rights, Eekelaar sets the following two preconditions for conceptualizing rights:¹⁵⁹ Firstly, the social perception that an individual or class of individuals has certain interests, and secondly, that these interests must be capable of isolation from the interest of others.

Eekelaar¹⁶⁰ explains the second precondition by using an example of the father making decisions about the welfare of his daughter although the father's interest or right to make such decisions is not identical with her interests. The child's interest is that the father should make the best decisions for her. However, Eekelaar warns¹⁶¹ that one should be careful when one talks about rights as protecting interests that one conceives as interests that are "only those benefits which the subject himself or herself might plausibly claim in them". This point is of great importance in the context of modern assertions of the right to parental autonomy. Goldstein, Freud and Solnit¹⁶² argue that the right to family integrity is a combination of the three liberty interests of direct concern to children, namely, the right of parents to autonomy; the right of children to autonomous parents; and

¹⁵⁷ Raz J, Legal Rights, 1984 Oxford Journal of Legal Studies 1, pp. 13-14.

¹⁵⁸ Ibid.

¹⁵⁹ Eekelaar J, The Emergence of Children's Rights", 1986 Oxford Journal of Legal Studies (JLS), pp. 169-170.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Freud, n. 128 above, pp. 9&14.

the rights of both parents and children to privacy. Eekelaar¹⁶³ question whether any of these things can plausibly be claimed by children in themselves. If they are claimed it will be because they are believed to advance other desirable ends, like material and emotional stability, which are the true objects of the claims.

Eekelaar's formulation refers to the claims that children "might plausibly make", and not what they actually claim. The reason for this is the fact that children often lack the information or ability to appreciate what will serve them best. Therefore, it is necessary to make some kind of imaginative leap and guess what the child might retrospectively have wanted once he/she reaches maturity. In doing this, adult values will inevitably come into play. This state of affairs should be accepted as it encourages debate about these issues.¹⁶⁴

2.4.4 Are Rights Important for Children?

Though the moral importance of rights is generally accepted, there are still those who deny the need to think in terms of rights when it comes to children.¹⁶⁵ Their viewpoint is based on one or more of the following arguments. The first view idealizes adult-child relations. It emphasizes that adults, particularly parents, have the best interest of their children at heart. Goldstein, Freud and Solnit¹⁶⁶ adopt this laissez-faire attitude toward the family. The only right which they appear to accept is the child's right to autonomous parents. They maintain that a policy of minimum coercive intervention by the state accords with their "firm belief as citizens in individual freedom and human dignity".¹⁶⁷

The second argument sees children as a golden age, as "the best years of your life". Childhood is seen as synonymous with innocence, a time of freedom, joy and play. Just as we avoid the responsibilities of adulthood when we are

¹⁶³ Eekelaar, n. 159 above, pp. 169-170.

¹⁶⁴ Ibid.

¹⁶⁵ Freeman in Freeman & Veerman (eds.), *The Limits of Children's Rights in Ideologies of Children's Rights*, Martinus Nijhoff Publication, London, 1992, p. 30.

¹⁶⁶ Goldstein n. 162 above, p. 55.

¹⁶⁷ Ibid.

children, so too should there be no necessity to think in terms of children's rights, a concept which we must assume is reserved for adults.¹⁶⁸ This view does not accurately reflect the lives of many of today's children and adolescents, which are plagued with poverty, disease, exploitation and abuse across the globe.¹⁶⁹

Thirdly, there is the argument that the importance of rights and rights terminology can be exaggerated because there are other morally significant values such as love, friendship, compassion and altruism. These values can raise relationships, for example, the parent-child relationship, to a higher level than can the mere observance of duties.¹⁷⁰ It is therefore unnecessary to regulate the relationship between parents, children and the state on a legal basis. This might be true in an ideal world, but the world is far from ideal, more so for children.¹⁷¹

In the fourth place, it is argued that children are different. They have lesser capacities, are more vulnerable, and need to be nurtured and protected. Since children lack the necessary wisdom and experience to make rational choices, and are consequently always at risk to make mistakes, double standards can be justified. These double standards are deeply embedded in our social practices and legislation. Double standards result in one set of rules for adults, which enable them to exercise their rights and capacities, and a different regime for children, providing them with protection and ensuring that they are subject to the control and authority of adults.¹⁷² As Freeman convincingly argues, it is difficult to justify double standards based on considerations such as rational conduct, experience and/or understanding, since the same considerations can exclude adults as rights holders.¹⁷³

¹⁶⁸ Freeman, n. 87 above, p. 56.

¹⁶⁹ Freeman in Freeman et al, n. 165 above.

¹⁷⁰ Freeman, 1992 IJLR p.55; Human in Davel (ed.), Introduction, p. 153.

¹⁷¹ Ibid.

¹⁷² Freeman in Freeman & Veerman et al, n. 165 above, pp. 34-36.

¹⁷³ Montgomery J, Children as Property, 1988 Modern Law Review (MLR), p. 323; Fortin J, Children's Rights and the Developing Law, Butterworth London, 1998, p. 7.

The last point of criticism is that children's rights interfere with family integrity. Woodhouse, writing from an American law perspective, puts it as follows:¹⁷⁴ "...much of the blame for the breakdown of the family has been laid at the door of excessive individualism."

From the above, it is clear that the arguments of those who deny the importance of children's rights fail to withstand critical evaluation. A study of the theory of children's rights is of critical importance for various reasons. Without a sound set of theoretical principles justifying the protection of children's rights, assertions or legislation will fail to be persuasive; the idea of children's rights will be challenged by notions of unfettered parented authority; and the concept of children's rights will "...succumb to the romantic fallacy of adult decision-makers always acting in the best interests of children".¹⁷⁵

2.5 What Rights do Children have?

Even if one accepts that children have rights, there are no clear methods of establishing which rights children may legitimately claim. The reason for this is the complexity of the concept of "children rights". The absence of a coherent theory is not surprising considering that the demand for children's rights calls into question certain basic beliefs held by society. Philosophical, moral, legal and social considerations are here involved.¹⁷⁶

The complexity of the concept "children's rights" is also reflected in the wide range of claims made for the recognition of a variety of children's rights". For example, children's rights advocate John Holt states that children of any age should be given the right to vote, to work for money, to choose what type of education they want, and to be free from corporal punishment.¹⁷⁷ Richard Farson

¹⁷⁴ Woodhouse B.B, *Children's Rights: the destruction and promise of family* 1993 Brigham Young University Law Review (BYULR), p. 497.

¹⁷⁵ Human, *The Theory of Children's Rights* in Davel CJ (ed.), *Introduction to Child Law in South Africa*, (2000) Juta, Cape Town, p. 151.

¹⁷⁶ Bainham A, *Children: the modern law* 2nd (ed.), 1998, Family Law, an import of Jordan Publishing Limited p. 81-82.

¹⁷⁷ Cited by Wald, 1979 UCDLR p. 257.

goes even further when he argues that children's rights can only be realized when all children have total freedom to decide for themselves what is best for them, including the right to sexual freedom, financial independence, and the right to choose where they shall live.¹⁷⁸ While most theorists do not go this far, respected experts from many disciplines argue for the adoption of a "Bill of Rights" for children.¹⁷⁹ The type of rights suggested range from broad claims such as the right to receive parental love and affection, and to be born a wanted child, to more specific rights such as the right of children to seek and obtain medical care, treatment and counseling, and to earn and keep their own earnings.¹⁸⁰

However, in spite of the indeterminacy of the concept "children's rights", the following recurring theme is found in various attempts to define children's rights. Traditionally, a distinction is made between two approaches to the protection of the rights of children, namely the so-called "self-determination/autonomy approach" on the one hand, and "nurturance approach" on the other hand. The latter approach advocates "giving children what is good for them", while the self-determination approach advocates "giving children the right to decide what is good for themselves".¹⁸¹ In this regard, Farson distinguishes between "protecting children and protecting children's rights". The former refers to the "nurturance approach", whereas the latter to the "autonomy approach".¹⁸²

The distinction between the "self-determination/autonomy" and "nurturance" approaches to the protection of children's rights can be observed in the earlier discussion of the philosophical underpinnings of children's rights theory. The "will theory of rights" can, in my opinion, be seen as the basis of the "self-

¹⁷⁸ Wald, 1979 (UCDLR) University of California, Davis Law Review, p. 257.

¹⁷⁹ Ibid.

¹⁸⁰ Foster H.H & Freed D.J A Bill of Rights for Children, 1972 Family Law Quarterly (FLQ) p. 343; Wald, 1979 (UCDLR) University of California, Davis Law Review, p. 257.

¹⁸¹ Freeman, n. 87 above, p. 17.

¹⁸² Farson, Birthrights (1978) p. 165, as cited by Freeman MDA, The Rights of Children in the International Year of the Child, 1980 Current Legal Problem 1, p. 17.

determination/autonomy approach”, whereas the interest theory of rights” can be regarded as the origin of the “nurturance approach”.

Wald correctly indicates that it is important to separate the various types of claims being made on behalf of children¹⁸³.

“By lumping a wide range of claims under the heading “children rights”, proponents of expanded rights broaden their appeal while masking significant differences in the desirability or undesirability of granting specific rights to children.”

Having in mind the above, attempts by Freeman, Eekelaar, Wald and Hafen to provide practical frameworks to promote and enable the recognition of children’s rights by classifying them into certain categories will be considered below.

2.5.1 Freeman’s Framework of Children’s Rights

Freeman proposes four categories of rights for children, namely, rights to welfare, rights to protection, rights to be treated as adults and rights against parents. The above-mentioned distinction between the “nurturance” and “self-determination” approaches can also be found in Freeman’s proposed framework. Rights to welfare and protection can be classified under the “nurturance approach”, whereas the right to be treated as an adult and rights against parents can be classified under “self-determination”. This conclusion is strengthened by the fact that Freeman regards children to have the following two types of rights: the right to equal opportunity and the right to liberal paternalism.¹⁸⁴ Freeman’s contribution to the children’s rights debate demonstrates the extremely diverse nature of the rights which children may claim.¹⁸⁵

Freeman’s first category, the rights to welfare, originated in the general notion of human rights, predominantly from the CRC. Freeman considers this document

¹⁸³ Wald, 1979 UCCLR, p. 259.

¹⁸⁴ Cited by Jones M & Marks LAB, The dynamic developmental model of the rights of the child: a feminist approach to rights and sterilization, 1994 International Journal of Children’s Rights (IJCR), p. 275.

¹⁸⁵ Bainham, n. 176 above, p. 87.

politically important because, by expressing children's rights as human rights, the United Nations was not only saying that children ought to have these rights but, since children are human beings, that they already have them.¹⁸⁶

These rights are "manifestos" of the fundamental rights that children ought to have against everyone. They are rights that society owes to children and the latter can hold against society in case of violation. The rights are perhaps deliberately vaguely formulated in order to reflect the cultural and economic differences that exist between societies. The rights are essentially protectionist rather than liberationist in nature and their realization is dependent on political decision-making and implementation of relevant policies and legislation.¹⁸⁷

His second category is concerned with protection from negative behaviour and activities, such as inadequate care, abuse or neglect by parents, exploitation by employers or environmental dangers. Whereas welfare rights are based on the assumption that society owes children the best it has to offer, protective rights aim to ensure that acceptable minimum standards of treatment are observed.

Freeman's first two categories of rights have a common paternalistic approach. They are rights which the adult would deem to be appropriate for children even if children would not claim them for themselves. These rights contrast sharply with Freeman's third and fourth categories, which belong to the liberationist school.

The third category, the right to be treated like adult, is based on social justice and egalitarianism. According to Freeman, the rights and liberties afforded to adults should also be extended to children as fellow human beings, unless there is a good reason for differentiating between adults and children.¹⁸⁸

Freeman regards the claim that children should be treated as adults with skepticism. In his view, respect for children as person requires society to provide

¹⁸⁶ Ibid., p. 88.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

“a childhood for every child” and not an adulthood for every child.¹⁸⁹ However, Freeman questions the double standard involved in the differential treatment of adults and children which he attributes to incapacity or lack of maturity which would prevent children from making sound decisions on their behalf. Freeman nevertheless rejects the removal of all age-related disabilities, since doing so would ignore evidence about the cognitive abilities of children provided by developmental psychology.¹⁹⁰ However, Freeman argues that at least the age-related restrictions should be kept under review, based on the research of developmental psychologists. His own preference is for legal capacity to be determined on a case-by-case basis, by assessing the actual capacity for the particular activities of individual children. This can be achieved by employing an objective test of rationality determined in accordance with a neutral theory of what is “good” for children.¹⁹¹

A significant aspect of Freeman’s proposed framework is the fact that he regards the dichotomy between “nurturance” and “self-determination” as false. This researcher agrees with his following statement:

“it is not a question of whether child-savers or liberationists are right, for they are both correct in pointing out part of what needs recognizing, and both wrong in failing to see the claims of the other side. To take children’s rights seriously requires us to take seriously nurturance and self-determination. It demands of us that we adopt policies, practices, structures and laws which both protect children and their rights. Hence the via media of ‘liberal paternalism’.”¹⁹²

In the case of children, it is especially their capacity for future autonomy which should be safeguarded. Therefore, a limited amount of intervention could be

¹⁸⁹ Ibid., p. 89.

¹⁹⁰ Freeman, n. 87 above.

¹⁹¹ Ibid.

¹⁹² Ibid., p. 69.

justified to protect children against their own irrational actions. According to Freeman:

“to take children’s interest more seriously requires us to take more seriously than we have done hitherto for the protection of children and recognition of their autonomy, both actual and potential. The view presented is premised on the need to respect individual autonomy and to treat persons as equals. Actual autonomy is important but it is as much the capacity for autonomy that is at the roof of this thinking”.¹⁹³

It is clear that Freeman is in favour of a measure of paternalism toward children. One must not only recognize the autonomy of the child, but also the dangers of complete freedom. In this way children can be protected against their irrational actions, but at the same time the goal of irrational independence of the child can be achieved¹⁹⁴.

The last category rights against parents is also concerned primarily with self-determination. However, whereas the third is concerned with the justification of civil liberties and the child’s position under the general law, this category is concerned with the claim for independence from parental control before the age of majority. Claims in this category range from the trivial to serious matters.¹⁹⁵

2.5.2 Eekelaar’s Framework of Children’s Rights

The key precondition for rights is the social perception that an individual or class of individuals has certain interests. The interests in question must also be capable of isolation from the interests of others. Eekelaar however points out that children often lack the information or ability to decide what is in their best interest. Thus, Eekelaar’s theory of rights involves “some kind of imaginative leap” in

¹⁹³ Ibid., p. 66.

¹⁹⁴ Ibid.

¹⁹⁵ Freeman, n. 87 above, pp. 16- 17,19,23.

terms of which it is guessed “what a child might retrospectively have wanted once he/she reaches a position of maturity.”¹⁹⁶

Eekelaar identifies three separate kinds of interests which might form the foundation of these retrospective claims, namely, basic interests; developmental interests; and autonomy interests.¹⁹⁷ Basic interests and developmental interest can be classified under the “nurturance approach”, whereas autonomy interests fall under the “self-determination approach”.

Basic interests relate to what might be described as the essentials of healthy living, including physical, emotional and intellectual care. The duty to secure these interests is initially placed on the child’s parents, but the state may intervene where the parents fail to fulfill their duty. These interests are “basic” because they require compliance with acceptable minimum standards of upbringing.

Developmental interests are wider than basic interests, and may be asserted against parents and the wider community. They entail that “all children should have an equal opportunity to maximize the resources available to them during their childhood so as to minimize the degree to which they enter adult life affected by avoidable prejudices incurred during childhood”¹⁹⁸. Eekelaar doubts whether developmental interests could legitimately be classified as legal rights, since, apart from the right to education, the law imposes no duty on parents to fulfill children’s developmental interests.

The autonomy interests which children may claim retrospectively refer to the freedom to choose their own lifestyle, and to enter social relations according to their own inclinations, “uncontrolled by the authority of the adult world, whether parents or institutions”.¹⁹⁹ This classic libertarian claim can be interpreted as a

¹⁹⁶ Eekelaar, n. 159 above.

¹⁹⁷ Ibid.

¹⁹⁸ Eekelaar, n. 159 above, pp. 81-82.

¹⁹⁹ Ibid., p. 171.

version of the developmental interests.²⁰⁰ Bainham argues that what Eekelaar probably means is that healthy development implies a measure of self-determination or autonomy.²⁰¹

Due to a possible conflict between a child's autonomy interests and his or her developmental interests, Eekelaar argues that a separate category of rights should be adopted.²⁰² For example, while the removal of age restrictions on drinking or driving would further the autonomy interests of children, it would also result in more deaths or injuries among children from road accidents, thereby infringing their developmental and basic interests.²⁰³

Eekelaar regards autonomy interests as subordinate to basic and developmental interests. However, he subsequently attempted to build on his earlier theory by suggesting a way in which furthering the best interests of children may be reconciled with treating them as possessors of rights. This theory is based on the concept of "dynamic self-determination" and relies on the argument that the best interest principle should be properly understood to accommodate an opportunity for the child to determine what those best interests are.²⁰⁴ Eekelaar proposes, subject to the following two limitations, that a child's decision should determine the outcome of the issue in question: Firstly, children may not make decisions which are incompatible with the general law and the interests of others; and secondly, children may not make decisions which are contrary to their "...self interest...narrowly defined in terms of physical or mental well-being and integrity."²⁰⁵

²⁰⁰ Ibid.

²⁰¹ Bainham, n. 176 above, p. 86.

²⁰² Eekelaar, n. 159 above. 171.

²⁰³ Bainham A, n. 176 above, p. 86.

²⁰⁴ Eekelaar J, n. 159 above, p. 42.

²⁰⁵ Ibid.

2.5.3 Wald's Framework of Children's Rights

According to Wald, there are four different types of claims under the general rubric of children's rights. The reasons for categorizing children's rights like this can be found in Wald's warning against "lumping a wide range of claims under the heading "children's rights". First, the proponents of expanded rights "broaden their appeal while masking significant differences in the desirability or undesirability of granting specific rights to children". Secondly, the means of achieving and enforcing various rights depends on the type of right concerned.²⁰⁶

The claims identified by Wald can be categorized under the two approaches to the protection of the rights of children (the "nurturance" and "self-determination" approaches). Wald refers to the claims usually made under the "nurturance approach" as "protections due (to) rather than rights of, children". He lists two categories of "protections", namely rights against the world and protection against inadequate care.²⁰⁷

Historically, age has been accepted as the only basis for withholding from children certain principles, for example, the right to vote, marry, drive and work. This distinction between adults and children is based on the assumption that children are incapable of acting in an "adult" manner. Wald indicates that if it is found that the assumptions of incapacity are invalid, or that the social structure and the rate of development of adolescents have changed, these constraints should be eliminated. A step in that direction is the lowering of the age of majority from 21 to 18 years in most states in the USA.²⁰⁸

In determining the rationality of a given restriction, it must be kept in mind that since people mature at different times, any given age will be arbitrary to some degree. The practical difficulties of making decisions on a case-by-case basis may justify the selection of some age as a cut-off point for granting specific rights. Wald correctly emphasizes that the re-examining of existing constraints

²⁰⁶ Wald, 1979 (UCDLR) University of California, Davis Law Review, p. 259.

²⁰⁷ Ibid., pp. 261, 263.

²⁰⁸ Wald, n. 206 above, pp. 260, 265, 267.

will never totally eliminate the incapacities of childhood. Children do not have the same mental abilities, judgment or work capacity as adults. While the reasons for disenfranchising a one-year-old are clear, the justification is less obvious with regard to sixteen-year-olds. For some rights it may be sensible to give control to parents rather than the state, for example, where the right of children to marry is involved.²⁰⁹

Wald's theory on rights against the parents shows that this category of rights has to do with the rights of children, prior to reaching the age of majority, to act independently of their parents. It touches on issues such as consent to medical care, consent to abortion, decisions on the school the child should attend, and where the child will live. Historically, all such decisions were made by the parents. Recently, the extent of parental control such as consent to medical care has been altered by courts and legislations in some countries, for example, USA.²¹⁰

2.5.4 Hafen's Framework for Children's Right

Hafen is an outspoken critic of rights for children who argue that children need a protective environment in which to develop their capacities. He contents that according children rights prematurely will damage individual liberty because children are incapable of making meaningful and rational choices.²¹¹ Hafen's approach to children's rights must be seen against the background of the following two themes: Firstly, the tradition of the individual, which is at the heart of American culture. His theme reference to America is questionable. Secondly, family tradition, which is regarded by Hafen as an essential precondition for the individual tradition²¹².

²⁰⁹ Ibid., pp. 260, 268 , 269.

²¹⁰ Ibid., pp. 260, 270, 271.

²¹¹ Federal K.H, On the road to reconceiving rights for children: a post-feminist analysis of the capacity principle, Depaul Law Review p.1012; Hafen 1976 BYULR pp. 657-658.

²¹² Hafen 1976 BYULR pp. 610-619.

The maintenance of the family tradition is a prerequisite for the existence of a rational and productive individual tradition.²¹³ Children are excluded from the individual tradition mainly because of lack of capacity for rational decision-making, an important requirement for individual freedom. However, children are part of the family tradition, where it is the duty of parents to develop the minimal capacities of their children with the intention of preparing them for the individual tradition.²¹⁴ It is within this framework that Hafen divides children's rights into two groups, namely, rights of protection and rights of choice.²¹⁵ The former include the right not to be imprisoned without due process, rights to property, and the rights to physical protection. These rights are aimed at protecting children not only against their parents and other adults, but also against the long term implications of their own decisions. On the other hand, rights of choice include the right to make affirmative choices of binding consequences, such as voting, marrying, exercising religious preferences, and choosing whether to seek education.²¹⁶ These rights are based on the assumption that the capacity for making rational decisions exists.²¹⁷

To restrict the child's right of choice is in fact an important form of rights of protection.²¹⁸ Hafen further argues that parents have a critical role to play in guiding the development of their children's rational capacities towards maturity.²¹⁹

2.6 Children Rights and Child Soldiers

Children are compulsorily and forcibly recruited into armed forces and groups, but also enlisted voluntarily. International law, as will be seen below, is moving

²¹³ Ibid., p. 657.

²¹⁴ Ibid.

²¹⁵ Hafen n. 212 above. p. 163.

²¹⁶ Ibid.

²¹⁷ Ibid., pp. 647-648.

²¹⁸ Ibid., p. 650.

²¹⁹ Ibid., pp. 651-658.

towards prohibiting all compulsory or forcible recruitment of children as soldiers. As the law currently exists, however, it does permit children aged 15 years or above to volunteer for military service. This is opposed by children's rights advocates, who argue for a 'straight-18' ban on all recruitment and use of child soldiers²²⁰.

The political landscape of the world is dotted with many theaters of conflict in which children are direct participants. The United Nations, regional, inter governmental, and non-governmental organizations continue to draw the attention of the international community to the ongoing recruitment, deployment, and misuse of persons under the age of 18 years in armed conflicts.²²¹ The effects of conflicts are ghastly on society, and on children in particular:

“Any conflict leaves children and youth orphaned, displaced, or responsible as the head-of-household when one or both parents are killed or away fighting. Schools which might otherwise occupy their time are destroyed or closed, fields they might otherwise plant are off-limits because of combat or mines, relatives and neighbours are arbitrarily arrested, humiliated, abused, or tortured”.²²²

Adults can both enlist voluntarily and be conscripted into national armed forces. An adult's decision to enlist in an armed force or group is recognized because adults are deemed to be sufficiently mature to make such decisions. In addition, adults have the responsibility to help to defend their country. There is no right in international law to avoid military service because of one's conscientious objections, whether based on one's religious, ethical or political beliefs. Although several treaties prohibit slavery and servitude, forced or compulsory labour, compulsory military service is excepted from these prohibitions²²³. For example,

²²⁰ Happold, n. 90 above, p. 29.

²²¹ Kargbo, n. 82 above, p. 485.

²²² Goodwin-Gill, n. 3 above, p. 23.

Article 4(3) of the European Convention on Human Rights²²⁴ on the prohibition of Slavery and force labour provides that:

“For the purposes of this article, the term ‘forced or compulsory labour’ shall not include
(b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service enacted instead of compulsory military service”(sic).

The international Covenant on Civil and Political Rights²²⁵ and the American Convention on Human Rights²²⁶ have similar provisions²²⁷. In addition, punishment for refusal to undertake military service is not generally considered to be persecution for the purposes of the Refugee Convention and cannot be the basis to support a claim for asylum²²⁸. It is open to the State parties to grant refugee status to persons who object to performing military service for genuine reasons of conscience.²²⁹ The decision whether to recognize a right to conscientious objectors lies within each state’s discretion. Such a right may exist *lex ferenda*²³⁰ but not *lex lata*. Adults can be forced to fight.

²²³ Happold, n. 90 above, p. 30.

²²⁴ European Convention on Human Rights (1950), formally entitled Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, European Treaty Series No. 5. Entered into force on 3 September 1953. Amended by Protocol No. 11 (European Treaty Series No. 155, entered into force on 1 November 1998), which replaced Protocols 2, 3, 5, 8, 9 and 10 and repealed Article 25 and 46 of the Convention.

²²⁵ Article 8(3), International Covenant on Civil and Political Rights (1966), United Nations, Treaty Series, Vol. 999, p. 171. Entered into force on 23 March 1976.

²²⁶ American Convention on Human Rights (1969), “Pact of San Jose”, Organisation of American States, OAS Treaty Series, No. 36. Entered into force on 18 July 1978.

²²⁷ Article 6(3), American Convention on Human Rights.

²²⁸ There are exceptions: if the penalties for draft evasion are excessive or disproportionate (which ground is in itself an implicit admission that states are allowed to punish draft evaders); if conscription is administered in a discriminatory manner; or if conscription would result in having to participate in illegal activities.

²²⁹ UNHCR, Handbook on Procedure and Criteria for Determining Refugee Status 1979, para. 173.

²³⁰ Article 10(2), European charter of Fundamental Rights.

The argument for preventing children from behaving in a particular way assumes that adults know better what their best interests are. If children have a right not to be recruited into an armed force or an armed group, the right is a welfare right based on a view that military service, even if voluntary, is contrary to children's best interests.²³¹ In some situations, it might be argued that a child's decision to join an armed force or group is rational. Modern warfare frequently sees soldiers preying on civilians rather than engaging in combat with each other. Statistically, it might be safer to be a soldier than a civilian. In addition, possession of a gun means access to other goods. In situations of scarcity, it is the men with guns and their families that get fed. This position is echoed by John Ryle:

“In Africa, where there is no state to protect you, a gun may be the only way to ensure that you and your family have food-and that someone else doesn't take it away from you. If I were a 17-year-old in Southern Sudan or Somalia today I would get myself a gun as soon as I could I'd join a guerrilla force or a government militia- whatever it took. If I were the responsible adult in my family and a 15 year-old can be, perforce, an adult-it would be my obligation to acquire the means to defend myself and my weaker relatives. If a foreigner, or anyone else, told me that I was a child and had to be protected from military service, I'd laugh.”²³²

Nobody considers the situation to be ideal, but joining an armed group can be situationally rational; infact the best option available when faced with situations such as the one outlined above.

It is argued that children's choices should be respected. It is the child who is in a situation requiring him or her to make the choice. The truth, however, is that

²³¹ Happold, n. 90 above, p. 30.

²³² John Ryle, Why Must a Child be Forced to Kill? Guardian, 25 January 1999 as cited by Happold, n. 90 above, p. 31.

children lack the psychological maturity to make a meaningful and informed decision to enlist or be enlisted into an armed force or group. Children are easily swayed by extraneous factors, for examples, peer pressure, parental and societal attitudes, and media propaganda. Poverty, lack of security, absence of educational or employment opportunities can also weigh heavily on children's decisions to volunteer. Nevertheless, whether one considers a child's decision to enlist as a rational one or not depends largely on one's view of what military service entails and how it weighs against benefits and detriments against other alternatives open to the decision-maker.

Arguments have been put forward by armed forces which recruit individuals before their eighteen birthdays. They contend that service in the armed forces can open opportunities for education, vocational training, professional and social advancement, and inculcates qualities such as courage, discipline and responsibility; One might ask whether it is a lack of sympathy for military life and values that has led to refusal to accept such arguments as having any cogency? Instead, we might wish to respect what the recruits themselves and their parents' think, as they might be thought to be the persons best placed to know what is in each child's best interests.

The most recent international treaty on the subject, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict²³³ largely reflects on such a position. It permits the voluntary enlistment of children aged 16 or above, but only if such recruitment is truly voluntary, fully informed and consented to by the recruit's parents. States parties are, moreover, required to use all feasible measures to ensure that such child soldiers do not participate directly in hostilities. Both the Optional Protocol and ILO Convention 182 on the Worst Forms of Child Labour prohibit the forced and compulsory recruitment of under-18s. While maintaining a distinction between childhood and adulthood, such a position acknowledges that childhood is not undifferentiated state but one that moves gradually into adolescence and full maturity.

²³³ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000), A/RES/54/263. Entered into force on 12 February 2002.

With regard to younger children, the argument that their development right not to be recruited trumps their autonomy right to make their own decisions seems much simpler. Younger children are less able to take decisions for themselves, while being less suited to military life owing to their lack of physical and psychological maturity. In addition, it might be said that the issue is as much about children's rights. Rene Provost argued that the provisions in the two Additional Protocols and in the CRC prohibiting the recruitment and use of children under-15 years to participate, or participate directly in hostilities, do not confer rights upon children falling within the scope of those provisions.²³⁴ Instead, for Provost: "the Convention on the Rights of the Child echoes the conclusion...that humanitarian law standards, although grounded in the principle of humanity, are not directly attached to the human person, but instead stem from international public order requirements".²³⁵ Indeed one argument for maintaining such standard stresses not the children's but other interests. Young children are too immature to be counted upon to comply with international humanitarian law, as all combatants are required, under threat of incurring individual criminal responsibility. Their lack of inhibitions and suggestibility means they are less disciplined and more likely to commit atrocities. Indeed, there have been numerous cases of child soldiers being used to do so.

Although all persons are under an obligation to comply with international humanitarian law, in general it is the combatants who are in the best position to violate its tenets. Accordingly, young children are banned from the battlefields for the protection of others, as well as for their own benefit. The obvious point is that at 18 years, not only can an individual decide to enlist and fight but can be forced to do so. Many adult soldiers are compulsorily or forcibly recruited, or enlisted 'voluntarily' for the same reasons that motivated child volunteers. Adult soldiers often face the same hardships and harsh treatment as child soldiers.²³⁶

²³⁴ Rene Provost, *International Human Rights and Humanitarian Law*, Oxford University Press, 2002, p. 34.

²³⁵ *Ibid.*

²³⁶ Happold, n. 90 above, p. 33.

One writer argued that “those who use child soldiers are, by definition, willing to ignore and transgress longstanding ethical norms and will likely be unswayed by new ones. Those who abduct children, send them into battle, and force them to commit rape and murder are simply unlikely to be persuaded by moral appeals: *one cannot shame the shameless*” (emphasis mine).²³⁷ This is why making laws is not the same as finding ways to enforce them.

2.7 The Status of Children Generally

Granting to children a special protection status during hostilities is based on how society holds them generally. Children are commonly recognized as a discrete group with identifiable rights and needs as a principle which now underlies much of the existing international human rights and humanitarian law.

In writing about Article 38 of the CRC concerning children in armed conflict including child soldier, the Quaker UN Office made the point that: “It has long been recognized that members of certain groups may be vulnerable to violations of their human rights and fundamental freedoms. Children are considered as such a group and may be entitled to special measures. Such special treatment is not considered to be discriminatory because its purpose is to ensure equality.”²³⁸

The arguments for special treatment of children usually rely on two main factors. The first is related to the above quotation, namely, the vulnerability of children. The second is premised on the fact that they are the new generations and therefore represent the future.²³⁹

The idea of special treatment to be granted to children in international law is founded, for example, in the guiding norm that ‘mankind owes to the child the

²³⁷ P. W.Singer, Talk Is Cheap: Getting Serious About Preventing Child Soldiers, CILJ Vol. 37 No. 3 (2004) p. 61 at 573 para. 3.

²³⁸ Quaker UN Office, The Rights of the Child (Geneva, 1988), 1; E. Ressler, N. Boothby, and D. Steinbock, ‘Unaccompanied Children (New York, 198), p. 259.

²³⁹ J. Kuper, ‘International Law Concerning Child Civilians in Armed Conflict’, Clarendon Press Oxford, 1997, p. 15.

best it has to give', first set out in the 1924 Declaration of the Rights of the Child;²⁴⁰ in the universal international support for CRC; and in the existence of over eighty international instruments concerning children as distinct from those of adults.²⁴¹ The granting of a distinct legal status to children seems to some extent to be a cross-cultural phenomenon.²⁴² This is confirmed by many statements made by states during the closing debates in the UN at the final stages of drafting the CRC.²⁴³

In Africa customary law, for example, there is some evidence that children enjoy special entitlements, although the diversity of African cultures and traditions makes it difficult to generalize. One writer asserts that: "infancy is a concept that has universal legal validity among all African societies, though the age at which it terminates, naturally varies from one community to another. Particular ages entitle the individuals to particular types of social participation in various affairs of life, and legal capacity or incapacity accompanies certain ages".²⁴⁴

Under traditional customary law in Zaire, children were entitled to special protection, although childhood was not defined strictly by age. Childhood began at birth and continued until the child attained a degree of economic independence and fully participated in the work of adults, which is between the ages of 17 and 20 years.²⁴⁵ Under Sesotho customary practice which is prevalent in parts of Southern Africa, every child had the right to claim maintenance in the form of food, clothing, shelter, and necessary medical expenses.²⁴⁶

²⁴⁰ The 1924 Declaration, League of Nations Official Journal, Special Supp. No.23 (Geneva, 1924), p. 81.

²⁴¹ S. Detrick (ed.), *The United Nations Convention on the Rights of the Child: A guide to the Travaux Préparatoires* (Dordrecht, 1992), p. 20.

²⁴² For discussion of the legal status of children in a cross-cultural context, see generally P. Alston (ed.), *The Best Interests of the Child*. Oxford Press, (1994).

²⁴³ United Nations Draft Convention on the Rights of the Child: Commission on Human Rights, Debate of 8 March 1989 (Stockholm, 1989), pp. 7-11, 29-39.

²⁴⁴ T.O. Elias, *The Nature of African Customary Law*, Manchester 1956, pp. 102-103.

²⁴⁵ J.F. Tchibinda and N. Mayetela, 'The Rights of the Child in the People's Republic of the Congo', in Pappas (ed.), 1983, p. 183.

In Islam, cross-cultural recognition of the special status of children can also be found. According to one writer:

“the importance of children as a class unto themselves is derived from Quranic provisions as well as the Muslim tradition of holding the family as the focal unit within the community. Although ‘childhood’ is not explicitly defined, the predominant view is that social responsibilities attach to individuals upon puberty, which is often held to be the age of fifteen. The protections due to children, therefore, should apply at least up to that age”.²⁴⁷

Islamic law explicitly grants children a number of entitlements, inter alia, rights to maintenance, with special provision for illegitimate children; parentage and to upbringing, including, for younger children, custody and fosterage, and when older, care and guardianship.²⁴⁸

However, while it is possible to identify certain cross-cultural practices that grant children special status, these practices are not necessarily coterminous with the granting to children of additional rights and or protection. In some cases the opposite applies, for example, as regards female circumcision and child marriage.²⁴⁹

²⁴⁶ A.N.R. Ramolefe, ‘Sesotho Marriage, Guardianship and the Customary-Law Heir, in M.Gluckman (ed.), *Ideas and Procedures in African Customary Law*, London, 1969, p. 198.; H. Mursal, ‘Report on the Situation in Somalia’, in Aldrich and van Baards, 1994, p. 27.

²⁴⁷ M. Elahi, *The Rights of the Child Under Islamic Law: Prohibition of the Child Soldier*, 19.2 *Columbia Human Rights Law Review* (Spring, 1988) p. 270; A. A Siddiqui, *Children’s Rights Within the Moslem Family*, 11.2/3 *International Children’s Rights Monitor*, (1994) p. 4; F.Krill, “The UN Convention on the Rights of the Child and His Protection in Armed Conflicts”, 3 *Mennesker og Rettigheter* (1986), p. 42.

²⁴⁸ J. Nasir, *The Islamic Law of Personal Status*, (2nd edn, London, 1990), pp.193-200; D. Pearl, *A Textbook on Muslim Personal Law*, (2nd edn, London, 1987), pp. 85-98.

²⁴⁹ J. Ngandjui, *Do Traditions Clash With Children’s Rights?* 10.4 *International Children’s Rights Monitor* (1993), p. 6; A. Belembaogo, *The Best Interests of the Child—The Case of Burkina Faso*, in Alston (ed.), (1994), pp. 202–206.

Indeed, J. Kuper asserts that some cross-cultural evidence does seem to reveal an acceptance of children as a distinct social group,²⁵⁰ and more recently, international legal initiatives acknowledge the entitlement of this social group which incorporates child soldiers, to special treatment, including certain additional rights, and a greater degree of protection than the adult population generally.²⁵¹

²⁵⁰ J. Kuper, *International Law Concerning Child Civilians in Armed Conflict*, Clarendon Press Oxford, 1997, p. 18.

²⁵¹ *Ibid.*

CHAPTER THREE

The United Nations and Child Soldiers

3.1 Introduction

One of the most sensitive tasks confronting mankind today is the maintenance of international peace and security. The twentieth century witnessed two world wars and many other local conflicts, which claimed the lives of millions of people, and displaced many more.

Irrespective of the arrangement made under the League of Nations, which obviously failed, and the present arrangement under the United Nations, war and conflicts remain a scourge and rear their ugly heads in virtually all the continents of the world.²⁵² It is notable that conflicts today have changed in nature and pattern in that most of them are neither between states nor between two clearly identifiable armies with a clearly defined battle front. Rather, today's conflicts are mainly internal in nature and often take a religious or ethnic character unusual involving violence and cruelty. Inter-state conflicts have on the other hand become less frequent.

The new breed of intra-state conflicts have posed serious challenge to the United Nations in its effort to maintain world peace and security. It may be difficult to state in concrete terms the causes of these conflicts. However, there are general factors which underlie them, and these include economic, social, ethnic, religious and political, among others. Any of these or a combination of them could give rise to a conflict. Whenever there is a conflict, children are among those affected and in need of protection.

²⁵² L. Onoja, *Peacekeeping and International Security in a Changing World*, Mono Expressions Ltd, Jos, 1988, p. 17.

The Secretary-General of the United Nations in his third report to the Security Council on children and armed conflict²⁵³ wrote:

“Since 1998, when the issue of war-affected children was formally placed on the agenda of the Security Council, the progressive engagement of the Council has yielded significant gains for children. These include four resolutions devoted to the issue... an annual debate and review, an annual report submitted by the Secretary-General, the incorporation of child-specific concerns into the briefs of Security Council fact-finding missions, an important contribution to monitoring and accountability through the listing of parties to conflict that violates the rights of children and the stipulation for the systematic inclusion of children in country-specific reports”.²⁵⁴

The Secretary-General also noted that: ‘Child protection has been integrated into the mandates and reports of peacekeeping missions and the training of personnel’.²⁵⁵

3.2 The UN Involvement

At the instance of the General Assembly following the coming into force of CRC on the 2 September, 1990, the Committee on the Rights of the Child was established to monitor and supervise states’ compliance with their obligations under the Convention. One of the earliest issues considered was the issue of children and armed conflict. At the second session of the Committee in 1992, a proposal was made that an Optional Protocol to the CRC be adopted to further restrict children’s participation in hostilities.²⁵⁶ The Committee recommended to the United Nations General Assembly at its third session that the Secretary-

²⁵³ Report of the Secretary-General: Children and Armed Conflict, UN Doc.A/58/ 546- S/2003/1053 (10 November 2003).

²⁵⁴ Ibid., para. 4.

²⁵⁵ Ibid., para. 5.

²⁵⁶ UN Doc. CRC/C/10, paras, 61-77.

General should undertake a study of the ways and means of improving the protection of children from the adverse effects of armed conflicts²⁵⁷.

The 1993 World Conference on Human Rights devoted an entire section of its Vienna Declaration and Programme of Action²⁵⁸ to the rights of the child. The latter went much further and dealt more specifically with the situation of children than did the previous UN World Conference on Human Rights in Tehran, 1968. The Tehran Proclamation merely stated that the protection of the child was the concern of the international community and that 'the aspirations of the younger generation for a younger world ... must be given the highest encouragement'.²⁵⁹ By contrast, the Vienna Declaration stated that:

"The World Conference on Human Rights strongly supports the proposal that the Secretary-General initiate a study into means of improving the protection of children in armed conflicts. Humanitarian norms should be implemented and measures taken in order to protect and facilitate assistance to children in war zones. Measures should include protection for children against indiscriminate use of all weapons of war especially antipersonnel mines. The need for after-care and rehabilitation of children traumatized by war must be addressed urgently. The Conference calls on the Committee on the Rights of the Child to study the question of raising the minimum age of recruitment into armed forces".²⁶⁰

²⁵⁷ Happold, n. 90 above, p. 35.

²⁵⁸ UN Doc. A/CONF. 157/24 (adopted 25 June 1993), para 21.

²⁵⁹ United Nations World Conference on Human Rights. Proclamation of Tehran (1-8), reproduced in P.R. Ghandhi (ed.). Blackstone's International Human Rights Instruments, Oxford: Oxford University Press, 2002, p. 414. Happold, n. 90 above, p. 35.

²⁶⁰ Report of the Secretary-General: Children and Armed Conflict, UN Doc.A/58/546- S/2003/1053 (10 November 2003), (Part I, ch. III, s. II). para. 50.

Part of the recommendation of the Conference was that ‘matters relating to human rights²⁶¹ and the situation of children be regularly reviewed and monitored by all relevant organs and mechanisms of the United Nations system’.²⁶²

3.3 The Involvement of General Assembly and Security Council

The Vienna Conference and the Committee of the Rights of the Child’s proposals were noted by the United Nations General Assembly in its Resolution 48/157 of 20 December 1993 on the protection of children affected by armed conflict. The resolution, among other things:

“...Requests the Secretary-General to appoint an expert,... to undertake a comprehensive study of this question, including the participation of children in armed conflict, as well as the relevance and adequacy of existing standards, and to make specific recommendations on ways and means of preventing children from being affected by armed conflicts and of improving the protection of children in armed conflict and on measures to ensure effective protection of these children ... and to promote their physical and psychological recovery and social reintegration ... taking into account the recommendations by the World Conference on Human Rights and the Committee on the Rights of the Child.”²⁶³

Resolution 48/157 marked the first time that the General Assembly had considered the issue of children affected by armed conflict in any specific way. In Resolution 44/25 the General Assembly adopted the text of the Convention on the Rights of the Child, and in Resolution 3318(XXIX) it proclaimed the

²⁶¹ See Article 6 rights to life; Article 7 rights to name, nationality and to be care for by her parents; Article 12 & 13 rights to express her views; Article 24 right to health facilities and Article 29 rights to education of CRC.

²⁶² Report of the Secretary-General: Children and Armed Conflict, UN Doc.A/58/546- S/2003/1053* (10 November 2003), (Part I, ch. III, s. II). Para 51.

²⁶³ GA Res. 48/157 of 20 December 1993: Protection of Children Affected by Armed Conflict, paras 6 and 7.

Declaration on the Protection of Women and Children in Emergency and Armed Conflict, which largely emphasized the need to provide special protection to women and children belonging to the civilian population.²⁶⁴

However, neither resolution had resulted in any sustained engagement with the issue. Resolution 48/157, by contrast, went into detail by setting out a plan of action which proved to be the beginning of a continuing commitment by the political organs of the UN to the issue of children's involvement in armed conflict.

Mrs Graca Machel was appointed as expert of the Secretary-General to conduct the study on the impact of Armed Conflict on Children. The report was issued on 26 August 1996²⁶⁵ after a series of consultations²⁶⁶ and following field trips to several areas affected by armed conflicts.²⁶⁷ Guidance was also received from a group of eminent persons from a broad spectrum of political, religious and cultural backgrounds.²⁶⁸ The report remains a point of reference and is considered as having made an impact on policy on children involved in armed conflict.

The most serious ways in which armed conflict affected children was found to be their participation as soldiers. This was identified as 'one of the most alarming trends in armed conflict'.²⁶⁹ The report examined how child soldiers were recruited and used, their demobilization and reintegration into society, and how future recruitment might be prevented. It made a number of proposals on the last

²⁶⁴ This was later reflected in Articles 76 and 77 of APL, when women and children were declared to be objects of special respect.

²⁶⁵ Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graca Machel submitted pursuant to GA Res. 48/157, UN Doc. A/51/306 (26 August 1996).

²⁶⁶ In Addis Ababa, Cairo, Abidjan, Manila, Bogota and Florence. See Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children: Note by the Secretary-General: Addendum, UN Doc. A/51/306/ Add. 1 (9 September 1996).

²⁶⁷ Report of the Secretary-General: Children and Armed Conflict, UN Doc.A/58/546- S/2003/1053*(10 November 2003), para 14.

²⁶⁸ Ibid., para. 15.

²⁶⁹ Ibid., para. 34.

issue. It requires governments to pay much closer attention to their methods of recruitment, and in particular, renounce the practice of forced recruitment, and ensure that all children are registered at birth and receive documentation of age. To be certain that these measures succeed, governments were required to establish effective monitoring systems and back them up with legal remedies and institutions that are sufficiently strong to tackle abuses.²⁷⁰

According to Harold²⁷¹, these are not minor matters; they go to the very effectiveness of states' administrative and judicial systems. The report also made a number of specific recommendations with regard to the problem of child soldiers generally. Firstly, a global campaign should be launched that aimed at eradicating the use of children under the age of 18 years in the armed force. Secondly, United Nations bodies, specialized agencies and international civil society actors should begin to pursue quiet diplomacy with governments and non-state forces and their international supporters to encourage the immediate demobilization of child soldiers and adherence to the legal provision of CRC. Thirdly, all peace agreements should include specific measures to demobilize and reintegrate child soldiers into society. Fourthly, States should ensure the early and successful conclusion of the drafting of the Optional Protocol to the Convention on the Rights of the Child on involvement of Children in Armed Conflicts, raising the age of recruitment and participation in the armed forces to 18 years.

Subsequent to the report, the General Assembly recommended that the Secretary-General appoint a special representative on the impact of armed conflict on children, with the following mandate:

Firstly, assess progress achieved, steps taken and difficulties encountered in strengthening the protection of children in situations of armed conflict.

²⁷⁰ Ibid.

²⁷¹ Happold, n. 90 above, p. 37.

Secondly, raise awareness and promote the collection of information about the plight of children affected by armed conflict and encourage the development of networking.

Thirdly, work closely with the Committee on the Rights of the Child, relevant United Nations bodies..., relevant special rapporteurs and working groups, as well as United Nations field operation, regional and sub-regional organizations, other competent bodies and non-governmental organizations.

The special Representative was required to submit an annual report to the General Assembly and to the Commission on Human Rights (Now the UN Human Rights Council).²⁷² In September 1997, the Secretary-General appointed Mr. Olara Otunnu of Uganda to the position. Although he was originally appointed only for a three-year term, his mandate has been twice renewed.²⁷³

The General Assembly has continued to pass a series of resolutions dealing with the protection of children in armed conflict,²⁷⁴ to support efforts to end the use of children as soldiers in armed conflict, and catalogue discussion to raise the minimum age for recruitment and participation in armed conflicts. The General Assembly has also condemned specific instances of the recruitment and use of child soldiers by parties to a conflict. For example, in a series of resolutions it has condemned the Burmese Government and other parties to the conflict in Burma, and urged the government to put an end to the practice and ensure the disarmament, demobilization and reintegration of child soldiers.²⁷⁵

²⁷² Ibid., para 37.

²⁷³ See GA Res. 54/149 of 17 December 1999; The Rights of the Child, section II, para 2; and GA Res 57/190 of 18 December 2002: The Rights of the Child, section V, paras 2.

²⁷⁴ See GA Res. 52/107 of 12 December 1999. the Rights of the Child GA Res 53/128 of 9 December 1998 The Rights of the child: GA Res 54/149 of 17 December 1999 .The Rights of the Child; GA Res 55/79 of 4 December 2000: The Rights of the child GA Res 56/138 of 19 December 2002; and GA Res 58/157 of 22 December 2002: the Rights of the child. See also GA Res S-27/2 of 10 May 2002: a World fit for Children.

²⁷⁵ See GA Res. 55/122 of 4 December 2000: situation of Human Rights in Myanmar, para 18; GA Res 56/231 of 24 December 2001: situation of Human Rights in Myanmar, para 22; GA Res 57/231 of 18 December 2002, para. 5(e); and GA Res 58/247 of 23 December 2003; situation of Human Rights in Myanmar, para 6(c). The resolution varies in their terms. Earlier resolutions on the situation do not mention the issue specifically.

3.4 The Involvement of the Security Council

From 1990, Security Council resolutions began to make reference to conflict-affected children. At first, reference was made to situations with which the Council was seized. In two resolutions adopted in 1996 on the situation in Liberia, the Council condemned the practice of recruiting, training and deploying children for combat.²⁷⁶ In Resolution 1071, the Council requested the Secretary-General to prepare a report on what assistance the UN could provide in support of the Liberian peace process and deplored the ‘inhuman and abhorrent practice’ while in Resolution 1083 it called upon the parties to the conflict to release child soldiers in their ranks for demobilization. However, in practice, these calls had little impact.²⁷⁷

The Security Council adopted two resolutions on Sierra Leone in early 90’s. In Resolution 1181, the Council welcomed:

“the efforts of the Government of Sierra Leone to coordinate an effective national response to the needs of children affected by armed conflict, and the recommendation of the Special Representative of the Secretary-General for Children in Armed Conflict that Sierra Leone be made one of the pilot projects for a more concerted and effective response to the needs of children in the context of post-conflict peace building”.²⁷⁸

Council resolution 1231 deplored ‘all violations of human rights and international humanitarian law...including the recruitment of children as soldiers’ which had occurred in the recent upsurge of violence in the country and urged the prosecution and punishment of those responsible for such violations.²⁷⁹

²⁷⁶ SC Res. 1071 of 30 August 1996 on the Situation in Liberia, para. 9; and SC Res. 1083 of 27 November 1996 on the Situation in Liberia, para 6.

²⁷⁷ Happold, n. 90 above, p. 112.

²⁷⁸ SC Res. 1181 of 13 July 1998 on the situation in Sierra Leone, Para 14.

²⁷⁹ Ibid., para 3.

Following consideration of an agenda item entitled ‘Children and Armed Conflict’²⁸⁰ and a public debate held at the request of the Special Representative, the President of the Security Council issued a statement²⁸¹ which expressed the Security Council’s grave concern at the harmful impact of armed conflict on children. The Council condemned the targeting of children in armed conflict, as well as their recruitment and use in hostilities ‘in violation of international law’, and called upon parties to conflicts to put an end to such activities. The Council also called upon all parties to comply with their international legal obligations and stressed the obligation on all states to prosecute those responsible for ‘grave breaches of international humanitarian law’. The statement expressed

“...the Security Council’s intention to pay serious attention to the situation of children affected by armed conflicts and, to this end to maintain contact, as appropriate, with the Special Representative of the Secretary-General and with the relevant programmes, funds and agencies of the United Nations system”.

The Security Council made further references to the harmful impact of armed conflict on children in a number of other subsequent statements.²⁸² The Security Council intensified its engagement with the issue and adopted on 30 August 1999 Council Resolution 1261, the first resolution specifically concerned with the situation of children in armed conflict.²⁸³ The preamble to the resolution noted the recent efforts to bring to an end ‘the use of children as soldiers in violation of international law’. It welcomed in particular the adoption of International Labour Organization (ILO) Convention 182 on the Prohibition and Immediate Action for

²⁸⁰ Statement by the President of the Security Council of 29 July 1998 (S/PRST/1998/18).

²⁸¹ See Report of the Special Representative of the Secretary-General on children and Armed Conflict. 12 October 1998 (A/53/482) at para. 104.

²⁸² Statement by the President of the Security Council of 12 February 1999 (S/PRST/1999/6): Children and Armed Conflict; Statement by the President of the Security Council of 23 March 2000 (S/PRST/2000/10): Maintenance of Peace and Security and Post-conflict Peace Building; Statement by the President of the Security Council of 31 August 2001 (S/PRST/2001/21): Small Arms; Statement by the President of the Security Council of 15 March 2002 (S/PRST/2002/6): Protection of Civilians in Armed Conflict; Statement by the President of the Security Council of 7 May 2002 (S/PRST/2002/12): Children and Armed Conflict.

²⁸³ SC Res. 1261 (25 August 1999).

the Elimination of the Worst Forms of Child Labour and the provisions of the Rome Statute of the International Criminal Court characterizing as a war crime the recruitment or use to participate actively in hostilities of children under the age of 15.

In the operative part of the resolution, the Council condemned the targeting of children in armed conflict, including their recruitment and use in violation of international law, and called on all parties concerned to put an end to such practices. The Council also called upon parties to armed conflict to comply with their international legal obligations, including states' obligation to prosecute those responsible for grave breaches of international humanitarian law.

However, the resolution also made a number of recommendations. It urges parties to armed conflicts to: ensure that the protection, welfare and rights of children are given due importance in peace negotiations and processes; undertake effective measures during armed conflicts to minimize the harm suffered by children, and to promote, implement and respect such measures; abide by concrete commitments made to ensure the protection of children in armed conflict; and to take special measures to protect children, in particular girls, from rape and other forms of sexual abuse and gender-based violence in situations of armed conflict. Further, States and all relevant parts of the UN system were urged to intensify their efforts to ensure an end to the recruitment and use of children in armed conflict in violation of international law, and to facilitate the disarmament, demobilization, rehabilitation and reintegration of children used as soldiers in violation of international law.

The Council itself undertook, when taking action to promote peace and security to give special attention to the protection, welfare and rights of children, and requested the Security-General to ensure that personnel involved in UN peacemaking, peacekeeping and peace-building activities had appropriate training on the protection, and promotion of the rights and welfare of children.²⁸⁴

²⁸⁴ Happold, n. 90 above, p. 44.

It was as much the passage of the resolution as its content that was significant. The Security Council, as the UN organ with primary responsibility for the maintenance of international peace and security,²⁸⁵ has traditionally left to the General Assembly “softer” subjects such as “assisting in the realization of human rights and fundamental freedoms”²⁸⁶ on the ground that they were irrelevant to the fulfillment of its core mandate. By passing a resolution on children and armed conflict, the Council was implicitly stating that children’s protection during armed conflicts were issues affecting international peace and security and therefore, placing this issue on the Council’s agenda. This, in its turn, implied that peace was more than simply the absence of war; it encompasses the presence of a variety of goods also. Thus report of the Secretary-General on the implementation of Resolution 1261²⁸⁷ started:

The present resolution is submitted pursuant to paragraph 29 of Security Council Resolution 1261 (1999) which represents a veritable landmark in the cause of children affected by armed conflict. The adoption of the resolution has finally given full legitimacy to the protection of children exposed to conflict as an issue that properly belongs to the agenda of the Council. The Council has now clearly acknowledged in several resolutions and presidential statements that the harmful impact of conflict on children has implications for peace and security.²⁸⁸

Since then, the Security Council has passed further resolutions dealing specifically with children and armed conflict. Security Council Resolution 1314 of 11 August 2000 condemned the targeting of children in armed conflict, including their recruitment and use as soldiers.²⁸⁹ In 2000, the UN General Assembly

²⁸⁵ Articles 24(1); Charter of the United Nations.

²⁸⁶ *Ibid.*, Article 13 (1) (b).

²⁸⁷ Children and Armed Conflict: Report of the Secretary-General. UN Doc. A/55/ 613- S/200/712 (19 July 2000).

²⁸⁸ *Ibid.*, para 1.

²⁸⁹ S.C. Res. 1261, U.N. SCOR, 4037th mtg., U.N. Doc. S/RES/1261 (1999).

adopted an Optional Protocol to the Convention on the Rights of the Child and urged all UN Member States to sign and ratify it²⁹⁰. The Council reiterated many of the concerns expressed and recommendations made in its earlier resolution but also set out specific action-orientated measures directed at the various actors. It also noted that:

“The deliberate targeting of civilian populations or other protected persons, including children, and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law, including that relating to children in situations of armed conflict may constitute a threat to international peace and security and in this regard reaffirms its readiness to consider such situations and where necessary to adopt appropriate steps”.²⁹¹

At the request of the government of Sierra Leone, the Security Council Resolution 1315 established “the Special Court for Sierra Leone”. The Court is charged with trying persons who “bear the greatest responsibility” for violations of human rights and international humanitarian law during the conflict in Sierra Leone²⁹². Certain individuals were charged with and indicted for having recruited children for use in conflict and with having arranged forced marriages. This is the first time that such charges have been brought against persons before an international tribunal.

Furthermore, targeted measures were adopted in Council Resolution 1379 of 20 November 2001 in which Council expressed its determination to give the fullest attention to the question of the protection of children in armed conflict when considering the matters of which it is seized, and its readiness to include

²⁹⁰ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000, U.N. GAOR, 54th Sess., U.N. Doc A/RES/54/263 (2000), available at <http://www.unhchr.ch/html/menu2/6/protocolchild.htm>. (Last visited 14 Oct, 2006).

²⁹¹ SC Res. 1314 of 11 August 2000 On Children and Armed Conflict, para 9.

²⁹² See S.C. Res. 1315, U.N. SCOR, 4186th mtg., U.N. Doc. S/RES/1315 (2000) (urging Sierra Leone to prosecute crimes committed against child soldiers); see also Statute of the Special Court for Sierra Leone, U.N. SCOR, 55th Sess., 4186th mtg., Enclosure, at 21, U.N. Doc. S/2000/915 (2000), available at <http://ods-dds-ny.on.org/doc/UNDOC/GEN/N00/661/77/PDF/N0066177.pdf> (establishing the Special Court for Sierra Leone pursuant to Security Council Resolution 1315).

provisions for the protection of children when considering the mandates of peacekeeping operations.²⁹³ In addition, it requested the Secretary-General to:

Attach to his report a list of parties to armed conflict that recruit or use children in violation of the international obligations applicable to them, in situations that are on the Security Council's agenda or may be brought to the attention of the Security Council by the Secretary-General in accordance with Article 99 of the Charter of the United Nation, which in his opinion may threaten the maintenance of international peace and security.²⁹⁴

In the resulting report,²⁹⁵ twenty-three parties to conflicts were found to be engaged in recruiting and/or using children in violation of their international obligations in five areas of conflicts: Afghanistan, the DRC, Liberia and Somalia. Concern was expressed over the recruitment and use of children soldiers in Burma, Nepal, the Philippines, Sudan, Northern Uganda and Sri Lanka. The Secretary-General's report was particularly enlightening with regard to the legal standards applicable to the recruitment practices of non-state parties to armed conflicts.²⁹⁶

In Resolution 1460 of 30 January 2003, the Security Council expressed its concern about what the list revealed. The Council called upon all parties to armed conflict recruiting or using child soldiers in violation of their international obligations immediately to halt such recruitment. In particular, it called upon all parties identified in the list to provide information to the Special Representative on the steps taken to halt their recruitment or use of child soldiers. The Secretary-General was requested to prepare another report including information on the progress made by the parties listed in the annex of his previous report in

²⁹³ Report of the Secretary-General: Children and Armed Conflict, 7 September 2001 (A/56/342-S/2001/852).

²⁹⁴ See SC Res 1379 of 20 November 2001 on Children and Armed Conflict, para 16.

²⁹⁵ Report of the Secretary-General: Children and Armed Conflict, 26 November 2002 (S/2000/1299).

²⁹⁶ Ibid.

ending the recruitment or use of child soldiers in violation of their international obligations, and in this regard, it intended to consider taking 'appropriate steps' to further address the issue if it deemed that insufficient progress had been made.

The Secretary-General report was tabled on 10 November 2003.²⁹⁷ Two lists were annexed to the report: one containing an updated list of parties annexed to the previous report; the other containing a list of parties named in the body of the previous report. Both lists included new parties²⁹⁸ that the Secretary-General had found to be recruiting or using children in armed conflict. The Secretary-General assessed whether parties featuring in the previous report had engaged in dialogue with the Secretary-General's representatives in the field, ended the recruitment or use of child soldiers, developed action plans for the demobilization of child soldiers, and whether they had begun to demobilize child soldiers. However, despite some progress, all parties listed had continued to use or recruit children in armed conflict and, in a new development, all the parties to the conflict in Cote d'Ivoire were recruiting or using child soldiers.

The Security Council considered that a number of especially egregious violations against children, including the recruitment and use of child soldiers, should receive priority attention in monitoring operations. It recommended that a monitoring network of various bodies and actors, each of which could bring its specific expertise to the process, should be developed. These would include the Security Council itself, the UN field presence, the UN human rights regime, the International Criminal Court and the Office of the Special Representative but would also engage participants outside the UN system.

The Council recommended the adoption of imposition of travel restrictions on leaders and their exclusion from any governance structures and amnesty provisions; a ban on the export or supply of small arms; a ban on military assistance; and restrictions on the flow of financial resources to the parties

²⁹⁷ Report of the Secretary-General: Children and Armed Conflict, UN Doc. A/58/546-S/2003/1053 (10 November 2003).

²⁹⁸ The list include Afghanistan, Burundi, Cote d'Ivoire, Democratic Republic of the Congo, Liberia, Somalia, Republic of Chechnya of the Russian Federation, Colombia, Myanmar, Nepal, Northern Island, Philippines, Sri Lanka, Sudan, Uganda.

concerned. In addition, special steps were to be taken to ensure that persons responsible for crimes against children are among the first to be prosecuted in the ICC,²⁹⁹ and that the listing of parties recruiting or using children in armed conflict be updated annually and include all situations where such practices persisted.

It was evident that despite these resolutions, parties to conflict continue to violate with impunity the relevant provisions of applicable international law relating to the rights and protection of children in armed conflict'.³⁰⁰ The Council in Resolution 1539 of 22 April 2004, requested the Secretary-General, as a matter of urgency and preferably within three months, to devise a plan of action for a systematic and comprehensive reporting mechanism, which would provide timely, objective, accurate and reliable information on the recruitment and use of child soldiers in violation of applicable international law and on other violations and abuses committed against children affected by armed conflict. The plan would consider the type of appropriate action to be taken against those responsible.³⁰¹

However, it is clear that Resolution 1539 marks another landmark in the Council's involvement in the issue of the recruitment and use of child soldiers. The Council has restricted the threat to impose sanctions to those situations of which it is already seized, which indicate that it does not consider the recruitment or use of children in armed conflict to be in itself a threat to international peace and security. However, the threat itself is a weighty indication of how seriously it now views the practice and how high on the Security Council's agenda the issue has risen in recent years.

²⁹⁹ Ibid.

³⁰⁰ SC Res. 1539 of 22 April 2004 on Children and Armed Conflict, para. 3.

³⁰¹ Ibid., para. 2.

3.5 Action by the Special Representative

In his first report of the Special Representative published on 12 October 1998,³⁰² the focus of the work is stated thus:

“A serious and systematic effort by all concerned parties...is needed to address the abominations being committed against children in the context of armed conflict. As an advocate on behalf of these children, the Special Representative is working to spearhead that effort. He is seeking to combine normative, political and humanitarian strategies in efforts to promote prevention, protection and rehabilitation for the benefit of children”.³⁰³

Three major activities were highlighted for achieving the objectives of his mandate, namely protection through public advocacy; the promotion of concrete initiatives in the midst of ongoing conflicts; and mobilization of concerted responses to post-conflict needs. In addition, these activities would include the participation of children in armed conflict and a number of issues linked to it, such as encouraging the incorporation of human rights and humanitarian law standards protecting children affected by armed conflict into United Nations policies, procedures and operations.³⁰⁴ Support would also be given to efforts to raise the legal age for recruitment and participation in hostilities to eighteen years.³⁰⁵

Among the activities undertaken in pursuit of his mandate include mobilizing and engaging the media to publicise the issue of war-affected children; forging close links with NGOs working on the issue, lobbying vigorously and successfully for

³⁰² Protection of children Affected by Armed Conflict: report of the special representative of the Secretary General for children and Armed conflict, annexed to protection of children Affected by Armed Conflict: Note by the Secretary-Generally, UN Doc. A/53 482 (12 October 1999).

³⁰³ Ibid., para 13.

³⁰⁴ Ibid., para 40.

³⁰⁵ Ibid., para 21.

the adoption of an Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, and lobbying states to sign and ratify the Convention, including efforts to designate 18 years as the minimum age for voluntary recruitment into their armed forces. He successfully campaigned against conscripting or enlisting children under the age of 15 into armed forces or groups, or using them to participate actively in hostilities to be considered as a war crime included within the Rome Statute of the International Criminal Court (ICC). In addition, the Special Representative has been active in visiting countries affected by conflict, with the aim of seeking commitments for child protection from the parties to the conflict and proposing child-friendly provisions in peace agreements. Above all, he has served as an advocate within the UN system to promote a child-centred approach in peacemaking, peacekeeping and peace-building operations.

3.6 The Special Representative and parties to armed conflict

The Special Representative has been an advocate for the protection of children in a number of recent and ongoing armed conflicts. His first report resulted in visits to Sierra Leone, Sri Lanka and Sudan. During his visit to Sierra Leone in 1998 he obtained commitments from the government, the CDF (Civil Defence Forces- Kamajors) and ECOMOG (the Economic Community of West African States' Monitoring Group). The CDF agreed to stop the recruitment and initiation of children under the age 18 and to begin demobilizing child combatants currently in their ranks. ECOMOG and the CDF agreed to provide special protection to the Armed Forces Revolutionary Council (AFRC) and the Revolutionary United Front (RUF) child combatants who fell into their hands. A joint taskforce was to be constituted, comprising of senior representatives from ECOMOG, the CDF, the Ministry of Social Welfare, Gender and Children's Affairs and international humanitarian agencies, in order to establish and oversee a systematic procedure for the demobilization and reintegration of child combatants. The Sierra Leone Government agreed not to recruit children under 18 into the new national army, which it proposed to establish under the aegis of ECOMOG.

Visits to Sri Lanka and Sudan also bore fruit. In Sri Lanka, the Special Representative elicited an undertaking from the Tamil Tigers that the latter would

not use children under the age of 18 in combat or recruit children under the age of 17, and likewise the Sri Lankan Government reiterated its commitment not to recruit children under the age of 18.³⁰⁶ In Sudan, the Government pledged its commitment not to recruit or deploy children under the age of 18.³⁰⁷ It also reaffirmed its pledge to help facilitate the release and repatriation of children abducted from northern Uganda by the Lord Resistance Army (LRA).³⁰⁸

Following discussions with the Special Representative, the Colombian Government announced a new policy not to enlist persons below the age of 18 into the armed forces. On 27 December 1999, the Government discharged the final contingent of 950 soldiers under the age of 18³⁰⁹. The principal Colombian rebel group, the *Fuerzas Armadas de Colombia* (FARC), agreed to end the recruitment of children below 15 years of age and expressed its willingness to explore with the UN and relevant NGOs a framework for the demobilization of children already within its ranks. FARC, however, did not comply with its commitment, although following another appeal by the Special Representative, it admitted having ‘committed an error’ in recruiting under-15s into its forces and repudiated the practice.³¹⁰

Another visit to Sierra Leone took place in September 1999 during which the Special Representative obtained a commitment from the RUF not to recruit children under 18 and to release those already in its ranks. In all, during his first mandate the Special Representatives elicited thirty-six commitments for the protection of children (not all concerning the recruitment or use of child soldiers) from parties to armed conflicts. However, nine of them were fully met.³¹¹

³⁰⁶ Ibid., para 65.

³⁰⁷ Ibid., para 77.

³⁰⁸ In his second report, the Special Representative secured a commitment from the principal Congolese insurgent group, the *Rassemblement congolais pour la démocratie*, to cooperate with UN agencies and NGOs in ensuring the demobilization and reintegration of child soldiers in its ranks. In Burundi, the Government undertook to raise the minimum age of recruitment from 16 to 18.

³⁰⁹ Report of the Special Representative of the Secretary-General for Children and Armed Conflict: Protection of Children Affected by Armed Conflict. 3 October 2000 (A/55/442), para 76.

³¹⁰ Ibid.

In 2001, following successful discussions between the Special Representative and the Head of the United Nations Peace-building Support Office in Guinea-Bissau (UNOGBIS), the Government of Guinea-Bissau released 603 children under 18 years of age who were serving in the national army. The Office of the Special Representative worked with the United Nations Children's Fund (UNICEF) and the Department of Political Affairs in providing advice to UNOGBIS and the UNICEF country office on the demobilization and reintegration of the child soldiers. Also in 2001, several parties to the conflict in the Democratic Republic of Congo made commitments to the Special Representative that they would refrain from recruiting children into their armed forces or groups³¹². Consequently, both the Government and the *Rassemblement congolais pour la democratic-Goma* developed action plans for the demobilization of child soldiers³¹³.

In the sixth and most recent report, the Special Representative stated that altogether he has received sixty commitments from fifteen parties to armed conflicts.³¹⁴ However, although they all have been significant as advocacy benchmarks, not all of them have been observed.

The Special Representative has also worked to incorporate children's concerns into peace negotiations, proposing specific provisions for inclusion into peace agreements. A sustained engagement was made with the parties to the conflict in Sierra Leone, and his proposals for children were included in the 1999 Lome peace agreement, the first peace accord to stipulate that particular attention be paid to the special needs of child soldiers in disarmament, demobilization and

³¹¹ Ibid., para 110.

³¹² Report of the Secretary-General: Children and Armed Conflict. 26 November 2002 (S/2002/1299), para. 36.

³¹³ Report of the Secretary-General: Children and Armed Conflict. 10 November 2003 (A/58/546-S/2003/1053), para. 48.

³¹⁴ Report of the Special Representative of the Secretary-General for Children and Armed Conflict: protection of Children Affected by Armed conflict. 29 August 2003 (A/58/328). Para. 22.

reintegration programmes.³¹⁵ Working with former Tanzanian President Julius Kambarage Nyerere, the then facilitator of the Burundi peace negotiations, the Special Representative proposed several child-specific provisions that were included in the 2000 Arusha Peace Accord.³¹⁶ More recently, the Special Representative worked with the special Representative of the Secretary-General for West Africa, ECOWAS and UNICEF to ensure the incorporation of provisions for the protection and rehabilitation of children in the 2003 Liberian Peace Agreement.³¹⁷ He has also elicited commitments from governments and insurgent groups in Sudan and Sri Lanka to place the rights and protection of children on the agenda of their ongoing peace processes and to continue to work towards their fulfillment.³¹⁸

The Special Representative has been active in undertaking humanitarian diplomacy and acting as an advocate for war-affected children. In pursuit of this mandate, however, he has been considerably aided by the increasing interest that the Security Council has taken on the issue and the support it has given to his activities³¹⁹.

3.7 Child soldiers and UN activities

The Security Council's interest and the advocacy of the Special Representative has also resulted in the issue of the rights and welfare of conflict-affected children being mainstreamed in UN policy-making and activities. Child protection has been incorporated into peacekeeping mandates, training and reports.

³¹⁵ Report of the Secretary-General: Children and Armed Conflict, 19 July 2000 (A/55/1635/2000/712), para. 41.

³¹⁶ Arusha Peace and Reconciliation Agreement for Burundi, Arusha, 28 August 2000 www.usip.org/library/pa/burundi/p.a_burundi_08282000_toc.html (Accessed and last visited on 27 April 2007).

³¹⁷ Report of the Special Representative of the Secretary-General for Children and Armed Conflict: protection of Children Affected by Armed conflict. 29 August 2003 (A/58/328), para 24.

³¹⁸ Report of the Secretary-General: Children and Armed Conflict, 19 July 2000 (A/55/163-5/2000/712) at para 49 and Report of the Secretary-General: Children and Armed Conflict, 10 November 2003 (A/58/546-S/2003/1053), para. 9.

³¹⁹ Happold, n. 90 above, pp. 40, 41&42.

In his second report, the Special Representative proposed that child welfare and protection be an explicit priority in the mandate of every UN peace operation. In order to ensure the implementation of elements of a mission, it was suggested that there should be a senior officer explicitly responsible for overseeing and ensuring their coordination.³²⁰ This proposal was the germ of the concept of the child protection adviser, a number of whom have already been appointed to UN peace missions. Both elements were adopted by the Security Council into the mandates and staffing of UN missions to Sierra Leone and the DRC, even before its groundbreaking resolutions on children and armed conflict. Security Council Resolution 1260 of 20 August 1999 on the situation in Sierra Leone authorized 'the strengthening of the political, civil affairs, information, human rights and child protection elements' of the United Nations Observer Mission in Sierra Leone (UNOMSIL).³²¹ The resolution welcomed:

"The commitment of the Government of Sierra Leone to work with the UNICEF and the Office of the Special Representative of the Secretary-General for Children and Armed Conflict and other international agencies to give particular attention to the long-term rehabilitation of child combatants in Sierra Leone, and (encouraged) those involved also to address the special needs of all children affected by the conflict in Sierra Leone, including through the disarmament, demobilization and reintegration programme and the Truth and Reconciliation Commission, and through support to child victims of mutilation, sexual exploitation and abduction, to the rehabilitation of health and education services, and to the recovery of traumatized children and the protection of unaccompanied children".³²²

³²⁰ Report of the Special Representative of the Secretary-General for Children and Armed Conflict, 1 October 1999 (A/54/430). para. 173.

³²¹ SC Res. 1260 of 20 August 1999 on the Situation in Sierra Leone, para. 6.

³²² *Ibid.*, para. 16.

Security Council Resolution 1279 of 30 November 1999 on the situation concerning the DRC, which established the United Nations Organization Mission to the Democratic Republic of the Congo (MONUC), included in its mandate the task of assisting in ‘the protection of human rights, including the rights of children’.³²³ Child protection advisers were appointed to both missions.

The importance of the deployment of child protection advisers was also stressed by the Secretary-General in his report to the Economic and Social Council on strengthening the coordination of emergency humanitarian assistance of the UN.³²⁴ Further, the Security Council expressed its readiness to deploy child protection officers as appropriate in future peacekeeping operations in its Resolution 1314.³²⁵ The terms of reference for child protection advisers were drawn up by the Department of Peacekeeping Operations (DPKO), the office of the Special Representative and UNICEF.³²⁶ Since then child protection advisers have also been deployed in UN peace missions in Angola³²⁷ and Cote d’Ivoire.

Further Security Council resolutions concerning the DRC referred specifically to the recruitment and use of child soldiers by the parties to the conflict. Resolution 1332 expressed the Council’s grave concern at the continued recruitment and use of child soldiers and called on all armed forces and groups immediately to cease such practices. It further demanded that immediate steps be taken, with the assistance of relevant UN and other agencies and organizations, to disarm, demobilize, return and rehabilitate all such children.³²⁸ Resolution 1341 reiterated the Council’s concern but also, guided by Chapter VII of the Charter, demanded that ‘all armed forces and groups concerned bring an effective end to the

³²³ SC Res. 1279 of 30 November 1999 on the situation concerning the Democratic Republic of the Congo, Para. 5(e).

³²⁴ UN Doc. A/55/82-E/2000/61.

³²⁵ Articles 224(1), para. 12, Charter of the United Nations.

³²⁶ Report of the Secretary-General: Children and Armed Conflict, 19 July 2000 (A/55/163-5/2000/712) at para 41, box 5.

³²⁷ See SC Res. 1433 of 15 August 2002 on the Situation in Angola, para. 5.

³²⁸ SC Res. 1332 of 14 December 2000 on the situation concerning the Democratic Republic of the Congo, para. 16 and para. 14.

recruitment, training and use of children in their armed forces. It called upon them to extend full cooperation to MONUC, UNICEF and humanitarian organizations for the demobilization, return and rehabilitation of such children and further requested the Secretary-General to task his Special Representative with overseeing compliance with its demands.³²⁹ Resolution 1355, which was also passed by the Security Council acting under Chapter VII, repeated these demands.³³⁰ It also incorporated a number of child protection elements into MONUC's renewed mandate. In particular, the Security Council called upon the Secretary-General to ensure sufficient child protection advisers and consistent and systematic monitoring and reporting of the conduct of the parties to the conflict as concerns their child protection obligations under humanitarian and human rights law and the commitments they have made to the Special Representative of the Secretary-General for Children in Armed Conflict'.³³¹

Reports by the Secretary-General on both country-specific situations and thematic issues have regularly included information on the protection of conflict-affected children. Resolution 1460 requested that the Secretary-General include sections on the protection of children in armed conflict in all his reports on country-specific situations.³³² Child-specific concerns have also been incorporated into the briefs of Security Council fact-finding missions.

Following the Secretary-General's submission to the Security Council of a report on the protection of civilians in armed conflict,³³³ the Council asked the Secretary-General to produce an *aide memoire* listing the issues pertaining to the protection of civilians relevant to its deliberations of peacekeeping mandates.³³⁴

³²⁹ SC Res. 1341 of 22 February 2001 on the Situation Concerning the Democratic Republic of the Congo, pre.para. 8 and para. 10.

³³⁰ Sc Res. 1355 of 15 June 2001 On the Situation concerning the Democratic Republic of the Congo, para. 18.

³³¹ Ibid., para. 35.

³³² SC Res. 1314 of August 2000 On Children and Armed Conflict, para. 15.

³³³ UN Doc. S/2001/1331 (30 March 2001).

³³⁴ Letter from the President of the Security Council to the Secretary-General dated 21 June 2001.

The *aide memoire* lists specific issues for the Council to consider when pursuing various objectives. One of the primary objectives mentioned is a mission's effect on children, namely, addressing the specific needs of children for assistance and protection. Issues for consideration listed in the *aide memoire* include preventing the recruitment of child soldiers in violation of international law; taking effective measures to disarm, demobilize, reintegrate and rehabilitate child soldiers; securing the negotiated release of children abducted in situations armed conflict; including specific provisions for the protection of children in peace missions' mandates, and where appropriate, the integration of child protection advisers in peace operations. The *aide memoire* is a guide for the Security Council and as such, it should ensure that issues of children's rights, welfare and protection are considered whenever the Council decides whether to establish, renew or end a peace operation's mandate.

In several resolutions in 1999 and 2000, the Security Council requested the Secretary-General to ensure that personnel involved in UN peace operations received appropriate training in child-related provisions of human rights, international humanitarian and refugee law.³³⁵ In August 1999, the Secretary-General issued a bulletin on the observance by UN forces of international humanitarian law³³⁶ which provided that children shall be the object of special respect and shall be protected against any form of indecent assault; children under 16 who take a direct part in hostilities and are detained or interned by UN forces shall continue to benefit from this special protection. The Secretary-General stated that it would also be useful; 'Within a peacekeeping and post-conflict environment... to provide guidance on appropriate modes of response when confronted by child soldiers in the field, the protections due to detained combatants and child civilians, and recommended procedures for responding to sexual abuse'.³³⁷

³³⁵ Statement by the President of the Security Council of 29 July 1998 (S/PRST/1998/18), para. 19; SC Res. 1265 of 25 August 1999 on the Protection of Civilians in Armed Conflict, para. 14; and SC Res. 1296 of 19 April 2000 on the Protection of civilians in Armed Conflict, para. 19.

³³⁶ Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/12: reproduced in (1999), 38 ILM 165.

Since then inter-agency working groups have produced guidelines on the integration of child protection into peacemaking, peacekeeping and peace-building,³³⁸ and materials for training military, police and civilian personnel in child protection issues adaptable to the mandate of any peace operation.³³⁹

Concern for children has also influenced who the UN considers should represent it in peace operations as well as what training they should receive. On 29 October 1998, the Secretary-General announced that Member States contributing to UN peacekeeping operations should not send civilian police and military observers under the age of 25, and that troop should, ideally, be over 21 and never younger than 18 years of age³⁴⁰.

Conclusively, over the past few years child protection considerations have been integrated into the mandates, training, staffing, practices and reporting of UN peace operations. This development is only one facet of the UN's growing concern for war-affected children. In a little over a decade the issue has gone from nowhere to high on the agenda of both the General Assembly and the Security Council and it will probably remain there for the foreseeable future.

3.8 Children in Armed Forces in Peace Time

There is widespread evidence of state practice restricting the recruitment of children into the armed forces as most states have legislated on the minimum age upon which persons can be recruited into their armed forces³⁴¹ in peace time. Studies done by the Coalition to Stop the Use of Child Soldiers³⁴²,

³³⁷ Report of the Secretary-General: Children and Armed Conflict, 19 July 2000 (A/55/163-5/2000/712) at para 57.

³³⁸ SC Res. 1314 of August 2000 On Children and Armed Conflict, para 8.

³³⁹ Ibid., para. 11.

³⁴⁰ Report of the Secretary-General: Children and Armed Conflict, 19 July 2000 (A/55/163-5/2000/712), para 40.

³⁴¹ It is well established that municipal laws can constitute state practice. See M. Akehurst. 'Custom as a Source of International Law' (1974-75) 47BYIL 1, pp. 8-10.

augmented by statements and declarations made by states on ratifying the Optional Protocol, show that state practice support 18 years as the minimum age of recruitment, at least in law. Most states recruit children from the age of 18 or above. This is particularly the case with regard to compulsory recruitment.

The provisions that existed in international law concerning child soldiers particularly in time of peace, is found in human rights conventions, declarations or resolutions.³⁴³ These, however, do not explicitly deal with the matter at all because international concern concentrated much attention on the recruitment and use of child soldiers in times of war. Many countries allowed conscripting children below the age of 18 years into their national armed forces. For example, the USA armed forces permit the recruitment of 17-year-olds with parental consent and some 50,000 children of this age are recruited into the US military each year.³⁴⁴ However, only a small proportion of these recruits complete training prior to turning 18 years.³⁴⁵ The British army recruits 16-year-olds into the Army Foundation College, while 17-year-olds can join the 'man's service', although parental consent is still required.³⁴⁶ Happold wrote that under-18s were deployed during the first Gulf war, of which nearly 500 British soldiers were aged under 18 years.³⁴⁷

Michael J. Dennis, one of the US negotiators of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, has written:

³⁴² Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2001* and Coalition to Stop the Use of Child Soldiers, *Child Soldiers Use 2003: a Briefing for the 4th Security Council Open Debate on Children and Armed Conflict* (2003).

³⁴³ See S.38 (3) Convention on the Rights of the Child (1989) United Nations, Treaty Series, Vol. 1577, p. 3. Entered into force on 2 September 1990, Two Additional Protocols to the Geneva Conventions of 12 August 1949.

³⁴⁴ M. J. Dennis, 'Newly Adopted Protocols to the Convention on the Rights of the Child' (2000) 94 AJIL 798, p. 791. Cited by M. Happold, *Child Soldiers in International Law*, Manchester University Press, 2005, p. 19.

³⁴⁵ *Ibid.*, p. 792.

³⁴⁶ Michael Smith, 'Britain Bans Boy Soldiers Going to War', *Daily Telegraph*, 29 March 2002. Happold, n. 90 above, p. 19.

³⁴⁷ Happold, n. 90 above, p. 19.

“Governments that meet their national armed forces’ recruitment through compulsory or forced recruitment have insisted on raising the minimum age standard to eighteen, whereas other governments, like the United States and the United Kingdom, maintain all-volunteer armed forces and have professed the need for flexibility to recruit individuals during the time they are finishing their secondary education”.³⁴⁸

Though several human rights groups have condemned the peacetime recruitment of under-18-year-olds, their focus has remained on the participation of children in armed conflicts. Amnesty International produced a report in 2000 on the treatment of child soldiers in the British Army. The report concluded that the recruitment of under-18s and their training in military establishments puts their mental and physical integrity at risk; that training using live ammunition and endurance exercises aimed at pushing recruits to their limits endangered the mental and physical health of under-18s; and that allegations of ill-treatment and bullying in the armed forces, coupled with the inadequacy of a complaints procedure, might amount to cruel, inhuman or degrading treatment of recruits.³⁴⁹ Amnesty International’s policy is that no child should be permitted to serve in an armed force or group.³⁵⁰

Ordering a child into the armed forces in peace time may be contradictory to the principle of the special protection of children provided for them. This is because many international declarations and human rights conventions can be interpreted so that they also include the common notion of the ‘freedom of the child from any obligations’. Those mandatory activities connected with children, such as education, are arranged through the parents’ responsibility for care, and

³⁴⁸ Michael J. Dennis, ‘The ILO Convention on the Worst Forms of Child Labour’ (1999) 93 AJIL 943, p. 945.

³⁴⁹ Amnesty International, United Kingdom: U-18s: Child Soldiers at risk, AI Index EUR 45/56/00, 2000, p. 20.

³⁵⁰ Ibid.

correspondingly the exceptional, specific references in human rights instruments to the obligations of children are connected primarily with the internal functions of the family.

On the other hand, it seems that the application of this principle cannot be extended to those children who have volunteered for service to the army in peace time. Human rights instruments appear, however, as a natural way to assign the main duty for the special protection of children to those who already are responsible for them, generally their parents or family. In making this decision, the interests of the child must be the decisive determining factor. It is therefore quite obvious that such an important matter as volunteering for service in the armed forces presupposes the consent of the legal guardian of the child.

Even though children cannot be permitted independent discretion on this matter, certainly those children who are in general able to bear arms are accordingly capable of being heard in their own way, and their opinion also carries weight. Furthermore, the child volunteer can be considered to have an independent right to resign from the armed forces.³⁵¹

The result may be indirectly derived from the case of *W, X, Y and Z v. United Kingdom*³⁵² before the European Commission of Human Rights, which dealt with the national service of minors, who had volunteered for military service but subsequently wished to leave. The point at issue in this case was the relationship between voluntary service and servitude and also compulsory military service. The Commission observed that the young age of minors (and certainly even the age classifying a person as a child) cannot in itself attribute the character of 'servitude', and referred in this respect also to parental consent. But the Court also assumed that the European Convention and the ICPR impose on a

³⁵¹ Application Nos. 3435-8/67, Collection of Decisions (of the European Commission of Human Rights), Vol. 28, p. 109 /or/ Yearbook of the European Convention on Human Rights, Vol. 11, p. 562; cited by Arto Kosonen in 'the Special Protection of Children and Child Soldiers', The University of Helsinki Publication, 1987, p. 41.

³⁵² 1967; Applications Nos. 3435-8/67, Collection of Decisions (of the European Commission of Human Rights), Volume 11, p.109 /or/ Yearbook of the European Convention on Human Rights, Volume 11, p. 562.

volunteer minor the obligation to continue his national service when this is entered into on a voluntary basis.

The special treatment of the child is a widely accepted principle in human rights laws recognised in many global instruments³⁵³. The pivotal Article 77(1) is found in Section III, Part IV, of 1977 Additional Protocol I. The Article applies widely to all children in the territories of the parties to a conflict, and articulates the fundamental precept that children 'shall be the object of special respect and shall be protected against any form of indecent assault'. The prohibition on indecent assault incorporates rape and other sexual abuse of children which so frequently affects small girls, particularly in situations of armed conflict as was seen in former Yugoslavia, Rwanda, Liberia and in Sierra Leone.

The best interest of the child is to be determined by taking account of the child's wishes although this may not be conclusive. In English law this has meant, in the words of Lord Denning, that: 'the legal right of a parent to the custody of a child ends at the eighteenth birthday and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he (sic) is. It starts with a right of control and ends with little more than advice.'³⁵⁴ Lord Denning contrasted this view with the attitude of the courts in the Victorian period, which saw absolute paternal authority continuing until a child attained the age of majority. His insight was the views of what childhood is and what it entails to develop over time.³⁵⁵

³⁵³ See Y. Kubota, 'The Protection of Children's Rights and the United Nations' 58 *Nordic Journal of International Law* 9-10 (1989). See also J. Kuper, 'International Law Concerning Child Civilians in Armed Conflict', Clarendon Press Oxford, 1997, p. 25.

³⁵⁴ *Hewer v. Bryant* (1970) 1QB 357 at 369. See also *Gillick v. West Norfolk and Wisbech Area Health Authority* (1986) 1 AC 112. However, even the options of a child viewed as being 'Gillick competent' are subordinate to the child's best interests as determined by the courts.

³⁵⁵ Happold, n. 90 above, p. 21.

3.9 Why do Children Volunteers/Participate in Armed Conflict?

One of the most alarming trends in armed conflict is the participation of children as soldiers. Children serve armies in supporting roles as cooks, porters, messengers and spies. Increasingly, however, adults are deliberately conscripting children as soldiers. Some commanders have even noted the desirability of child soldiers because they are “more obedient, do not question orders and are easier to manipulate than adult soldiers”.³⁵⁶ In recent years, however, more children and youth bear arms in internal armed conflict and violent strife than ever before. When conflict drags on for years and decades, the root causes such as poverty or repression are exacerbated, galvanizing civilian populations for recruitment into armed groups. International coalition against the use of children as combatants especially in the Liberian and Sierra Leonean civil wars, among others, raised international awareness on the practice of child soldiering. However, the tragic lessons have either been overlooked or inadequately addressed. This is in part due to the seductive images of, and emotion-laden responses to, child soldiering that often blur the reality.

Kofi Annan³⁵⁷ belatedly admitted this when he declared that “if there is any lesson we can draw from the experience of the past decade, it is that the use of child soldiers is far more than a humanitarian concern, that its impact lasts far beyond the time of actual fighting; and the scope of the problem vastly exceeds the numbers of children directly involved”.³⁵⁸ Therefore, there is need to examine the underlying socio-economic, political and technological factors associated with child soldiers with a view to gaining valuable insights into possible post conflict programmes for child combatants and future security implications of the civil society³⁵⁹.

³⁵⁶ Brett, Rachel, Margaret McCallin and Rhonda O’ Shea, *Children: The Invisible Soldiers*, Geneva, Quaker United Nations Office and the International Catholic Child Bureau, April 1996, p. 88.

³⁵⁷ Immediate past Secretary-General of United Nations.

³⁵⁸ See excerpts of Kofi Annan’s speech on the eve of the UN General Assembly Special Session on Children (UNGASS) in *Child Soldiers Newsletter*, Issue 4/June 2002, p. 1.

Nevertheless, some writers concluded that the vast majority of young soldiers are not forced or coerced into participating in conflict, but are subject to many subtly manipulative motivations and pressures that are all the more difficult to eliminate than blatant forced recruitment. A composite picture of the child soldier in a given conflict might help our understanding of why some children fight, but broad generalizations are difficult in the case of voluntary participation because the motivating factors are so varied.³⁶⁰

Children differ widely, both within and across areas of armed conflict, in the nature of their pre-war and war-related experiences. Several studies have explored the extent to which the objective features of children's war-related experiences and children's subjective appraisals or comprehension of their experiences are the basis for negative or positive psychosocial outcomes.³⁶¹ Anecdotal evidence supports the supposition that many young people voluntarily join armed groups or forces because of their personal experiences and circumstances, and in the light of their subjective appraisal of the decision to volunteer.³⁶²

Children's subjective understanding of reality is influenced by their social milieu or what has come to be called children's ecologies, and by developmental processes. The ecologies of children's life, their parents, families, peer groups, schools, religious communities and other community-based institutions might exert pressures or send messages that allure children to participate in hostilities.

³⁵⁹ Amadu Sesay, (ed.), 'Civil Wars, Child Soldiers and Post Conflict Peace Building in West Africa', College Press and Publishers Ltd, 2003, p. 137.

³⁶⁰ Goodwin-Gill, n. 3 above, pp. 30, 168.

³⁶¹ Mona Macksoud and J. Lawrence Aber, 'The War Experiences and Psychosocial Development of Children in Lebanon', *Child Development* (in press); Jose Luis Henriquez Milagros Mendez, '*Los Efectos Psicosociales de la Guerra en Niños de El Salvador*', *Revista de Psicología de El Salvador*, Vol. XI. No. 44, San Salvador (1992). Cited by Prof. Goodwin-Gill and Dr Ilene Cohn. *Child Soldiers: The Role of Children in Armed Conflict*, Clarendon Press Oxford, 1994, p. 30.

³⁶² *Ibid.*

Members of children's ecologies may also influence how a youth appraise the choice to participate in hostilities or not.³⁶³

Although at times, the youth also present themselves for service; it is misleading to consider this as voluntary. While young people may appear to choose military service, the choice is not exercised freely. They may be driven by any of several forces, including cultural, social, economic or political pressures.

One of the most basic reasons that children join armed groups is economic. Hunger and poverty may drive parents to offer their children for service. In some cases, armies pay a minor soldier's wages directly to the family.³⁶⁴ Child participation may be difficult to distinguish as in some cases whole families move with armed groups. Children themselves may volunteer if they believe that this is the only way to guarantee regular meals, clothing or medical attention. There are instances when parents who encourage their daughters to become soldiers if their marriage prospects are poor.³⁶⁵

Moreover, as conflicts persist, economic and social conditions suffer and educational opportunities become more limited or even non-existent. Under these circumstances, recruits tend to get younger and younger. Armies begin to exhaust the supplies of adult manpower and children may have little option but to join. In Afghanistan, where approximately 90 per cent of children now have no access to schooling, the proportion of soldiers who are children is thought to have risen in recent years from roughly 30 to at least 45 per cent.³⁶⁶

Some children feel obliged to become soldiers for their own protection. Faced with violence and chaos all around, they decide they are safer with guns in their hands. Often such children join armed opposition groups after experiencing

³⁶³ Ibid.

³⁶⁴ Brett et al, n. 356 above, p. 33.

³⁶⁵ Ibid., p., 34.

³⁶⁶ Ibid., p. 53.

harassment from government forces. For example, many children have joined the Kurdish rebel groups as a reaction to scorched earth policies and extensive human rights violations. In El Salvador, children whose parents had been killed by government soldiers joined opposition groups for protection. In other cases, armed forces will pick up unaccompanied children for humanitarian reasons and in most cases these children grow up fighting on their side. This is particularly true of children who stay with a group for long periods of time and come to identify it as their protector or “new family”.³⁶⁷

In some societies, military life may be the most attractive option. Young people often take up arms to gain power and power can act as a very strong motivator in situations where people feel powerless or otherwise are unable to acquire basic resources. In many situations, war activities are glorified. In Sierra Leone, the expert met with child soldiers who proudly defended the number of “enemies” they had killed.³⁶⁸

The lure of ideology is particularly strong in early adolescence, when young people are developing personal identities and searching for a sense of social meaning and belonging. As was shown in the case of Rwanda³⁶⁹, however, the ideological indoctrination of youth can have disastrous consequences. Children are very impressionable and may even be lured into cults of martyrdom. In Lebanon and Sri Lanka, for example, some adults have used young people’s immaturity to their own advantage, recruiting and training adolescents for suicide bombing.³⁷⁰ According to Islamic tradition, “he who gives his life for an Islamic cause will have his sins forgiven and a place reserved in paradise.”³⁷¹

³⁶⁷ Machel, n. 60 above, p. 12.

³⁶⁸ Ibid.

³⁶⁹ Ibid.

³⁷⁰ Brett, n. 356 above, p. 31.

³⁷¹ Lamis Andoni, “Searching for Answers: Gaza’s Suicide Bombers”, *Journal of Palestine Studies*, vol. 26, no. 4 (Summer, 1997), pp. 35-45.

Nevertheless, it is important to note that children may also identify with and fight for social causes, religious expression, self-determination or national liberation, as happened in Iraq, Palestine, Afghanistan and other occupied territories. Most children joined struggles in pursuit of political freedom based on their belief or perceived injustice they face, or unjust executions witnessed by them. Religious belief and indoctrination made so many children engaged in suicide bombing especially where they were told it is *Al-Jihad* (Holy War), and whoever is involved will be going to heaven.³⁷²

In the Israel-Palestine conflict, especially during the al-Aqsa Intifada, controversy arose over the participation of children in Palestinian militant and terrorist actions. Faced by limited choice, Palestinian militant groups actively recruited children to attack Israeli civilians and soldiers; in some instances these groups also recruited children as suicide bombers to attack Israeli targets, both military and civilian.³⁷³ According to the Global Report on the Use of Child Soldiers", there were at least nine documented suicide attacks involving Palestinian minors between October 2000 and March 2004.³⁷⁴ The Coalition to Stop the Use of Child Soldiers reported in 2004, that "there was no evidence of systematic recruitment of children by Palestinian armed groups," also noting that this remains a small fraction of the problem in other conflict zones such as Africa, where there are an estimated 20,000 children involved in active combat roles in the Sudan alone.³⁷⁵ Human Rights Watch also reported that "there was no evidence that the Palestinian Authority (PA) recruited or used child soldiers."³⁷⁶ According to the Palestinian Human Rights Monitoring Group, in the al-Aqsa Intifada, Palestinian militant groups have used children as "messengers and

³⁷² The Coalition to Stop the Use of Child Soldiers 2004 Global Report on the Use of Child Soldiers, p. 292.

³⁷³ Ellis Shuman, What makes suicide bombers ticks?, 'Israelinsider', Israel's daily Newsmagazine, 4 June 2001.

³⁷⁴ The Coalition to Stop the Use of Child Soldiers, n. 372 above.

³⁷⁵ Ibid.

³⁷⁶ Ibid.

couriers, and in some cases as fighters and suicide bombers in attacks on Israeli soldiers and civilians."³⁷⁷

However, Sheik Abdul Aziz bin Abdullah al Sheik, the supreme religious leader of Saudi Arabia, issued a *fatwa* (religious edict) in April that equated suicide bombings with suicide, which therefore is not allowed in Islam.³⁷⁸ In response, Mohammed Sayed Tantawi, a leading doctrinal authority in the Sunni Muslim world, wrote in by Egypt's *Al Ahram* that

"if a person blows himself up, as in operations that Palestinian youths carry out against those they are fighting, then he is a martyr. But if he explodes himself among babies or women or old people who are not fighting the war, then he is not considered a martyr."³⁷⁹

From a religious perspective, martyrdom, the *Shahada* (the martyr), is "the greatest hope in this world" for a Muslim. The martyr earns eternal glory by dying for the sake of *Allah*, and is rewarded with eternal life.³⁸⁰ This statement underpins the martyr's world view: "strive for death and you will receive life."³⁸¹

In the Palestinian territories, there currently exists a "cult of martyrdom." From a very young age children are socialized into a group consciousness that honors "martyrs", including human bombers who have given their lives for the fight against what is perceived by Palestinians to be the unjust occupation of their lands. This "cult of martyrdom", which has a strong underpinning in longstanding cultural roots (the honoring of martyrs), appears to have developed principally over the last decade, as the first act of suicide terrorism occurred in Israel only twelve years ago.³⁸²

³⁷⁷ Ibid.

³⁷⁸ Ellis Shuman, n. 373 above.

³⁷⁹ Ibid.

³⁸⁰ The Koran, Surat Al-‘Imran (3), 169.

³⁸¹ Al-Istiqlal, March 5, 1999; January 6, 2000.

3.10 Effects of Children's Membership of Armed Conflict

Several misguided views have been expressed about child soldiers. One is that child soldiers are damaged goods. One sees a lost generation of teenagers who have lost their childhood and opportunity for education, and also their chance for proper moral development. Youth are portrayed as perpetrators and hardened killers who can never go home. However, available evidence shows the contrary. The majority of former child soldiers are resilient, not damaged, and able to reintegrate into civilian life with varying degrees of success. It is a disservice to these young people to suggest otherwise. Although there are impairment must be addressed, their resilience far outweighs any dysfunction. Reintegration, however, depends the prevailing environment in each society.³⁸³

Child soldiers have themselves been or seen others abducted; they have been exposed to land mines, separated from their parents, and witnessed death. In Sierra Leone and Liberia, for example, some child soldiers were forced to kill members of their own family or village, thereby severing ties of trust between them and their primary support systems, the family and community. Such incidents can leave searing memories and emotional, psychological and social scars.³⁸⁴

The effects of armed conflict on the physical, psychological and emotional development of children are complex and ghastly. The stage of physical, psychosocial, cognitive and moral development that a child has reached directly affects his or her ability to cope with these impacts. Thousands of children are killed every year as a direct result of fighting, from bullet wounds , bombs and landmines, but many more die from malnutrition and disease caused or increased by armed conflicts.

³⁸² See Speckhard, Anne. *Understanding Suicide Terrorism: Countering Human Bombs and Their Senders in Topics in Terrorism: Toward a Transatlantic Consensus on the Nature of the Threat* (Vol. I) (Eds.), Jason S. Purcell & Joshua D. Weintraub Atlantic Council Publication 2005.

³⁸³ Dr Michael Wessells, 'Psychosocial Issues in Reintegrating Child Soldiers', *Cornell International Law Journal* Vol. 37 No. 3 (2004), p. 513.

³⁸⁴ *Ibid.*

The interruption of food supplies, the destruction of food crops and agricultural infrastructures, the disintegration of families and communities, the displacement of populations, the destruction of health services and programmes and of water and sanitation systems all take a heavy toll on children. Many die as a direct result of diminished food intake that causes acute and severe malnutrition, while others, compromised by malnutrition, become unable to resist common childhood diseases and infections.

Landmines and unexploded ordnance pose a threat to child soldiers, especially because they are naturally curious and likely to pick up strange objects they come across. Devices like the “butterfly” mines used extensively by the former Union of Soviet Socialist Republics in Afghanistan are coloured bright green and have two “wings”. This may be a trap to make them appear like a toy.³⁸⁵ Even if they are aware of mines, small children may be less able than adults to spot them: a mine laid in grass and clearly visible to an adult may be less visible to a small child whose perspective is two or three feet lower.

The effect of widespread practice of rape and torture as an instrument of armed conflict and ethnic cleansing has created physical and psychological damage and mental violence on children. National and International law must be brought to punish the perpetrators of these heinous acts so as to serve as a deterrence to other. The current experiment in Sierra Leone is good step in achieving this trend.

Diarrhea is one of the most common diseases among children during conflicts. In Somalia, 23 to 50 per cent of deaths in Baidoa, Afgoi and Berbera were reported to have died due to diarrhea.³⁸⁶ Cholera is also a constant threat and, following armed conflicts, it has occurred in camps in Bangladesh, Kenya, Malawi, Nepal, Somalia and Zaire, among others. Acute respiratory infections, including pneumonia, are particularly lethal in children. Measles epidemics have been

³⁸⁵ Machel, n. 60 above, p. 27.

³⁸⁶ Ibid., p. 33.

reported in recent conflicts in several African countries – at the height of the conflict in Somalia, more than half the deaths in some places were caused by measles.³⁸⁷

Moreover, the potential for greater spread of sexually transmitted infections, including HIV/AIDS, increases dramatically during conflicts. Rape, sexual violence and the breakdown of established social values all increase the likelihood of unprotected sexual activity and larger numbers of sexual partners. The breakdown of health services and blood transfusion services and lack of ability to screen for HIV/AIDS also increase transmission of these diseases.

When children join an armed conflict, thousands of them are killed, but three times as many are seriously injured or permanently disabled. Armed conflict and political violence are the leading causes of injury, impairment and physical disability and primarily responsible for the conditions of over 4 million children who currently live with disabilities.³⁸⁸ In Afghanistan alone, some 100,000 children have war-related disabilities, many of them caused by landmines. The lack of basic services and the destruction of health facilities during armed conflict means that children living with disabilities receive little or no support. Only 3 per cent in developing countries receive adequate rehabilitative care. The provision of prosthetics to children is an area that requires increased attention and financial support. In Angola and Mozambique, less than 20 per cent of children needing them received low-cost prosthetic devices; in Nicaragua and El Salvador, services were also available for only 20 per cent of the children in need.³⁸⁹ This lack of rehabilitative care adversely affected effective access of disabled children to education, health and rehabilitation services.

Schools are targeted during war, in part because they have such high profiles. In rural areas, the school building may be the only substantial permanent structure, making it highly susceptible to shelling, closure or looting. In some places, local

³⁸⁷ Ibid.

³⁸⁸ Ibid., p. 34.

³⁸⁹ Ibid.

teachers are prime targets because they are important community members and tend to be more than usually politicized. More than two-thirds of teachers either fled from their community or were killed in Rwanda.³⁹⁰ The destruction of educational infrastructures represents one of the greatest developmental setbacks for countries affected by conflicts. Year of lost schooling and vocational skills will take equivalent years to replace and their absence imposes a greater vulnerability on the ability of societies to recover after conflicts.³⁹¹

³⁹⁰ Ibid., p. 43.

³⁹¹ Ibid.

CHAPTER FOUR

International Humanitarian Law and the Use of Children in Hostilities

4.1 Introduction

Though children have always participated in armed conflicts, international law has only recently attempted to regulate their engagement. It is trite to observe that non-international or internal armed conflicts have been commonplace throughout history. They occur for a variety of reasons, such as the desire to overthrow one government and replace it with another or the desire of one or more parts of a state to secede from the rest and established its own independence.³⁹²

The legal regulation of internal armed conflict has continued to grow in importance in the post-colonial era. Since 1945, the vast majority of armed conflicts have been internal rather than international in nature.³⁹³ Kofi Annan³⁹⁴, stated that 'wars between sovereign States appear to be a phenomenon in distinct decline'.³⁹⁵ This is however not true of internal armed conflicts. The world has witnessed an apparent diminution in the application of the laws to internal armed conflicts. There has been a blatant disregard of international humanitarian law in more recent conflicts, such as those in Bosnia-Herzegovina and Rwanda, typified by atrocities, ethnic cleansing and genocide. That these conflicts continue to arise clearly underlines the need for their effective legal regulation, and the pattern of the conflicts confirms that those in need of protection are those not directly involved in hostilities, largely civilians.³⁹⁶

³⁹² Lindsay Moir, 'The Law of Internal Armed Conflict', Cambridge University Press, 2002, p. 1.

³⁹³ Statistics compiled by the International Peace Institute in Oslo suggest that in the period 1990-1995, seventy-three States were involved in armed conflicts, of which fifty-nine were involved in internal conflict or civil war. See Dan Smith, *The State of War and Peace Atlas*, 3rd (ed.), (London, 1997), pp. 90-95 and Lindsay Moir, 'The Law of Internal Armed Conflict', Cambridge University Press, 2002, p. 1.

³⁹⁴ Former Secretary-General of the United Nations.

³⁹⁵ Preface to UNHCR, *The State of the World's Refugees* (Oxford, 1997), ix. Cited by Lindsay Moir, 'The Law of Internal Armed Conflict', Cambridge University Press, 2002, p. 1.

Even though the Fourth Geneva Conventions of 1949 contain certain provisions dealing with children as civilians, the first treaties to include provisions on children's recruitment and their involvement in hostilities were: the two Additional Protocols of 1977 to the Convention on the Rights of the Child³⁹⁷, the Optional Protocol on the Involvement of Children in Armed Conflict,³⁹⁸ ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,³⁹⁹ and the African Charter on the Rights and Welfare of the Child.⁴⁰⁰ Of equal importance are the General Assembly and Security Council resolutions that have been promulgated in recent years which here modified the extent to which international law requires armed groups to refrain from recruiting or using child soldiers in conflicts.⁴⁰¹

4.2 The 1949 Geneva Conventions

A Diplomatic Conference represented by 63 states in Geneva in 1949 established the texts of four substantial Conventions for the protection of war victims. These Conventions constituted both an emphatic vindication of the humanitarian principles and a worthy contribution to the growth and content of the modern law of war.⁴⁰² The First Convention was entitled the "Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in

³⁹⁶ Ibid.

³⁹⁷ Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977. Entered into force on 7 December 1978 and Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977. Entered into force on 7 December 1978.

³⁹⁸ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000), A/RES/54/263. Entered into force on 12 February 2002.

³⁹⁹ ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999), ILO, Official Bulletin Vol. LXXXII (1999), Ser. A, No. 2. Entered into force on 19 November 2000.

⁴⁰⁰ African Charter on the Rights and Welfare of the Child (1990). Entered into force on 29 November 1999.

⁴⁰¹ Happold, n. 90 above, p. 54.

⁴⁰² Colonel G.I.A. Draper, Michael A. Meyer & Hilaire McCoubrey, 'Reflections on Law and Armed Conflicts', Kluwer Law International, 1998, p. 54.

Armed Forces in the Field” and was first adopted in 1864 and revised in 1929. The Second Convention, “The Geneva Convention for the Amelioration of the Condition of Wounded and Sick and Shipwrecked Members of Armed Forces at Sea”, revised the Hague Convention X of 1907 for the adaptation to Maritime Warfare of the Geneva Convention of 1906. The Third Geneva Convention is titled “The Geneva Convention Relative to the Treatment of Prisoners of War” and was first adopted in 1929. The Fourth Convention, and perhaps the most important, bore the title “The Geneva Convention Relative to the Protection of Civilian Persons in time of War”, which was based on parts of Hague Convention IV of 1907.

All these four conventions were last revised and ratified in 1949. The whole set is variously referred to as the “Geneva Conventions of 1949”, “Geneva Conventions” or “Geneva Law”. The Geneva Conventions of 1949 consist of 427 Articles; each of which is the product of hard experience and detailed discussion in the Diplomatic Conference.

There were no provisions specifically dealing with children’s recruitment and the use of children in hostilities but this was neither surprising nor unusual. In the immediate circumstances of the 1949 Diplomatic Conference, the major influences on the participants thinking were the events of the Second World War. This was the case with the Fourth Geneva Convention, the only one of the Conventions that dealt with the situation of children in armed conflicts. The Second World War was fought largely by mass conscripted armies. It was only in extremes, such as in Germany in 1945, had any of the major powers conscripted children into their armed forces. Where children participated in any hostilities it was as irregulars – partisans or resisters. As such, it was seen by the Allied powers as voluntary and heroic, or at best, an unfortunate necessity that did not require legal regulations because it was unlikely to be repeated.⁴⁰³

Moreover, the regulation of children’s participation in hostilities was perceived as being primarily an internal matter. It was for each state to determine the age

⁴⁰³ Happold, n. 90 above, p. 54.

from which its nationals should be recruited into its armed forces. The developments in international law whereby individuals have gained rights against their own state have been largely a post-war phenomenon and were not so visible before 1949 when the Geneva Conventions were being negotiated.⁴⁰⁴ The treatment of individuals by the state was seen as matters within a state's domestic jurisdiction and not the business of other states. International humanitarian law traditionally sought to protect individuals from the acts of other states other than their own.⁴⁰⁵

The Fourth Geneva Convention was adopted basically to protect two groups of persons against the acts of enemy powers; the first is, nationals of the enemy living within the territory of a belligerent state and the second, the inhabitants of a territory occupied by an enemy power but excluding nationals of the occupying state.⁴⁰⁶ Thus, Article 4 (1) of the Fourth Geneva Convention therefore defined "protected persons" as "those who, at any given moment and in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or occupying power of which they are not nationals". As J. Pictet's Commentary states:

"The definition [of protected person in Article 4(1)] has been put in a negative form: as it is intended to cover anyone who is *not* a national of the Party to the conflict or occupying Power in whose hands he is. The Convention sincerely remains faithful to principle of international

⁴⁰⁴ Of the major international and regional human right instruments, only the Genocide Convention and the Universal Declaration of Human Rights of 1948 had been adopted.

⁴⁰⁵ See *Prosecutors. Tadic*. Case No. IT T, Trial Chamber, ICTY, judgment of May 1997, reproduced in (1997) 56 ILR 90S For a civilian to have the status of a "protected person" under GC IV, he must be in the hands of a party to the conflict or an occupying power of which he is not a national. This element of the decision was, however, overturned on appeal: see *Prosecutor v. Tadic*. Case No IT 94-1-A. Appeals Chamber. ICTY, judgment of 15 July 1999. For a critical account. See M. Sassoli and L.M. Olson. "The Judgment of the ICTY Appeals Chamber on the Merits in the *Tadic* case" (2000) IRRC No. 839, p. 37. Cited by M. Happold, *Child Soldiers in International Law*, Manchester University Press, 2005, p. 55.

⁴⁰⁶ Happold n. 90 above, p. 55.

law: it does not interfere in a State's relations with its own nationals.⁴⁰⁷

Part II of the Fourth Geneva Convention applies to the whole of the populations of countries in conflict.⁴⁰⁸ These various categories⁴⁰⁹ among the civilian population are persons who had not taken part in hostilities and whose weakness makes them incapable of contributing to the war potential of their country.⁴¹⁰

The Geneva Conventions do not provide precise definitions of a 'child', though there are a number of articles or provisions for children, minors, parents and their children, children under eighteen, fifteen, twelve and seven years, maternity cases, pregnant women, and expectant mothers.⁴¹¹ The diversity of these protected groups reflects the many different needs of each one of them. However, the Geneva law establish the age of fifteen as the age which a child must enjoy some special protection⁴¹² and the implication seems to be that for the purposes of the Fourth Geneva Convention, a child is a person under 15 years of age. Part III of the Convention contains an even more extensive set of protections, but it has a narrower field of application since it only applies to "protected persons".

Article 50(1) in part III of the Convention states that:

"The Occupancy Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage. It may

⁴⁰⁷ J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*. Geneva: ICRC, 1955, vol. IV, p. 46.

⁴⁰⁸ Article 13, the Fourth Geneva Convention.

⁴⁰⁹ Article 14, the Fourth Geneva Convention refers to wounded, sick and aged persons, children under 15, expectant mothers and .mothers of children under 7.

⁴¹⁰ Pictet, n. 407 above, p. 126.

⁴¹¹ See Articles 14, 16, 23, 24, 38, 50, 51 and 68 the Fourth Geneva Convention. For an examination of the rights of children as civilians, see J. Kuper, *International Law Concerning Child Civilians in Armed Conflict*, Oxford; Oxford University Press, 1997.

⁴¹² See Articles 14, 23, 24, 38, and 50 of the Fourth Geneva Convention, 1949.

not, in any case, change their personal status, nor enlist them in formations or organizations subordinate to it”

This provision is not concerned with prohibiting the enlistment of children who are not nationals of the occupying power into its armed forces. It refers to the enrolment of children into youth movements of an ideological character, such as those established in a number of countries under German occupation.

Again, the recruitment of protected persons is covered in Article 51, which prohibits the conscription of protected persons into an occupying power’s armed forces and any pressure or propaganda aimed at securing the voluntary enlistment of such persons. Thus Article 51 refers to all protected persons to include children but the Article cannot be seen as specifically protecting children⁴¹³. As Pictet notes: “The prohibition in paragraph 1 (of Article 51) is not new, since a basic principle universally recognized in the law of war, strictly prohibits belligerents from forcing enemy subjects to take up arms against their own country”. The principle might be seen, from one point of view, as an anti-poaching agreement, a pact between states that they will not trespass on each others’ sovereign right to their nationals allegiance. Indeed, both Articles 50 and 51 can be seen as a reaffirmation of the rule in the 1907 Hague Regulations⁴¹⁴ that prohibits compelling the inhabitants of occupied territory to swear allegiance to the hostile power.⁴¹⁵

The most comprehensive safeguards are found in Article 24, which provides that children under 15 who are orphaned or separated from their families, should not be left to their own devices. States parties are obliged to facilitate their maintenance, education and exercise of their religion. The Convention also

⁴¹³ Happold, n. 90 above, p. 56.

⁴¹⁴ Regulations Respecting the Laws and Customs of War on Land annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

⁴¹⁵ Article 45, the Fourth Geneva Convention.

prohibits the imposition of the death penalty on persons less than eighteen years of age.⁴¹⁶

4.3 Additional Protocol I

The two Protocols Additional to the Geneva Conventions adopted on 8th June 1977 enabled the international community to lay down rules regulating the participation of children in hostilities.⁴¹⁷ The reasons for their negotiation arose out of two perceptions, though not clearly distinguished. Firstly, the four Geneva Conventions had a number of lacunae. Secondly, the humanitarian law was in need of progressive development. This was specifically either for humanitarian reasons or because it was perceived by the developing nations and their allies (particularly national liberation movements) as the product of developed nations, therefore favoring their interests.⁴¹⁸ Thus the two Additional Protocols were adopted in order to supplement the four Conventions.

Protocol I applied to certain types of internal armed conflicts, namely those in which people are fighting against colonial domination, alien occupation and racist regimes to assert their right to self-determination.⁴¹⁹ In this instrument the first attempt was made to address the problem of children participating in hostilities. The Fourth Convention had prohibited a belligerent from recruiting “protected persons” of an adversary to its armed forces, which included children⁴²⁰ but this was unexceptional provision taken from customary international law. The

⁴¹⁶ Ibid., Article 68.

⁴¹⁷ Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of victims of International Armed Conflicts, (Protocol I) (1977). Entered into force on 7 December 1978 and Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977). Entered into force on 7 December 1978.

⁴¹⁸ For the background to the Diplomatic Conference, see G. Best War and Law Since 1945, Oxford University Press, 1994, pp. 341-347 and M. Happold, Child Soldiers in International Law Manchester University Press, 2005, p. 57.

⁴¹⁹ Article 1(4). Certain combatants fighting in internal conflicts may also benefit from protections offered by the Protocol under Article 44(3).

⁴²⁰ Article 51 of the Fourth Geneva Convention, 1949.

Protocol went further by requiring states to refrain from recruiting children who were their own nationals.

The provisions dealing with the participation of children in armed conflict appear in Section III, on the treatment of persons in the power of a party to the conflict. Article 72, which sets out the field of application of the section, describes its provisions as being additional to the Fourth Geneva Convention and any `other applicable rules of internal law relating to the protection of fundamental rights during international armed conflict`. Article 77 contains the provisions relating to the protection of children in international armed conflicts. Paragraphs 1-5 is produced in extensor below because of the importance of its scope.

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into the armed forces. In recruiting among these persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavor to give priority to those who are oldest.

3. If, in exceptional cases, despite the protection of paragraph 2, children who have not attained the age of fifteen take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of

adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.

5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.

Article 77 (1) is a general provision. It complements Article 76(1) of Additional Protocol I which declares women to be the object of special respect. The two provisions are simply exercising gap-filling where, in the Fourth Geneva Convention, the wounded and sick, the infirm and expectant mothers, were declared to be objects of particular protection and respect but not women per se.⁴²¹ Article 77 (2) deals with children's participation in hostilities. There is no minimum age limit attached to the term "children" in this Article. Admittedly, the omission was deliberate, partly to evade debate about what the minimum age for recruitment should be and partly to accommodate the diversity of national laws defining the concept of childhood.⁴²² Nonetheless, the absence of any definition of childhood left a potentially troublesome area of ambiguity that states could exploit to their own advantage.

4.3.1 The definition of children

Article 77 did not define the word 'children' at all. In paragraphs 2 and 5 reference is made to persons under 18 years old. Given the location of these references in an Article on the protection of children, it might be argued that they peg the upper limit of childhood at 18 years of age. On the basis of the reference in paragraphs 2 and 3 to 'children who have not attained the age of fifteen years', it may be argued that childhood ends on the attainment of an individual's fifteenth birthday. This would render the provision consistent with the corresponding provision of the Fourth Geneva Convention.

⁴²¹ See Article 16, GC IV. H. Mann, in his article 'International Law and the Child Soldier' (1987) 36 ICLQ 32, p. 34, readers to the original omission as a 'stage lacuna in of the Fourth Geneva Convention.

⁴²² See Official Records (OR) XV, p. 465: CDDH/407/Rev. 1, para. 63.

Although it is clear to whom paragraphs 2, 3 and 5 apply, this is not the case with paragraphs 1 and 4. Those two latter provisions simply refer to `children`.⁴²³ In the circumstances, it might be argued that the reference to children is simply to persons under 15 years old. If this is the case, then childhood ends rather earlier for the purposes of Additional Protocol I than it does under the Convention on the Rights of the Child, where a child is defined as a person below the age 18 years. However, this is not necessarily the case for two reasons. In the first place, references to `children who have not attained that age of fifteen years` in Article 77(2) and (3) might serve to indicate that there can be children above this age. The text of Article 77 does not prevent a reading of the term “children” to mean persons under 18 years old. In the second place, one might consider it appropriate to read the earlier treaty in conformity with the latter, given that all parties to Additional Protocol I are also parties to the Convention on the Rights of the Child.⁴²⁴

4.3.2 The scope of the definition

The reference to children in Article 77 is a blanket one; it does not refer, as in the Fourth Geneva Convention, only to persons who are not nationals of the state into whose hands they have fallen. It was the International Committee of the Red Cross's stated intent that Article 77 should apply to nationals of state parties: Draft Article 68 (which formed the basis of Article 77) was introduced by ICRC to Committee III of the Diplomatic Conference. It was stated that the Article was intended to operate for the benefit of all children who were in the territories of the Parties to the conflict, whether or not the children fell within the definition of protected persons in Article 4 of the Fourth Geneva Convention.⁴²⁵ No objections to this characterization appear on record and the amendments to the draft Article did not affect its blanket character.⁴²⁶

⁴²³ As do the provisions on the evacuation of children in Article 78 Additional Protocol I.

⁴²⁴ For interpretation of the relevant provisions see Articles 31 & 32, Vienna Convention on the Law of Treaties, 1969.

⁴²⁵ Happold, n. 90 above, p. 2005, p. 59.

⁴²⁶ Obviously, Article 77(3), as it expressly states, only impose obligations on an adverse party.

However, the Coalition to Stop the Use of Child Soldiers does offer a working definition, and also promotes a “straight-18” approach. This opposes anyone under the age of 18 engaging in any kind of armed hostilities. A child soldier is defined as “any person under 18 years of age who is a member of or attached to the armed political forces or an armed political group, whether or not there is an armed conflict.” The Coalition is careful to stress that this definition includes a child participating in direct combat as well as an extensive range of military-related activities. The latter include scouting, acting as messengers, any type of military preparedness training, as well as acting in a support capacity, (ranging from carrying weapons, camp maintenance), or those suffering the abuses of forced labour or sexual slavery.⁴²⁷

However, the above definition runs counter to the development in law which has demarcated between direct and indirect participation. This might suggest that the definition is more than a “norms wish list”; it is in fact based on the realities of child soldiers in the field. The simple truth is that various duties of minors often overlap and therefore it can be difficult to separate direct from indirect participation. These direct/indirect dichotomies have been maintained by human rights and international humanitarian laws throughout their development.⁴²⁸

4.3.3 The Scope of the provision

Additional Protocol I is applicable in the same situations as the Four Geneva Conventions. This is laid out in common Article 2 of the Geneva Conventions,⁴²⁹ namely, in cases of armed conflict between two or more of the states parties to the Convention and in cases of partial or total occupation of the territory of a state party.⁴³⁰ Common Article 2 of the Geneva Conventions, however,

⁴²⁷ Mary-Jane Fox, n. 2 above, p. 30.

⁴²⁸ Ibid.

⁴²⁹ See Article 1(3), Additional Protocol I.

⁴³⁰ Under Article 1 (4), the Protocol is also state to apply in conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-

commences by stating: “In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply...”

It is arguable that the prohibition on the recruitment of children below 15 years into a state’s armed forces under Article 77(2) is a provision of Additional Protocol I which should be implemented in peacetime.⁴³¹ This may probably account for one of the reasons why America was reluctant to ratify the Protocol.⁴³² Although the wording of the paragraph refers to conflict from which children should be protected, to permit states to recruit children into their armed forces when not engaged in armed conflict might circumvent the fundamental purpose of the paragraph which will defeat the objective of the Article.⁴³³

State which had recruited children in peacetime would not be willing to discharge them on the outbreak of war. Similarly, a state staging an attack on another might kill or injure child soldiers in that state’s army before they could be demobilized. On the other hand, Article 77(2) specifically refers to “Parties to the conflict”, which would seem to imply that a conflict must first exist for the provision to apply.⁴³⁴

4.3.4 The ICRC Draft Article

Before the First World War, the International Committee of the Red Cross (ICRC) had made appeals for the international regulation of civil wars. Unfortunately, applications by the ICRC to engage in humanitarian relief work were often regarded by states as an unfriendly attempt to interfere in their domestic affairs. This was still the prevailing attitude in 1912 when the Red Cross International Conference in Washington refused to consider a draft proposal suggesting that

determination`. This provision has been the subject of much controversy. It is, however, no longer of much practical significance.

⁴³¹ Happold, n. 90 above, p. 59.

⁴³² See Michael Southwick, Political Challenges Behind the Implementation of the Optional Protocol to the Convention on the Rights of the Child. CILJ Vol.3 7 No.3 (2004), pp. 540-546.

⁴³³ Happold, n. 90 above, p. 60.

⁴³⁴ Ibid.

Red Cross societies provide aid for both warring sides during civil conflict. Several States were strongly oppose to this, particularly Russia, believing that it would be improper for the Red Cross to impose any duty upon itself to work for the benefit of rebels regarded as criminals by the laws of their land.⁴³⁵

The ICRC (along with national societies) was able to take limited action in subsequent internal conflicts,⁴³⁶ and by 1921 it had adopted a modest resolution affirming the rights of all victims of civil wars to relief in conformity with the general principles of the Red Cross.⁴³⁷ This was recognized in the 1928 revision of the Statute of the ICRC,⁴³⁸ and enabled the latter for the first time to induce both sides in the conflict in Upper Silesia and Spain to give limited undertakings to respect the principles of the Geneva Conventions. This encouraged the ICRC to table a more substantial resolution in 1938,⁴³⁹ anticipating the application of all essential principles of the Geneva Conventions to internal armed conflicts.

Thus Article 77(2) was much amended from the ICRC's original draft,⁴⁴⁰ which stated:

“The parties to the conflict shall take all necessary measures in order that children aged fifteen or under shall not take any part in hostilities

⁴³⁵ See Lindsay Moir, ‘The Law of Internal Armed Conflict’, Cambridge University Press, 2002, p. 1; Anton Schlogel, ‘Civil War’ (1970) 108 Int Rev of Cross 123 at 125 and Jean S. Pictet, Commentary on the Geneva Conventions of 12 August 1949, Volume III (Geneva, 1960), 29.

⁴³⁶ Most notably those in Russia and Hungary, Pictet, Commentary III, p. 29; see also Schlogel, ‘Civil War’, 125 and Georges Abi-Saab, ‘Non-international Armed Conflict’ in UNESCO, International Dimensions of Humanitarian Law (Dordrecht, 1988), p. 219. On ICRC action in the Russian Revolution, See Andre Durand, History of the International Committee of the Red Cross, Volume I: From Sarajevo to Hiroshima (Geneva, 1984), pp. 97-108.

⁴³⁷ Resolution XIV of the 10th International Red Cross Conference, Geneva, 1921. See Schlogel, ‘Civil War’, pp. 125-126.

⁴³⁸ Article 4 of the Statute was revised to read as follows: “The special role of the ICRC shall be... (d) to take action in its capacity as a neutral institution, especially in case of war, civil war or internal strife’.

⁴³⁹ Resolution XIV of the 16th International Red Cross Conference, London, 1938. See Schlogel, ‘Civil War’, pp. 126-127.

⁴⁴⁰ Draft article 68 (2). See Or 1, Part Three, for the text of the draft Additional Protocol.

and, in particular they shall refrain from recruiting them in their armed forces or accepting their voluntary enlistment”.

Although paragraph 2 was extensively amended during the Diplomatic Conference, no record exists of the deliberations leading to the amendments.⁴⁴¹ The meetings of the Working Group to which it was referred to were held in private.⁴⁴² Consequently, the only explanation given for the changes made by the Working Group appear in the report of the latter submitted by the Rapporteur to Committee III.

In relation to draft Articles 68, the Rapporteur stated: ‘This Article was the subject of discussion in the Working Group for a period of a week. The final product was a compromise in many respects and was not completely satisfactory to a number of representatives.’⁴⁴³ On adoption of the Article by Committee III, a number of representatives took the opportunity to give explanations of their votes, but these are not, by and large, particularly enlightening. No explanations of votes were given on the adoption of the Article in plenary session. While it is clear that the form of Article 77 (2) was the subject of controversy and of extensive discussion, the reasons for the amendments made to the original draft are obscure. Common sense suggests that they were made with the intention of weakening the contents of the paragraph, but nowhere in the record of the Conference is this made explicit. Consequently, a number of issues arise concerning the meaning of the text and of its relationship with the previous draft.⁴⁴⁴

⁴⁴¹ After amendments by the Working Group, the article was adopted by consensus, first by committee and then by the Conference in plenary session. See OR XV, p. 218; CDDH/IIISR.59 and OR IV, p. 251; CDDH/SR. 43.

⁴⁴² See the Conference’s Rules of Procedure at OR II, p. 15; CDDH/2/Rev.3.

⁴⁴³ OR XV, p. 521; CDDH/111/391.

⁴⁴⁴ Happold, n. 90 above, p. 60.

4.3.5 The meaning of ‘all feasible measures’

Parties to conflicts are required by Article 77(2) of Additional Protocol I to take ‘all feasible measures’ to ensure that children do not take a direct part in hostilities. The choice of the term “all feasible measures” has been a particular sticking point, since it put a limited expectation on the state. Cohn and Goodwin-Gill rightly explained that ‘feasible’ is to be understood as “that which is capable of being done and, by definition, whatever is under the jurisdiction and control of a party is *prima facie* capable of being done.”⁴⁴⁵ They explained that although it might always be “feasible” for organized armed forces/groups to have a policy of non-recruitment of children, it might not necessarily always be feasible to guarantee the implementation or compliance with the provisions and the protocol by all armed groups. In other words, they are obliged to refrain from recruiting minors under fifteen years into their own forces, because this clearly is “within the authority or competence of the party.”⁴⁴⁶ At the time of the Diplomatic Conference, the ICRC proposed a stronger wording by reference to “all necessary measures.” However, the proposal was rejected so that states could avoid the “absolute obligations” (*l’interdiction absolue*) that such as wording would entail.⁴⁴⁷

This also had strong implications in regard to the restriction in Article 77(2) of children under fifteen being prohibited from taking “a direct part in hostilities.” Here again the ICRC attempted to strengthen this Article by including indirect participation in hostilities as well, since their own understanding of direct “meant a casual connection between the act of participation and its immediate result in military operations.”⁴⁴⁸ However, only *direct* participation was ultimately agreed to. Bennett rightly questions the foresight of that decision, since most minors do

⁴⁴⁵ Goodwin-Gill, n. 3 above, p. 63.

⁴⁴⁶ Ibid.

⁴⁴⁷ M.T. quoted in Cohn & Goodwin-Gill, n. 3 above, p. 61.

⁴⁴⁸ T.W. Bennett, Criminalising the Recruitment of Child Soldiers, Institute for Security Studies (Pretoria) Monograph No.32; Using Children in Armed Conflict: A Legitimate African Tradition? December 1998, p. 7.

begin as support personnel and eventually become more actively engaged in actual combat over time.⁴⁴⁹ He also pointed out that by clearly allowing even indirect participation, the primary purpose of international humanitarian law-protection is undermined because any level of involvement of a minor in hostilities is clearly expose him/her to danger.⁴⁵⁰ Moreover, the combinations of 'feasible' and 'direct' make a relatively weak demand on the parties to the Protocol.

Consequently, it can be seen that Article 77(2) imposes two related obligations on states parties. First, there is an obligation not to recruit children under 15 into their armed forces. The wording of the paragraph indicates that this is something that is always feasible for states to do.⁴⁵¹ Governments can legislate as to the minimum age of recruitment into a state's armed forces and exercise control over the armed forces. They can ensure compliance with the legislation by ensuring that individuals aged under 15, or those who appear as such (in cases where proof of age is lacking) are not recruited. Second, states must take all feasible measures to ensure that children under 15 do not by any other means take a direct part in hostilities. Such circumstances might arise in relation to the pupils of military schools or the members of paramilitary youth organizations, or due to recruitment by military forces not under or direct governmental control. In all cases, however, the obligation is the same, although it is a far weaker and more subjective one than the ICRC had originally intended. The concept of 'necessary measures' makes reference only to the aim contemplated. The concept of

⁴⁴⁹ Ibid.

⁴⁵⁰ See H. Mann, *International Law and the Child Soldier*, *International and Comparative Law Quarterly*, Vol. 36, 1987; Y.Sandoz, (ed.), *Commentary on the Additional Protocols*, Geneva: ICRC, Martinus Nijhoff, (1987) and Mary-Jane Fox, n. 2 above, p. 35.

⁴⁵¹ The French text of the paragraph is slightly different. It states; 'Les parties au conflit prendront toutes les mesures possibles dans la pratique pour que les enfants de moins de quinze ans ne participent pas directement aux hostilités, notamment en s'abstenant de les recruter dans les forces armées...' Unlike the English version, which contains two prepositions coordinated by the word 'and', the French text contains one principal and one subordinate preposition, so that the restriction 'toutes les mesures possibles' applies throughout the sentence; See P. Tavernier, 'Combatants and Non-Combatants', in I.F. Dekker and H.H.G. Post (eds.), *The Gulf War of 1980-88; The Iran-Iraq War in International Legal perspective*, Dordrecht: Martinus Nijhoff, 1992, pp. 141-2 Under Article 102 of Additional Protocol I, the English and French texts have equal status. However, for the reasons given above, this difference in emphasis probably has no practical effect.

‘feasible measure’ also refers to the circumstances in which the measures are to be taken. As Paul Tavernier observed; ‘Article 77, Protocol 1, imposed on contracting states only an obligation of means and not an obligation of result’.⁴⁵²

4.3.6 What constitutes a state’s ‘armed forces’?

All States parties to Additional Protocol I are prohibited from recruiting children below the age of 15 into their armed forces. However, what constitutes a state’s armed forces? The 1949 Geneva Conventions did not give much assistance. The latter merely made a distinction between ‘members of the armed forces of a Party to the conflict as well as members of Militias or volunteer corps forming part of such armed forces’ with ‘members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict.’⁴⁵³ Although neither category is defined, Article 43(1) of Additional Protocol I is more helpful. It provides that:

“The armed forces of a party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.”⁴⁵⁴

Though it is not compulsory that such persons wear uniform, failure to do so can have devastating effect on the individuals themselves when captured by the forces of an adverse party. Article 43(3) is very important, as it states that: ‘whenever a party to a conflict incorporates a paramilitary or armed force law enforcement agency into its armed forces it shall so notify the other parties to the

⁴⁵² The Conference’s Rules of Procedure at OR II, p. 15; CDDH/2/Rev.3.

⁴⁵³ See Article 13 Geneva Convention I and Article 4 Geneva Convention III.

⁴⁵⁴ Happold, n. 90 above, p. 62.

conflict.’ Happold believed that it may imply recruitment of children who have not yet attained 15 years of age into such organizations, unless they fall within Article 43(1), and it does not *per se* breach the prohibition on the recruitment of children under 15. It will only do so if the party does not take all feasible measures to ensure that any child under 15 so recruited does not take a direct part in hostilities.⁴⁵⁵ This might be said with regard to the militias, volunteer corps and organized resistance movements not forming part of a party’s armed forces referred to in Geneva Convention I and III.⁴⁵⁶

Happold concluded that though Additional Protocol I does not use the term child soldier, but its provisions reflect a narrower understanding of the concept than the Cape Town Principles.⁴⁵⁷ The latter views children’s use in various auxiliary roles as putting them within the definition whether they have been enrolled into the armed forces or not. Additional Protocol I takes a more formal approach. A child soldier is either a member of a state’s armed forces or combatant of some other kind. Indeed, it would be more accurate to say that Additional Protocol I is concerned with child combatants rather than child soldiers.⁴⁵⁸

4.3.7 Taking a ‘direct part in hostilities’

There are strong implications with regard to the restriction in Article 77(2) of Additional Protocol I which says that children under fifteen are prohibited from taking “a direct part in hostilities.” The ICRC attempted to strengthen this Article by including *indirect* participation in hostilities as well, since their own understanding of direct “meant a causal connection between the act of participation and its immediate result in military operations.”⁴⁵⁹ However, there was strong opposition to the insertion of the word ‘*indirect*’ in the Article; and only

⁴⁵⁵ Ibid.

⁴⁵⁶ See Article 13 Geneva Convention I and Article 4 Geneva Convention III.

⁴⁵⁷ Happold, n. 90 above, p. 63. See also Cape Town Principles and Best Practices, 27-30 April 1997, Cape Town, South Africa.

⁴⁵⁸ Ibid.

⁴⁵⁹ Bennett, n. 448 above, 7.

‘direct’ participation was ultimately agreed upon. Bennett rightly questions the foresight of this decision by the States Parties.⁴⁶⁰

Article 43(2) of Additional Protocol I attributes the right to participate directly in hostilities to members of the armed forces of a party to a conflict. The phrase also appears in Articles 51, which deals with the protection of the civilian population against the effects of hostilities. Paragraph 3 provides that: ‘Civilians shall enjoy the protection afforded in this section, unless or until and for such time as they take a direct part in hostilities.’ In relation to its use in Articles 77 (2), the phrase can be contrasted with the prohibition in Article 4(3) (c): “children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor be allowed to take part in hostilities.” And 3(d) provides “the special protection provided by this Article to children who have not attained the age of 15 shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured”.

Commenting on Article 51(3), the ICRC Commentary states: ‘in general the immunity afforded to civilians is subject to a stringent condition: that they do not participate directly in hostilities, i.e. that they do not become combatants on pain of losing their protection. Thus, “direct” participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces’.⁴⁶¹

The correct interpretation of ‘taking a direct part in hostilities’ means ‘that the person in question performs warlike acts which by their nature or purpose are designed to strike enemy combatants or material such as firing at enemy soldiers, throwing a Molotov-cocktail at an enemy tank, blowing up a bridge carrying enemy war material, and so on.’⁴⁶² Taking a direct part in hostilities means taking part in combat. It does not include such activities as the gathering

⁴⁶⁰ Ibid.

⁴⁶¹ Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), Commentary on the Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949. Geneva: ICRC, 1987, p. 619.

⁴⁶² F. Kalshoven, Constraints on the Waging of War, Geneva; ICRC, 1987, p. 91.

or transmission of military information, the transportation of arms and munitions or the provision of supplies. The use of children in such activities is not prohibited in Additional Protocol I. This is another way in which it differs from the Cape Town principles, which demand that: 'A minimum age of 18 years should be established for any person participating in hostilities or for recruitment in all forms into any armed force or armed group'.⁴⁶³

Happold doubts the broadness of the prohibition to provide for children under 15 with effective protection from the acts of the forces of an adverse party. First, the use of children for the gathering and transmission of military information can place them in danger if they fall into enemy hands of being accused of espionage and treated as spies.⁴⁶⁴ It appears that children are commonly used for such tasks.⁴⁶⁵ Second, this can happen despite Article 51 of Additional Protocol I's insistence that civilians should not be objects of attack unless and for such time as they take a direct part in hostilities.⁴⁶⁶ For example, if civilians were being used to transport munitions up to the front line for use by the troops fighting or any other part of the conflict zone.⁴⁶⁷

4.3.8 The meaning of 'Refrain from recruiting'

The advocates of stricter controls on recruitment were disappointed with Article 77(2).⁴⁶⁸ The original draft of paragraph 2 referred to states 'refraining from recruiting' children under 15 or 'accepting their voluntary enlistment'. It is difficult to do more than speculate as to the reasons behind the deletion of the latter

⁴⁶³ Happold, n. 90 above, p. 64.

⁴⁶⁴ See Article 46, Additional Protocol I.

⁴⁶⁵ As Cohn and Goodwin-Gill state: 'A Zimbabwean officer who fought against the smith regime explained it simply: children can move freely and are not instantly suspected of spying and supplying.' I. Goodwin-Gill, n. 3 above, p. 96.

⁴⁶⁶ Article 51 (2) and (3), Additional Protocol I.

⁴⁶⁷ Happold, n. 90 above, p. 64.

⁴⁶⁸ See H. Mann, "International Law and the Child Soldier", *International and Comparative Law Quarterly*, Vol.36, 1987, p.38 for a history of the drafting of those provisions.

phrase. The only comment in the official Record was made by the representative of Italy, who stated that his delegation would have preferred the phrase to have been completed in conformity with the ICRC draft.⁴⁶⁹ It seems likely that the intention of the deletion was to weaken the provision. The question is whether it succeeded or not.

This issue was raised in the Dissenting Opinion of the Appeals Chamber of the Special Court for Sierra Leone's interlocutory decision in *Prosecutor v. Norman*.⁴⁷⁰ Justice Robertson stated that: "Recruitment" is a term which implies some active soliciting of "recruits", i.e. to pressure or induce them to enlist: it is not synonymous with "enlistment" '.⁴⁷¹ Justice Robertson's comments were with regard to Article 4(3) (a) of Additional Protocol II, but would seem to apply equally to Article 77(2). For the corresponding provision of Additional Protocol I, such an interpretation would seem to imply that children under 15 can serve in armed forces and armed groups, provided that their enrolment is not actively solicited.

In English usage the word 'recruitment' is broader than the word 'conscription'. The former covers both voluntary enlistment and conscription into a state's armed forces.⁴⁷² In the context of the paragraph, the prohibition is part of a broader obligation on states to take all feasible measures to prevent children from taking a direct part in hostilities. Plainly, it is as feasible for a state to refuse to accept the voluntary enrolment of children into its armed forces as it is to refrain from conscripting them. Finally, the object and purpose of Additional Protocol I, as its preamble makes clear, is to protect civilians from the effects of

⁴⁶⁹ OR XV, p. 220; CDDH/III/SR. 59. The comment was made during explanation of votes, after the adoption of the article by committee III.

⁴⁷⁰ *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2004-14-AR729E, Special Court for Sierra Leone (Appeals Chamber), decision on preliminary motion based on lack of jurisdiction (Child recruitment) 31 May 2004. See also M. Happold, *Child Soldiers in International Law*, Manchester University Press, 2005, p. 64.

⁴⁷¹ Ibid.

⁴⁷² Under Article 102 of Additional Protocol I. The Arabic, Chinese, English, French, Russian and Spanish texts of the Protocol are all equally authentic. I am unable to comment on the Arabic, Chinese, Russian or Spanish texts. The equivalent word in the French text, however, is *recruteur*, which can apply to both forcible and voluntary recruitment and also (as with its English equivalent) refer to the recruitment of employees in civilian life.

armed conflict.⁴⁷³ Like Geneva Convention IV, the Protocol views women and children as quintessential civilians and non-combatants. Accordingly, it is immaterial whether a child's recruitment is voluntary or coerced. It is interesting that elsewhere in his Opinion, Justice Robertson, stated that international law prohibits the enlistment of under 15 year-olds, not just their recruitment.⁴⁷⁴

Finally, in recruiting among persons who have attained the age of 15 years but who have not yet reached the age of 18, paragraph 2 stipulates that 'states shall endeavour to give priority to those who are oldest'. This provision is self-explanatory. It was inserted into the paragraph as a sop to those states who wanted a higher minimum than 15 years for recruitment and participation in hostilities.⁴⁷⁵ According to Happold, two points about the provision can be made: firstly, it is an indication that (under the age of 18) the younger a person is, the more undesirable is his or her participation in hostilities. Secondly, it imposes an obligation on states, albeit a weak one, to regulate such participation. Although a number of states do recruit persons under 18, few recruit 15- or 16-year-olds.⁴⁷⁶

The purpose of Article 77(3) was to ensure that even if the principles of the previous paragraph were abused, minors under 15 still maintained special status as "protected persons". This would apply whether they qualified for the treatment due to those with prisoners of war status or not.⁴⁷⁷

4.4 Additional Protocol II

Having achieved the inclusion of struggles for national liberation in Protocol I, the interest of many delegations in the Second Protocol to cover internal conflicts

⁴⁷³ Happold, n. 90 above, p. 65.

⁴⁷⁴ *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2004-14-AR729E, Special Court for Sierra Leone (Appeals Chamber), decision on preliminary motion based on lack of jurisdiction (Child recruitment). 31 May 2004. Dissenting Opinion of Justice Robertson. para. 33.

⁴⁷⁵ OR III. p.301: CDDH/III/325; and Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: ICRC, 1987, p. 901.

⁴⁷⁶ Happold, n. 90 above, p. 65.

⁴⁷⁷ Mary-Jane Fox, n. 2 above, p. 35.

greatly diminished. Some were strongly opposed to any international regulation whatsoever. To avoid Protocol II being neglected, and the consequent risk that no agreement would be reached regarding internal armed conflicts, the provisions of both draft Protocols were discussed at Committee level simultaneously from the second session.⁴⁷⁸

Following a multitude of informal meetings, Pakistan presented a series of amendments to the Plenary, constituting a shorter and simplified Protocol II. This is based on the assumption that it 'should not appear to affect the sovereignty of any State Party or the responsibility of its government to maintain law and order and defend national unity, nor be invoked to justify any outside intervention'.⁴⁷⁹ The work radically changed and, with a minimum of debate, the Pakistani amendments were accepted as a 'Gentleman's Agreement'.⁴⁸⁰

Additional Protocol II differs from Additional Protocol I in that it addresses the needs of victims in conflict "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." In other words, it includes well-organized and well-armed opposition forces which are violently opposing governments believed to be illegitimate, or at least in keeping with the principles of the UN Charter and related documents.⁴⁸¹ As detailed as this wording appeared to be, there were still possible situations which did not fall within its ambit, such as cases of state collapse or more than one non-state armed group fighting another non-state armed group and the government. This meant that the

⁴⁷⁸ Lindsay Moir, 'The Law of Internal Armed Conflict', Cambridge University Press, 2002, p. 91.

⁴⁷⁹ CDDH/SR.49; VII, 59 at 61.

⁴⁸⁰ CDDH/SR.49; VII, 59 at 70.

⁴⁸¹ It was also carefully added that it "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflict." In doing so, it reiterated the aims of Spain and the United Kingdom in their reservations towards Protocol I.

child soldiers in one group would have more protection and rights than those in another.⁴⁸²

Additional Protocol II moved forward from the traditional norms of international humanitarian law in that it regulated non-international armed conflicts. Though it sets out a code regulating the conduct of internal conflicts,⁴⁸³ the code is far more in general terms than the very specific provisions in the Four Geneva Conventions and Additional Protocol I. It is concerned with setting minimum standards of conduct rather than laying down detailed regulations; it is prohibitive rather than prescriptive. The provisions governing the special status of children and regulating their participation in hostilities are somewhat briefer, forming part of Article 4, which lists a number of fundamental guarantees for persons affected by internal conflicts.⁴⁸⁴

Article 4(3)(c) of Additional Protocol II is clear and simple, it provides: “children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor be allowed to take part in hostilities.” Article (3)(d) claims “special protection provided by this Article to children who have not attained the age of 15 shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured.”

This is an important advancement for all under-15 children from all previous treaties. The restrictions imposed in respect of the use of children in hostilities in internal armed conflicts are far broader than those imposed on the use of children in international armed conflicts by Article 77(2) of Additional Protocol I.

Both protocols display some positive advancement in the law relating to child soldiers in both international and non-international armed conflicts, because they are asymmetrical in those advancements. Since there are clear restrictions

⁴⁸² Mary-Jane Fox, n. 2 above, p. 35.

⁴⁸³ Or, at least, internal conflicts above a certain level of intensity; see Article 1 (1) Additional Protocol II.

⁴⁸⁴ Happold, n. 90 above, p. 66.

regarding applicability, the potential force and reach of the advancements are weakened, contributing to what already began as patchwork protection.⁴⁸⁵

4.4.1 The Special Protection of Children in the Provisions of the Protocol in General

Additional Protocol I and II include a perspicuous statement about the general principle of the special protection of children. The protocols principle is phrased in somewhat different words and order, but its substance coincides with that of the international declarations and conventions, namely that all children – civilians and soldiers, nationals of one's own country and foreigners – must receive special protection. The manifestations of the principle are more accurately found in those provisions dealing particularly with the special protection itself and providing provisions of necessary core and paramount aid for children.⁴⁸⁶

In protocol I the general principle is contained in Article 77(1). A similar principle is evident in the general provision in Article 4(3) of Protocol II and the child prisoner provisions contained in both Protocols, Articles 77, 3, 4(3) (d). Article 70(1) of Protocol I dealing with relief actions and providing priority for children⁴⁸⁷ contains a further reference to the fact that the general rule in the entirety of Articles 77(4)(3) is the "special protection of children".⁴⁸⁸ However, in the draft Protocol of the International Committee of the Red Cross (ICRC) the general principle of special protection was perhaps better evident as a main principle, from which, in turn, the obligations regarding care and aid and the prohibition of indecent assault were derived.

⁴⁸⁵ Mary-Jane Fox, n. 2 above, p. 36.

⁴⁸⁶ Arto Kosonen in 'the Special Protection of Children and Child Soldiers', The University of Helsinki Publication, 1987, p. 50.

⁴⁸⁷ Article 38 and 50(4) of the Fourth Geneva Conventions, 1949.

⁴⁸⁸ Regarding the interpretation and, in general, the drafting of the above provisions on the special protection of children and that of evacuation (Articles 78/4,3e); Protection of war Victims, Protocol I to the 1949 Geneva Conventions. Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts, Geneva 1974-1977, Volume 4. Levie (ed.), 1981 (Protection of War Victims), pp. 94-106.

However, in stressing the value of this Protocol, the view has been expressed that specifically the general clause in Article 77(1) of the Protocol as well as the corresponding clause in Article 76(1) on the protection of women have today achieved validity in customary international law.⁴⁸⁹ The provisions on women and children in Articles 76-78 are largely part of customary international law.⁴⁹⁰

The significance of the family is evident in the Protocols' arrangements which have to do with the education, evacuation and deprivation of liberty of children, and the unity or reunion of families. However, as these provisions do not place unconditional obligations on the Contracting States in all cases, it is difficult to establish them as generally binding. Still taking into consideration similar rules in human rights instruments, it is possible to argue that not only the principle of the reunion and also that of the unity of the family in general may have some connections with customary international law, at least in "normal" conflict situation.⁴⁹¹

4.4.2 The Special Protection of Children in the Child Soldier Provisions

The general principle of the special protection of children for security reasons and preventive measure required that they should be moved from areas of actual conflict than be brought into the very heat of the battle which is reflected in the general clause of both Protocols.

Indeed, Article 4(3) (c) of Protocol II, which deals with the military use of children, would appear to follow this broad assumption to a great extent. Article 4(3), states that:

⁴⁸⁹ Kosonen, n. 486 above, p. 53.

⁴⁹⁰ Penna, Customary international law and Protocol I: An analysis of some provisions. Swinarski (ed): Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet. 1984, p. 224.

⁴⁹¹ Ibid., p. 55.

“Children below the age of fifteen years shall neither be recruited in the armed forces or groups nor be allowed to take part in hostilities.”

The corresponding provision in Protocol I, Article 77(2), is clearly weaker. It states:

“The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.”

4.5 Conclusion

These Additional Protocols marked the actual foundation of the legal regulations of children’s involvement in hostilities. It was established that the two treaties differed in a number of respects. Although the differences already highlighted may have been the result of inadvertence, other difference between the two protocols was intentional.⁴⁹² References in Additional Protocol I of ‘Parties to the conflict’ refers to state parties to the Protocol, to national liberation movements who have made a unilateral declaration undertaking to apply both the Geneva Conventions and Additional Protocol I,⁴⁹³ and possibly to the forces of other recognized and already existing subjects of international law, such as governments in exile.⁴⁹⁴ Additional Protocol II, by contrast, addresses itself to none. It was deliberately drafted in an impersonal manner. Additional Protocol II binds not only states which have ratified or acceded to it, but also armed opposition groups fighting against the governments of such states. This is clear from the drafting history and is highlighted in the ICRC Commentary.⁴⁹⁵

⁴⁹² Happold, n. 90 above, p. 68.

⁴⁹³ Ibid., p. 66.

⁴⁹⁴ See Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: ICRC, 1987, p. 507.

⁴⁹⁵ Ibid., p. 134.

CHAPTER FIVE

International Human Rights Law and the legal regulation of the Recruitment and use of child Soldiers

5.1 Introduction

On 20th November 1989, the United Nations General Assembly (UN GA) adopted the CRC⁴⁹⁶. The adoption of the CRC was a profound shift in the world's thinking about children and their rights. This put to rest the arguments about whether children have definable rights or not. The Convention came into force on 2nd September 1990, the first international treaty to encompass a wide range of the rights of children.⁴⁹⁷ The CRC remains, to date, the most universally accepted human rights instruments in history, generating an unprecedented degree of formal commitments by states. All member states of the United Nations, with the exception of the United States and Somalia, have ratified the CRC; precisely, 192 states as of 31 May 2006.⁴⁹⁸ Judicial authorities confirmed that "the CRC became international customary law almost at the time of its entry into force".⁴⁹⁹

Articles regulating the participation of children in hostilities appear in the 1989 CRC. However, following dissatisfaction with the provisions contained in the CRC, in 2000, an Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict was adopted. Difficulties encountered in the negotiation of the Optional Protocol, however, meant provisions on child recruitment were also included in a 1999 ILO treaty, the ILO Convention 182 on the Worst Forms of Child Labour. The only regional treaty on

⁴⁹⁶ Convention on the Rights of the Child (1989), United Nations, *Treaty Series*, Vol. 1577, p. 3. Entered into force on 2 September 1990.

⁴⁹⁷ Amnesty International, *Childhood Stolen: grave human rights violations against children*, 1995, p. 5.

⁴⁹⁸ See Vladimír Volodin, 'Human Rights Major International Instruments, Status as at 31 May 2006, United Nations Educational, Scientific and Cultural Organization, UNESCO 2006.

⁴⁹⁹ *Prosecutor v. Norman*, Case No SCSL-2004-14-AR72 (E), Judgment, (31 May 2004).

the rights of the child, the 1990 African Charter on the Rights and welfare of the Child⁵⁰⁰, also includes provisions on child-soldiering.⁵⁰¹

5.2 The 1989 Convention on the Rights of the Child (CRC)

The Convention had its origins in the Declaration of the Rights of the Child, based on the Children's Charter which was adopted by the League of Nations in 1924 and the UN Declaration on the Rights of the Child in 1959. The latter declaration recognized the need to make children's welfare a primary concern but was non binding and limited in scope.⁵⁰²

In the 1970s arguments in favour of a United Nations convention gathered impressive force and report from around the world heightened children's vulnerability, their frequent invisibility in the face of abuse, and the consequent need for greater protection. Children also began to be perceived less as "minors" subject to parental control and more as individuals with capacity and rights to express their own views and decisions. International legal instruments concerning children were scattered over some eighty different, and not always consistent, human rights treaties. It was felt that time had come to treat children as a single category and protect them with a single binding treaty. This was formally proposed by the Polish Government in 1978 and the drafting of the Convention began the following year.⁵⁰³

The CRC prioritizes the interests of the child.⁵⁰⁴ It clearly defined a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."⁵⁰⁵ Article provides that: 'States

⁵⁰⁰ African Charter on the Rights and Welfare of the Child (1990). Entered into force on 29 November 1999.

⁵⁰¹ Happold, n. 90 above, p.71.

⁵⁰² Amnesty International, *Childhood Stolen: grave human rights violations against children*. 1995, p. 5.

⁵⁰³ *Ibid.*, p. 6.

⁵⁰⁴ Article 3 and 6 Convention on the Rights of the Child 1989, are particularly relevant in this regard.

⁵⁰⁵ *Ibid.*, Article I.

Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention'. Although there are several articles that *ipso facto* preclude the possibility of recruitment⁵⁰⁶. Article 38 deals with the participation of children in hostilities. The Article provides:

1. States Parties undertake to respect and ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. State Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. State Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall take all feasible measures to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, State Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

The Article makes no significant or little progress from the provisions of Additional Protocol I, although it does confirm that the prohibition on the recruitment of children under 15 is a blanket prohibition applying at all times. It is weaker than Article 4(3) (c) of Additional Protocol II. This was a disappointment to a number of states and NGOs involved in the negotiation of the CRC. Indeed, Article 38 is the only provision in the Convention that includes provisions

⁵⁰⁶ See Article 19(1) requires States Parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury, or abuse, neglect or negligent treatment or exploitation, including sexual abuse, while in care of parents, legal guardians or any other person who has the care of the child. Articles 3(2), 6 and 16 are among those articles which are similar in this regard.

extending protection only to children under 15 years old, as opposed to all children.⁵⁰⁷

Article 2 of the CRC is also an advancement on both Additional Protocols I and II, since States Parties are not just obliged to take all feasible measures in regard to their own recruits, but to anyone that has not attained the age of fifteen. This would include non-state recruitment and thus the protection is somewhat improved.

The text of the CRC was negotiated within an open-ended Working Group established by the then UN Commission on Human Rights (UNCHR) in 1979.⁵⁰⁸ The original draft of the CRC did not include any provision on the protection of children in armed conflicts. This was seen, particularly by Non-Governmental Organisations, as a lacuna in the treaty. A number of proposed new articles dealing with the subject were submitted in the 1985 and 1986 sessions of the Working Group. At the 1986 session and after a length debate, a draft article was adopted. The new draft article 20 provided that:

1. The States Parties to the present Convention undertake to respect and ensure respect for rules of international humanitarian law applicable to them in armed conflicts, which are relevant to the child.
2. States Parties to the present Convention shall take all feasible measures to ensure that no child takes a direct part in hostilities and they shall refrain in particular from recruiting any child who has not attained the age of fifteen years into their armed forces.
3. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, states Parties to this Convention shall take all feasible

⁵⁰⁷ Happold, n. 90 above, p. 72.

⁵⁰⁸ For discussion of the negotiation of the CRC, see S. Detrick (ed.), *The United Nations Convention on the Rights of the Child: A guide to the 'Travaux Préparatoires'*, Dordrecht: Martinus Nijhof, 1992; and Françoise Krill, 'The Protection of Children in Armed Conflict', in M. Freeman and P. Veerman (eds.), *The ideologies of Children's Rights*, Dordrecht: Martinus Nijhof, 1992.

measures to ensure protection and care of children who are affected by an armed conflict.

The new Article was seen as unsatisfactory by a number of states and Non-Governmental Organisations for its failure to live up to the standards set in international humanitarian law. It failed to develop them in at least one respect, namely, the absence of any provision obliging states to give priority to the oldest when recruiting among persons aged between 15 and 18 years of age. The Article was weaker than Article 77(2) of Additional Protocol I. Following representations made at the 1986 and 1987 sessions, discussion of the Article was reopened at the 1988 session of the Working Group.⁵⁰⁹

The United Nations Centre for Human Rights and UNICEF have grouped the rights of the child in the CRC into what is referred to as “the three P’s”, namely provision, protection and participation.

Provision includes the rights to possess, receive or to have access to certain things or services, for example, the right to a name and nationality, health care, education, rest and play, care for disabled and parentless children.

Protection requires the rights to be shielded from harmful acts and practices, for example, separation from parents, commercial or sexual exploitation, physical and mental abuse, and engagement in welfare.

Participation implies that the child’s rights should be heard on decisions affecting his or her life. As maturity and capacity evolve, the child should have increasing opportunity to take part in the activities of society, as preparation for social responsibility and adulthood.

At the 1988 session, however, the Chairman singled out two items on the agenda that needed attention: amendments to the exiting text which improved international standards, and the insertion of a new text taken from Article 77(2) of

⁵⁰⁹ See M. Happold, *Child Soldiers in International Law*, Manchester University Press, 2005, p. 73.

Additional Protocol I. It was agreed to insert the new text (imposing an obligation to give priority to the oldest when recruiting persons between 15 and 18), but to leave the amendments to the existing text to the second reading of the Convention.⁵¹⁰ After a lengthy deliberation on texts that were tabled, the following wording which had the maximum level of protection and concern was adopted: “States Parties shall take all feasible measures to ensure that persons who have not attained the age 15 years do not take a direct part in hostilities”.

However, unhappiness remained about the level of protection afforded by the CRC to children involved in armed conflicts. A number of state parties to the CRC⁵¹¹ made declarations that they considered Article 38 as having failed to prohibit the use of all persons under 18 in armed conflicts. Like the CRC, the resulting document fell prey to a compromise, though without doubt it was an improvement on the CRC.⁵¹²

5.3 The Optional Protocol to the CRC

The four Geneva Conventions and the two Additional Protocols⁵¹³ form the core of modern International Humanitarian Law and thus provide standards for the treatment of persons that are no longer taking part in hostilities during a state of armed conflict. However, most of today’s conflicts are internal, whereas the Geneva Conventions regulate international conflicts. However, Article 3 common to the Geneva Conventions, which the ICJ regards as reflecting “elementary considerations of humanity,”⁵¹⁴ defines certain rules to be applied, “as a

⁵¹⁰ UN Doc. E/CN.4/1988/28, AT p.26; See for details M. Happold, *Child Soldiers in International Law*, Manchester University Press, 2005, p. 73.

⁵¹¹ Andorra, Argentina, Austria, Colombia, Ecuador (upon signature). Germany, the Netherlands, Spain and Uruguay. Cited by M. Happold, *Child Soldiers in International Law*, Manchester University Press, 2005, p. 74.

⁵¹² Mary-Jane Fox, n. 2 above, p. 38.

⁵¹³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the protection of victims of International Armed Conflicts (Additional Protocol I), 15 August 1977, 16 I.L.M.1391; Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 15 August 1977, 16 I.L.M. 1442.

⁵¹⁴ *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986 I.C.J. 14, 114 (June 27); *Corfu Channel Case (United Kingdom v. Albania)*, 1949 I.C.J. 22, 215 (April 9). For further details see N.J. Udombana,

minimum,”⁵¹⁵ in armed conflict of a non-international character.⁵¹⁶ Article 3 constitutes the basic minimum yardstick for international armed conflicts.⁵¹⁷ The Additional Protocols, in turn, combine rules of war with rules protecting civilians, thereby filling in some of the shortcomings of the Geneva Conventions.⁵¹⁸ The Additional Protocol II which supplements and develops Articles common to the four Geneva Conventions, applies to all non-international armed conflicts taking place in a territory of a State party between its armed forces and dissident armed forces.⁵¹⁹

Some commentators believe that the Additional Protocols have not yet acquired the status of customary law, as they do not enjoy the same universal ratification as the four Geneva Conventions; thus, their applicability depends upon whether one of the other protocols is applicable.⁵²⁰ This implies that the rules become applicable only if a state involved in the conflict, whether it is international or internal in scope, is a party to the protocols, and the conflict fulfills the conditions for its application.⁵²¹ Customary international law may still bind parties that have not ratified the relevant treaties, once a pattern of practice or expectation is generally accepted or becomes extant.⁵²² Thus the Appeals Chamber of the

‘War is not child’s play! International law and the prohibition of children’s involvement in armed conflicts’, MCS FFV EDITS, <http://www.juscogens.net/orgs> (last visited 2 April, 2007).

⁵¹⁵ See Article 3 Common Geneva Conventions, 1949.

⁵¹⁶ See Lindsay Moir, ‘The Law of Internal Armed Conflict’, Cambridge University Press, 2002, p. 91.

⁵¹⁷ See International Commentary of the Red Cross, Commentary: IV Geneva Convention Relative to the Protection of Civilian persons in time of war, p. 27 (eds.), Oscar M. Uhler et al. <http://www.jstor.org/view/00029300/di981849/98p0467g/0> (last visited on 2 April, 2007).

⁵¹⁸ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the protection of victims of International Armed Conflicts (Additional Protocol I), 15 August 1977, 16 I.L.M.1391; Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 15 August 1977, 16 I.L.M. 1442.

⁵¹⁹ Ibid.

⁵²⁰ As at Dec 31 Dec 2003, there were 161 States Parties to the Additional Protocol I and 156 States Parties to the Additional Protocol II. See International Commentary of the Red Cross, States Party to the Geneva Conventions and their Additional Protocols (2004), available at <http://www.icrc.org> (search for “parties to Geneva Conventions” and follow the hyperlink for “ICRC Annual report 2003: Map of States Party (A4)”).

⁵²¹ See Frits Kalshoven, Book Review, 89 AM. J. INT’L L. (1995) 835 pp. 849-850.

Special Court for Sierra Leone concluded that “many of the provisions of Additional Protocol II, including the fundamental guarantees, were widely accepted as customary international law by 1996.”⁵²³

Dissatisfaction with Article 38 also manifested itself in the Committee on the Rights of the Child, the body established to supervise states’ compliance with their obligations under the CRC.⁵²⁴ A combination of unusual circumstances ultimately resulted in the establishment of the machinery for the drafting, completion, adoption and, subsequently, the entry into force of the Optional Protocol.⁵²⁵ In 1992, a proposal was made for the development of an Optional Protocol to the CRC which would further restrict the participation of children in hostilities by raising⁵²⁶ the minimum age of recruitment to 18.⁵²⁷ A short draft was prepared,⁵²⁸ the substantive provisions of Articles 1 and 2 which provided that:

1. States Parties shall take all feasible measures to ensure that persons who have not attained the age of 18 years do not take part in hostilities.
2. States Parties shall refrain from recruiting any person who has not attained the age 18 years into their armed forces.

⁵²² Madeleine Grey Bullard, Child Labor Prohibitions are Universal, Binding, and Obligatory Law: The Evolving State of Customary International Law Concerning the Unempowered Child Laborer, 24 HOUS. J. INT’L L. (2001), 139, p. 159.

⁵²³ *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2004-14-AR72 (E), Judgment, 18, 31 May 2004.

⁵²⁴ Article 43 Convention on the Rights of the Child.

⁵²⁵ See U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, Report of the Working Group on the Draft Optional Protocol to the Convention on the Rights of the Child on involvement of Children in Armed Conflicts on its Second Session, U.N. Doc. E/CN. 4/1996/102 (21 March, 1996).

⁵²⁶ UN Doc. CRC/C/10, paras. 61-77.

⁵²⁷ UN Doc. CRC/C/625, para. 176.

⁵²⁸ UN Doc. E/CN. 4/1994/91.

The draft was submitted to the Commissions on Human Rights, and in 1994 the Commission established a Working Group to negotiate an Optional Protocol.⁵²⁹ The text of the Committee on the Rights of the Child formed the basis upon which negotiations took place.⁵³⁰

5.3.1 Negotiating the Optional Protocol

There were apparent divisions during the negotiation of the Optional Protocol which took six years. A number of participants argued that it was imperative to set a minimum age of recruitment of 18.⁵³¹ The view again was expressed that all forms of participation in hostilities should be prohibited, because in actual practice there was often little difference between direct and indirect participation in hostilities.⁵³² Then the general feeling was that any prohibition should be in relation to all armed groups, whether governmental or non-governmental.⁵³³ On the other hand, some states only wanted to prohibit the conscription of under 18-year-olds and their participation (or direct participation) in hostilities. The USA wanted to reduce the proposed minimum age for recruitment from 18 to 17.⁵³⁴ Other states wanted to permit recruitment into military schools or for educational or training purposes; others differed on whether the minimum age for recruitment should be 15 or 16.⁵³⁵

At the second session of the Working Group, the matter was advanced and it was agreed that there should be no conscription of persons under 18.⁵³⁶ There an argument ensued on whether the Optional Protocol should cover non-

⁵²⁹ CHR Res. 1994/91.

⁵³⁰ Happold, n. 90 above, p.75.

⁵³¹ UN Doc. E/CN. 4/1995/96.para. 17.

⁵³² UN Doc. E/CN. 4/1995/96.para. 23.

⁵³³ Ibid., para. 24.

⁵³⁴ Ibid., para. 77.

⁵³⁵ Happold, n. 90 above, p. 75.

⁵³⁶ UN Doc. E/CN. 4/1995/96. paras. 24 and 17.

governmental armed forces or whether doing so would give unwarranted legitimacy to them. However, the general feeling was that such a reference should be made.⁵³⁷ A draft clause provides that:

“States Parties shall take all feasible measures, including any necessary legislation, to prevent recruitment of persons under the age of 18 years [of minors] subject to their jurisdiction by non-governmental armed groups [which are parties to] [involved in] an armed conflict.”

However, there was disagreement over the objective of the Optional Protocol – namely, whether it should be drafted so as to encourage the widest possible participation by states or it should be concerned with setting the highest achievable standards.⁵³⁸ In addition, the session saw the crystallization of disputes over the minimum age limit for participation in hostilities (with the USA and Pakistan arguing for 17 rather than 18) and whether all participation or only direct participation should be prohibited (with the USA, Japan and South Africa arguing for the later).⁵³⁹ Despite there being an agreement that the minimum age of recruitment should be higher, there was disagreement as to what age limit should be adopted.⁵⁴⁰

At the third session of the Working Group, signs of an impasse were beginning to appear in relation to the minimum age of children participation in hostilities. The UK, South Korea and Bangladesh favoured a 17-year age limit but stated that they would not block consensus on 18.⁵⁴¹ The USA, Pakistan and Cuba continued to favour 17.⁵⁴² There was no consensus over the minimum age of

⁵³⁷ Ibid., para. 31-32.

⁵³⁸ Ibid., para. 46.

⁵³⁹ Ibid., paras. 93-97.

⁵⁴⁰ Ibid., para. 24 and 103-117. Cited by M. Happold, *Child Soldiers in International Law*, Manchester University Press, 2005, p. 75.

⁵⁴¹ UN Doc. E/CN. 4/1997/96. para. 76.

recruitment⁵⁴³ or on whether the prohibition should cover all forms or only direct participation in hostilities.⁵⁴⁴

By the fourth session, 'a fundamental difference among States on the question of the minimum age for participation in hostilities was... noted by the Working Group'.⁵⁴⁵ A 'Chairman's perception' paper was circulated, setting out a compromise text.⁵⁴⁶ The 'vast majority' of states favoured an age limit of 18 for all participation in hostilities and an appeal was made to the dissenting states not to block consensus,⁵⁴⁷ but no consensus was reached.⁵⁴⁸ The representative of the USA expressly indicated that an age limit of 17 rather than 18 was acceptable to his government, although all other speakers were in favour of or ready to accept 18.⁵⁴⁹

The dispute over the minimum age limit for participation in hostilities got to the pick with the USA and Pakistan arguing for 17 rather than 18; and whether all participation or only direct participation should be prohibited, with the USA, Japan and South Africa arguing for the latter. The UK, South Korea and Bangladesh favoured a 17-year age limit but stated that they would not block consensus on 18. The USA, Pakistan and Cuba continued to favour 17. Disagreement also remained over whether the prohibition should cover all forms or only direct participation in hostilities.⁵⁵⁰

⁵⁴² Ibid., para 78.

⁵⁴³ Ibid., paras. 87-97.

⁵⁴⁴ Ibid., para. 79.

⁵⁴⁵ UN Doc. E/CN. 4/ 1998/102. para, 23.

⁵⁴⁶ Ibid, Annex II. The Chairman's text proposed, first , that States Parties to the Protocol be obliged to take all feasible measures to ensure that under-18 years –olds do not take a direct part in hostilities and, second, that the conscription of persons under 18 and the voluntary recruitment of persons under 17 years of age be prohibited.

⁵⁴⁷ UN Doc. E/CN. 4/ 1998/102. paras. 19-20 and 29.

⁵⁴⁸ Ibid., paras. 23.

⁵⁴⁹ Ibid., para. 69.

⁵⁵⁰ UN Doc. E/CN.4/1995/96. paras. 17, 93 and 103; UN Doc. E/CN.4/1997/96, para5. 76, 78 and 79.

The Commission on Human Rights mandated the Chairman of the Working Group to conduct informal consultations, which took place over the next two years.⁵⁵¹ The sixth session of the Working Group finally saw the agreement. The Optional Protocol was adopted by the General Assembly and opened for signature, ratification and accession on 25 May 2000,⁵⁵² and, having received the required number of ratifications, entered into force in February 2002.

5.3.2 The Optional Protocol

The Optional Protocol consists of just thirteen articles, the first four of which are most notable.⁵⁵³ Article 1 provides that:

“States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.”

This is a leap from Article 38 of the CRC, which prohibits those *under the age of fifteen* from taking a direct part in hostilities.⁵⁵⁴ As with the corresponding obligations in Additional Protocol I and the CRC, the obligation is not an absolute one. Knowing very well that the Optional Protocol does not impose a minimum age of recruitment of 18, an absolute obligation might prove impossible to fulfill by states parties which do recruit under-18-years-olds. However, the UK, in its

⁵⁵¹ The working Group did meet twice more before agreement was reached but only briefly; in April 1998 it met to elect a new Chairman-Rapporteur: see UN Doc. E/CN/41998/102/Add. 1; and in January 1999 it met for its fifth session to recommend to the Commission on Human Rights that the chairman is encouraged to continue her consultations: see UN Doc. E/CN. 4/1999/73.

⁵⁵² General Assembly Resolution A/RES/54/263 of 25 May 2000. Its entry into force took place three months after the tenth instrument of ratification or accession.

⁵⁵³ The full title of the document is Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts.

⁵⁵⁴ What constitutes direct vs. indirect participation is an unresolved discussion in itself and varies between institutions. It is an attempt to distinguish between an act could immediately result in fatality, injury or capture an opponent's soldier or cause damage to their arms or installations, as opposed to support for such an act such as supplying arms and equipment. See Mary-Jane Fox, *Child Soldiers and International Law: Patchwork Gains and Conceptual Debate*, HRR, October-December 2005, p. 38.

declaration upon signature of the Optional Protocol, read Article 1 rather more widely. The UK declaration states that:

The United Kingdom understands that Article 1 of the Optional Protocol would not exclude the deployment of members of its armed forces under the age of 18 to take a direct part in hostilities where:

- (a) there is a genuine military need to deploy their unit or ship to an area in which hostilities are taking place; and
- (b) by reason of the nature and urgency of the situation
 - (i) it is not practicable to withdraw such persons before deployment; or
 - (ii) to do so would undermine the operational effectiveness or their ship or unit and thereby put at risk the successful completion of the military mission and/or the safety of other personnel.

There has not been protest from any other state party to this declaration. It may be argued that this suggests that other states parties accept the UK's interpretation, but such a conclusion may be unfounded. In a similar vein, however, at the final session of the Working Group the US representative stated: "the standard recognize(s) that, in exceptional cases, it might not be feasible for a commander to withhold or remove (child soldiers) from taking a direct part in hostilities."⁵⁵⁵ This seems to go even further than the UK position by permitting commanders to take a positive decision to commit child soldiers to battle if they consider military necessity requires it. The strictures in the ICRC commentary on Article 57(2) of Additional Protocol I might be profitably recalled; a focus on military needs should not serve as an excuse for neglecting the humanitarian obligations prescribed by the provisions.

In addition, Article 1 does not ban all participation by children in hostilities. Children can be used to participate in hostilities; which means that under

⁵⁵⁵ UN Doc. E/Cn.4/2000/74, at para. 131.

Additional Protocol I and the CRC, a child soldiers can be employed in a number of roles which are likely to put them in danger from enemy forces. This point was made expressly in the USA's declaration on ratification of the Optional Protocol. The US understood the phrase 'direct part in hostilities' as implying that it 'does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions or other supplies, or forward deployment'.⁵⁵⁶

Article 2, by contrast, does contain an absolute prohibition: 'States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.' This is also a step beyond the CRC, which does not specifically mention compulsory recruitment restrictions. Thus the conscription of under-18-years olds is forbidden. Such an obligation seems to be something within states' powers, although difficulties may arise if states have not established proper systems for the registration of births. Consequently, in such cases states must err on the side of caution and not recruit anyone who may be under 18; if a state does so, even inadvertently, it will be in breach of the Article.

Article 3, makes no distinction between "direct" or "indirect" participation in hostilities. It contains the most complex provisions of the Optional Protocol, a clear sign of its origin as a negotiated compromise. First, Article 3(1) requires states parties to raise the minimum age for voluntary recruitment from that set out in Article 38, paragraph 3 of the CRC, namely, 15 years. It seems that Article 3 of the Optional Protocol requires the minimum age of recruitment to be raised but fails to specify to what age it must be raised. Consequently, the minimum age was raised from 15 to 16 years old.⁵⁵⁷ Secondly, in raising the minimum age at which they recruit, states parties must do so 'taking into account the principles

⁵⁵⁶ UN Doc. E/Cn.4/2000/74, at paras. 131.

⁵⁵⁷ See. D. Helle, 'Protocol no the Involvement of children in Armed Conflict to the Convention on the Rights of the Child' (2000) IRRC No. 839, p. 797.

contained in that Article and recognizing that under the Convention persons under 18 are entitled to special protection.'

The relevant principles in Article 38 of the CRC would appear to be those deriving from its requirement that: 'In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States parties shall take all feasible measures to give priority to those who are oldest.' In other words, the younger a person is, the more undesirable she/he is for recruitment. Invoking the principles that persons under 18 are entitled to special protection would appear to indicate that all recruitment of under-18-years-olds is undesirable. It is, however, unclear what effect the requirement to take account of these principles is meant to have. If the provision is not simply hortatory, it seems only to impose a weak obligation of states parties to consider whether it is appropriate to recruit under-18-year-olds and to set out criteria which they must take into account when making their decision whether to do so or not.

Then Article 3(2) provides that upon ratification or accession to the Optional Protocol, a state party shall deposit a binding declaration setting out the minimum age at which it will permit voluntary recruitment and describing the safeguards it has in place to ensure that such recruitment is truly voluntary.

Article 3(4) provides that a state party may, at any time, 'strengthen' its declaration. In consequence, once a state has become a party to the Optional Protocol it can not later reduce the minimum age from which it recruits but it may increase it again with binding effect. If a state's declaration provides that it will recruit persons aged 17 and upward, it may increase the minimum age to 18, but it can not reduce it to 16, even though that is the minimum age generally permitted under the Optional Protocol. The provision is akin to a ratchet mechanism. As many states do not, in fact, recruit from 16, the result of the provision may be the establishment of some higher age as the general minimum. As of May 2006, some one hundred and seven states (107) had become parties to the Optional Protocol and had made declarations upon signature or ratification.

Three of these states⁵⁵⁸ have no armed forces, so their declarations did not set any minimum age for recruitment of the others; six set the minimum age at 16; eleven at 17; forty-three at 18; and six at some higher age.

Article 3(3) provides that state which do permit voluntary recruitment of persons under the age of 18 into their armed forces shall maintain a number of safeguards to ensure that such recruitment is genuinely voluntary and not forced or coerced. These shall ensure not only that such recruitment is voluntary but also that it is fully informed and done with the informed consent of the person's parents or legal guardians. State must also only recruit persons who can provide reliable evidence that they are old enough to be recruited. An element of transparency is ensured by requiring states to set out the safeguards employed in order to ensure that these obligations are met in their declaration upon adherence to the Optional Protocol.

Finally, Article 3(5) provides that the increase in the minimum age of recruitment from 15 to 16 set out in Article 3(1) does not apply in respect to the enrolment of persons into schools operated by or under the control of state parties' armed forces. The operation of such schools must, however, comply with the relevant provisions of the CRC.⁵⁵⁹

Armed groups are dealt with in Article 4. Article 4(1) provides that: 'Armed groups that are distinct from the armed forces of a State should not, under any circumstances recruit or use in hostilities persons under the age of 18years'. This is an absolute prohibition, in contrast to the earlier, more complex and nuanced provisions regarding recruitment into, and use by, states parties' armed force. It appears that such a restriction was more acceptable to governments than restrictions on their own recruiting activities.

The definition of 'armed groups' is, however, of interest. It does not appear to be limited to armed opposition groups or insurgents in conflict with the governments

⁵⁵⁸ Happold, n. 90 above, p. 79.

⁵⁵⁹ That is, Articles 28 (the child's right to education) and 29 (the developments to which the education of the child shall be directed).

of states parties - but is wide enough to encompass armed groups allied with a state party's government but not part of, or under the control of, its armed forces. Such a definition also adds force to the provision in Article 4(2) that states parties shall take all feasible measures to prevent the recruitment and use of under-18-years-olds by armed groups, including by criminalizing such practices. States would not appear to have many means to prevent insurgent groups from recruiting or using child soldiers other than prosecuting and punishing rebels who fall into their hands if they have participated in the recruitment or use of child soldiers, but the situation might be different with regard to armed groups allied to the state's government. There is the usual disclaimer that the application of Article 4 shall not affect the legal status of any parties to an armed conflict.

The adoption of the Optional Protocol, in some quarters, was seen as a triumph for 'international civil society', being the first time that the US had given way on a human rights issue that it regarded as involving its military interests.⁵⁶⁰ On the other hand, the issue was not one that affected US national security in any major way. At the conclusion of the deliberations of the Working Group, President Clinton President of the US, then, announced that the text adopted: 'fully protects the military recruitment and readiness requirements of the United State'.⁵⁶¹

Although the US armed forces recruits 17-year-old high school graduates upon graduation rather than waiting for their eighteen birthdays, such recruits total less than half of one percent of the US military and almost all of them reach their eighteenth birthday before completing their training.⁵⁶² The USA has therefore not felt it necessary to raise the minimum age of recruitment in order to become a party to the Optional Protocol.⁵⁶³

⁵⁶⁰ 'Optional Protocol adopted by UN General Assembly', *Children of War*, No. 2/00 (July 2000), p. 1.

⁵⁶¹ Statement on the Geneva Protocol on Child Soldiers, 35 Weekly Comp. Pres. Doc. 130 (24 January 2000), cited in M.J. Dennis, 'Newly Adopted Protocols to the Convention on the Rights of the child' (2000) 94 AJIL 789, p. 792.

⁵⁶² See K. Roth, 'Sidelined on Human Rights', *Foreign Affairs* (March-April 1998), p. 2.

⁵⁶³ Indeed, it appears that the text of article 3 adopted was based on a US proposal. See Dennis, 'Newly Adopted Protocols to the Convention on the Rights of the child' (2000) 94 AJIL pp. 790-791.

5.4 Criticisms against the Optional Protocol

The Optional Protocol came as a result of a compromise. This is most glaring in the obscurity of the language in a number of provisions. As a result, it has been criticized from its sides. The opposition of a number of states to imposing 18 as the minimum age for all recruitment was premised upon a perception that states' armed forces serve useful functions; that service as a soldier can be a worthwhile and fulfilling occupation; and that if states were not allowed to enlist school leavers into their armed forces, then many persons who might otherwise chose a military career would be lost to civilian life.⁵⁶⁴ The Optional Protocol meets these concerns. Recruitment from the age of 16 is permitted, providing that recruits and their parents or guardians have given their full and informed consent. However, states parties must attempt to ensure that soldiers under 18 years of age do not directly participate in hostilities. At the same time, the Optional Protocol does increase the minimum age at which recruitment can take place; it prohibits the compulsory and (it can be inferred) forcible recruitment of children, and prevents the use of child soldiers to participate directly in hostilities.⁵⁶⁵

It may, however, be asked whether the Optional Protocol will have any real effect on states' behaviour or whether it augments in any significant manner the protection already given to under-18-year-olds. Most states do not currently recruit from age 15, some recruit from 16 or 17, others from 18. When they do conscript, it is generally only from the age of 18. Few changes will be necessary to comply with the Optional Protocol. In addition, by permitting the recruitment of under-18s and their participation (if not direct participation) in hostilities, the Optional Protocol does not give child soldiers effective protection from the effects of armed conflict. As members of a state's armed forces, they remain lawful targets by enemy forces who, in many cases, may be unable to distinguish them

⁵⁶⁴ See Denis, 'Newly Adopted Protocols to the Convention on the Rights of the child' (2000) 94 AJIL p. 790. See also the UK's declaration upon ratification of the Optional Protocol, which states that: 'The minimum age at which individuals may join the UK Armed Forces is 16 years. This minimum broadly reflects the statutory school leaving age in the United Kingdom, that is the age at which young persons may first be permitted to cease full-time education and enter the full-time employment market'.

⁵⁶⁵ Happold, n. 90 above, p. 81.

from their older comrades. As soldiers participating in hostilities, they can be put in positions of danger by their own side.⁵⁶⁶

State Parties that permit voluntary recruitment of individuals under the age of 18 into their national armed forces must maintain safeguards to ensure, as a minimum, that such recruitment is genuinely voluntary and is carried out with the informed consent of the person's parents or legal guardians.⁵⁶⁷ Such recruits must be fully informed of the duties involved in military service and must provide reliable proof of age prior to acceptance into national military service. This provision on volunteers again appears to be a compromise, but it was unnecessary because the Protocol is optional. The drafter appear to have been more cautious than courageous, shying away from the opportunity to draft a protocol that significantly affects the existence of the problem that it was meant to address.⁵⁶⁸

Voluntary recruitment is often a choice not exercised freely; it is rarely based exclusively on the volition of the child, and it tends to be conditioned by factors beyond the child's control.⁵⁶⁹ Parental consent, in many instances, does not provide an adequate safeguard.⁵⁷⁰ One of the main reasons advanced for raising the minimum age to eighteen years is the "physical, psychological and emotional impact of teaching of military skills and attitudes" on young persons, as well as

⁵⁶⁶ Happold, n. 90 above, p. 81.

⁵⁶⁷ See Article 3(3) Optional Protocol to the Rights of the Child on the Involvement of Children in Armed Conflicts, GA. Res. 54/263, U.N. Doc. A/RES/54/263 (25 May, 2000).

⁵⁶⁸ Throughout the drafting processes, sovereign interests continued to dog the Committee's deliberations; Pakistan, for example, warned that any change in their practice-of permitting children to volunteer at 15 or 16-would cause social problems. See U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts on Its Fourth Session, 58-59, U.N. Doc. E/CN.4/1998/102 (23 March, 1998).

⁵⁶⁹ See The Secretary-General, Report of the Expert of the Secretary-General: Impact of Armed Conflict on Children, delivered to the General Assembly, U.N. Doc. A/51/306 (26 August, 1996 prepared by Graca Machel).

⁵⁷⁰ The Secretary-General, Comments of the Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child of the Child on Involvement of Children in Armed Conflicts, Part II.A., p. 5, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/1999/WG.13.2 (8th Dec, 1998).

related “loss of opportunities to develop educational and social skills more appropriate for civilian life.”⁵⁷¹ Furthermore, birth registration in many countries is inadequate or non-existent and children may not know how old they are.⁵⁷² Thus, recruiters assessing age on the basis of physical development can more effectively enforce the minimum age of 18.⁵⁷³

There are more general reasons why the age of recruitment into the army, whether compulsory, coercive or voluntary, should not be lower than eighteen. State practice of the ninety-nine countries sampled regarding laws setting a minimum age for military service, indicate that seventy require 18 years or above.⁵⁷⁴ It is generally presumed that under 18 cannot fully appreciate the nature of their actions, or the extent of their own responsibilities.⁵⁷⁵ The U.N. Rules for the Protection of Juveniles Deprived of their Liberty⁵⁷⁶ defines a juvenile as “every person under the age of 18”.⁵⁷⁷ Again, it is morally wrong to compel or allow those who cannot influence political decisions to take up arms for their country or for other groups with or without parental consent.⁵⁷⁸ As Switzerland declared before the Working Group on the CRC Protocol, “there is no reason for lowering the limit...precisely in a sphere in which the rights of the child are exposed to grave danger.”⁵⁷⁹ The same psychological maturity needed

⁵⁷¹ Brett, n. 356 above, p. 127.

⁵⁷² Machel Report, Impact of Armed Conflict on Children, delivered to the General Assembly, U.N. Doc. A/51/306 (26 August, 1996), p. 36.

⁵⁷³ Brett, n. 356 above, p.125.

⁵⁷⁴ Child Soldiers U.N. Youth Ass’n of Australia [UNYA], Why Prohibit Military Recruitment of Under 18’s, http://203.33.253.235/Resoures/Thematic/Child_exclude_under_18/ (last visited 3rd April, 2007) See also I. Cohn and G.S Goodwin-Gill, Child Soldiers: The Role of Children in Armed Conflicts, Oxford Clarendon Press, 1994, pp. 187-208.

⁵⁷⁵ Ibid.

⁵⁷⁶ U.N. Rules for the Protection of Children Denied Their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (14 Dec, 1990).

⁵⁷⁷ Ibid.

⁵⁷⁸ It would seem wrong to condemn the unenfranchised to die as a consequence of political decisions on they can exercise no influence. Goodwin-Gill, n. 3 above, pp. 187-208.

for participation in political processes should be required for making a voluntary decision to join, or to be compulsorily recruited into, the armed forces.

In all, the CRC and its Optional Protocol were important and much-needed steps in creating and codifying an awareness of the special needs of armed minors in situations of peace or conflict. Although it is not surprising that protection still prevailed by retaining the two-tiered system, the continued use of “all feasible measures,” and the distinction that is still made between “direct” and “indirect” participation in these documents is perhaps the best that could be expected at the time. Though a more comprehensive codification could have been achieved, there would have been little point in creating legal instruments committing states to obligations to which they could not adhere.

5.5 ILO Convention 182 on the Worst Forms of Child Labour

Owing to the impasse in the Working Group on the Optional Protocol, the issue of child recruitment began to be raised in other fora. In June 17, 1999, the International Labour Conference unanimously adopted Convention No. 182, the Convention concerning the ‘Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.’⁵⁸⁰ The Convention bans four categories of child labour that governments should not tolerate:

Firstly, modern slavery, debt bondage and similar practices, including forced or compulsory recruitment of children for use in armed conflict; secondly, sex work, including pornography and prostitution; thirdly, illicit activities, in particular drug

⁵⁷⁹ The Secretary-General, Comments of the Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts Addendum, p. 4, delivered to the Comm’n on Human Rights, U.N. Doc. E/CN.4/1999/WG.13/2/Add.1(8th Dec., 1998).

⁵⁸⁰ The text of Convention No 182, as adopted by the ILC, is found in Report of the Committee on Child Labour, International Labour Conference, Record of Proceedings, 87th Session (1999) [hereinafter called Committee Report], and is reprinted in 38 ILM 1215 (1999). Portion of the text are also reproduced in Contemporary Practice, 93 AJIL 896 (1999). The ILC is the annual meeting of the International Labour Organization (ILO). The ILO is a tripartite body made up of representatives of government, labour and business from 174 countries. It was established in 1919, Cited by M. J. Dennis, “The ILO Convention on the Worst Forms of Child Labour”, 93 AJIL 943-948 (1999).

trafficking; and lastly, any other work that by its nature is likely to harm the health, safety and morals of children.⁵⁸¹

The Convention defines a child as any person under the age of eighteen.⁵⁸² This Convention is not the first attempt by the ILO to ban abusive forms of child labour. In 1973 the ILO Minimum Age Convention (No.138) was designed to eradicate different forms of child labour by category and age, permitting progressive implementation depending on member states level of development. It attracted only seventy-two ratifications over a period of twenty-six years.⁵⁸³ The ILO believed that it was now time to establish a clear international consensus concerning work that is the worst harmful and performed by those who are most vulnerable, namely children.⁵⁸⁴ An instrument to that effect would be a true cornerstone for a movement to eliminate as many forms of abusive child labour as possible, while at the same time recognizing the differences in practices among countries and the need to accommodate different cultures and legal standards.

The new Convention is limited in scope and represents a compromise text on several points. However, it does constitute a concise, focused and realistic instrument and one that should prove to be widely ratifiable. The ILO Conference decided that there should be a legally binding convention obliging states parties to take measures to secure the prohibition and immediate elimination of the worst

⁵⁸¹ Convention No.182, Article 3. Article 1 of the Convention specifically obligates ratifying states to ‘take immediate and effective means to secure the prohibition and elimination of the worst forms of child labour’ as defined in Article 3.

⁵⁸² Ibid., Article 2.

⁵⁸³ See List of Ratifications by Convention and Country, Report III (Part 2), International Labour Conference, 87th Session (1999). Neither the United States nor the United Kingdom is a party to Convention No. 138. Article 32 of the Convention on the Rights of the Child, GA Res, 44/25, annex, UN GOR, 44th Session, Supp. No. 49, pp 166, 167, UN Doc. A/44/49 (1989), *reprinted in* 28 ILM 1448, 1468 (1989), which has been ratified by 191 states, refers in cursory fashion to the child’s need for protection from exploitation, hazardous work and work that interferes with education, and to the need to regulate minimum age, hours and conditions of employment.

⁵⁸⁴ See The text of Convention No 182, as adopted by the ILC, is found in Report of the Committee on Child Labour, International Labour Conference, Record of Proceedings, 87th Session (1999) [hereinafter called Committee Report], and is reprinted in 38 ILM 1215 (1999), para. 23 (Statement of the government delegate of the Netherlands on behalf of governments of the Industrialized Market Economies Group, which includes the United States).

forms of child labour. It was suggested that the Convention should explicitly govern the recruitment and use of children in armed conflict among the major issues considered during the negotiations.⁵⁸⁵ Consequently, provisions on whether the use of children as child soldiers in armed conflict should be included in the Convention became the most controversial aspect of the negotiations and one among the major issues of debate at the 1999 session of the Conference.⁵⁸⁶

The African group had adopted a common position, which proposed that an explicit reference to the recruitment and use of children in armed conflict be included in the definition of the worst forms of child labour. They argued that activities such as military training and participation in armed conflict necessarily jeopardize the health or safety of children.⁵⁸⁷ Several delegates proposed that the Convention imposed an outright ban on the use of children (i.e., persons under eighteen) in all kinds of military activities. However, the USA urged for caution.⁵⁸⁸ The intention of the Convention was not to limit traditional military training and voluntary service: its emphasis was on the coerced or criminal imposition of military activity. The delegation of the Russian Federation doubted the advisability of a reference to child soldiers at all, as the issue was being addressed through the consideration of a draft Optional Protocol to the Convention on the Rights of the Child.⁵⁸⁹ Other delegations pointed to the ILO's limited experience with the military issues and argued that members exercise caution and maintain consistency with the Geneva Conventions of 1949, which generally refer to children under the age of fifteen.⁵⁹⁰

⁵⁸⁵ International Labour Conference, 87th Session. Geneva. June 1999. Report of the Committee on Child Labour (Corr.), para. 6.

⁵⁸⁶ *Ibid.*, para. II

⁵⁸⁷ See the statement of the Government member of Ethiopia. Speaking on behalf of the members of the African Group on the Committee, International Labour Conference, 87th Session. Geneva. June 1999. Report of the Committee on Child Labour (Corr.), para 37. See also the comments of the Government members of South Africa (para. 39) and Namibia (para. 45).

⁵⁸⁸ *Ibid.*, para. 41.

⁵⁸⁹ *Ibid.*, para. 44.

⁵⁹⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Opened for signature Dec. 12, 1977, Art. 77, 1125 UNTS 3 (drawing a distinction between children who have not attained the age of 15 for purposes of recruitment

An informal tripartite working group was established to work out a consensus on a number of issues including the explicit inclusion of a provision on the participation of children in armed conflict. Following consultations, the government of Australia presented a comprehensive proposal to the Committee. An amendment was proposed which defined the 'worst forms of child labour' to include 'debt bondage, serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict'. The proposal was widely supported by governments and delegates,⁵⁹¹ and was adopted by consensus.

However, the government of Ethiopia, speaking on behalf of members of the African Group on the Committee, stated that the proposal did not reflect the views of the members of the Group concerning the participation of children in armed conflict, which they considered the most hazardous and injurious form of child labour.⁵⁹² Other states also thought that the provision did not go far enough. Several states reiterated their support for a ban on the involvement of all persons under 18 in armed conflicts. The USA set out its understanding that the Convention did not cover voluntary enlistment in lawful national military service,⁵⁹³ and that there were no additional obligations related to military service contained in Article 3(d) of the Convention on hazardous work, which included among the worst forms of child labour 'work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children'. The USA specifically noted that no objections had been made

and taking a direct part in hostilities and *persons* who have attained the age of 18 for purposes of application of the death penalty); Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287 (providing explicit references to children under 15 in Articles 14, on hospital and safety zones; 23, on free passage of relief consignments; and 24 and 38(5), cited by M. J. Dennis, "The ILO Convention on the Worst Forms of Child Labour", 93 AJIL 943-948 at 944 (1999).

⁵⁹¹ Ibid., para. 130. The ILO is a tripartite organization made up of representatives of government, labour and business from its Member States.

⁵⁹² Ibid., para. 132.

⁵⁹³ Ibid., paras. 151-152.

to these understandings, and it was only on the basis that the Committee concurred with them that the US was prepared to move forward.⁵⁹⁴

It is clear that the then-stalled negotiations on the Optional Protocol were much in the minds of the Committee's members. During the closing statements in the Committee, the government of the Netherlands, speaking on behalf of a number of developed states,⁵⁹⁵

“Expressed satisfaction with the work carried out by the Committee in reaching a satisfactory compromise text for a Convention and a Recommendation considered the major relevant issues were adequately reflected.

The instruments represented a first step towards the setting of International standards on the issue of child soldiers. A basis had been laid for the Working Group on the Optional Protocol to the United Nations Convention on involvement of Children in Armed Conflict to make further progress”.⁵⁹⁶

The Convention and Recommendation were adopted as a whole and without objections by the International Labour Conference. It is clear, however, just as with the Optional Protocol that the need and to adopt by consensus a text that would be widely ratified led to a convention that many delegates would have preferred to have been in stronger language⁵⁹⁷. The new provision constitutes a significant enhancement of current international standards. Those standards, set forth in Article 77 of Protocol I to the 1949 Geneva Conventions and Article 38(2) of the CRC, require states to take “all feasible measures” to ensure that those

⁵⁹⁴ Ibid., para. 160.

⁵⁹⁵ Australia, Austria, Belgium, Canada, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, the UK and the USA. See also Convention No. 182, Article 3.

⁵⁹⁶ International Labour Conference, 87th Session. Geneva. June 1999. Report of the Committee on Child Labour (Corr.), paras. 395-396.

⁵⁹⁷ Happold, n. 90 above, p. 83.

under the age of fifteen “do not take a direct part in hostilities.”⁵⁹⁸ Raising the standard to eighteen for forced or compulsory recruitment for use in armed conflict should assist states in attacking the heart of the problem, that is, practices that force young children, often at the threat of gunpoint or through kidnapping, to take up arms in support of militias and paramilitary groups engaged in hostilities.⁵⁹⁹

This compromise is consistent with the view adopted by the diplomatic conference that drafted Protocol I to the Geneva Conventions, which concluded that a total prohibition on voluntary participation of children under fifteen, especially in occupied territories and in wars of liberation, would not be realistic.⁶⁰⁰ The new provision also helped to break the impasse at the United Nations on an Optional Protocol to the CRC as both the United States and the United Kingdom insisted that the lawful voluntary enlistment of sixteen-and seventeen-year-olds into national armed forces does not constitute one of the worst forms of child labour under the new Convention.⁶⁰¹

In a nutshell, the International Labour Organisation Convention 182 only deals briefly with the issue of child soldiers. It provides in Article 1 that each ILO Member State which ratifies the Convention ‘shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.’ Article 2 defines the term ‘child’ as applying to all

⁵⁹⁸ Both Article 38(3) of the Convention on the Rights of the Child, and Article 77(2) of Geneva Protocol I, further provide that states shall refrain from recruiting any person who has not attained the age of 15 into their armed forces. Articles 8(2)(b)(xxvi) (international conflicts) and Articles 8(2)(e)(vii) (noninternational conflicts) of the recently negotiated Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF. 183/9, reprinted in 37 ILM 999 (1998), define war crimes as including “conscripting or enlisting children under the age of fifteen years...or using them to participate actively in hostilities.”

⁵⁹⁹ See *Children under Arms*, Economist, July 10, 1999, at 19; Katherine Southwick, *Child Soldiers in Uganda*, Yale J. Hum. Rts, spring 1999, at 4; Frances Williams, *ILO’s Child Labour Treaty Set for Adoption*, FIN. Times (London), June 15, 1999, p. 8. Cited by M. J. Dennis, “The ILO Convention on the Worst Forms of Child Labour”, 93 AJIL 943-948 at 944 (1999).

⁶⁰⁰ See Commentary, International Committee of the Red Cross, *Commentary on the Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949*, pp. 900-901.

⁶⁰¹ The text of Convention No 182, as adopted by the ILC, is found in Report of the Committee on Child Labour, International Labour Conference, Record of Proceedings, 87th Session (1999) [hereinafter called Committee Report], and is reprinted in 38 ILM 1215 (1999). Portion of the text are also reproduced in Contemporary Practice, 93 AJIL 896 (1999).

persons under the age of 18. Article 3 (a) then goes on to define the ‘worst forms of child labour’ as including, inter alia, ‘forced or compulsory recruitment of children for use in armed conflict.’ Forced or compulsory recruitment of children for use in armed conflict is also defined as being a form of slavery or a practice similar to slavery. This is of particular interest because slavery and slavery-like practices are already prohibited in international law, under both conventional and customary international law.⁶⁰²

The provisions on the recruitment of children in ILO Convention 182 corresponded to portions of the text of the draft Optional Protocol on which there was already general agreement.⁶⁰³ As a result, the Convention was rapidly and widely ratified, entering into force on 19 November 2000, just eighteen months after its adoption. Indeed, the USA found the treaty easy to accept and became the third state to ratify it.⁶⁰⁴ As at 31 May 2006, the Convention had 160 parties.⁶⁰⁵

5.6 The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child⁶⁰⁶ is the first regional human rights treaty specifically concerned with children’s rights. It is also the only regional human rights treaty which deals with children’s involvement in armed conflict. The Charter was adopted by the Member States of the Organization of African Unity (OAU) on 11 July 1990. It was preceded by a non-binding and less comprehensive Declaration of the Rights and Welfare of the African Child⁶⁰⁷ adopted by the Assembly of Heads of State and Government of the OAU in

⁶⁰² Happold, n. 90 above, p. 83.

⁶⁰³ It is now presently Article 2 of Optional Protocol to Convention to the Rights of the Child.

⁶⁰⁴ M.J. Dennis, ‘The ILO Convention on the Worst Forms of Child Labor’ (1999) 93 AJIL 943, pp 947-948.

⁶⁰⁵ Happold, n. 90 above, p. 83.

⁶⁰⁶ OAU Doc. CAB/LEG/24.9/49 (1990).

⁶⁰⁷ See Declaration of the Rights and Welfare of the African Child. OAU Doc. AHG/ST. 4 Rev.1 (1979); Van Bueren (1993) 31-32.

1979. However, the latter declaration did not make any specific reference to children and armed conflict.

To a large extent, the Charter is similar to the 1989 CRC, but in some respects specifically oriented to the African context.⁶⁰⁸ The preamble, for example, asserts 'that the situation of most African children remains critical owing to certain 'unique factors', specifically including armed conflicts. It adds that 'the children, by reason of his (sic) physical and mental immaturity, needs special safeguards and care'.

The substantive Articles in the Charter which particularly express an African perspective include those that prohibit 'harmful social and cultural practices',⁶⁰⁹; provisions that focus on the needs of children living under regimes practicing racial and other forms of discrimination⁶¹⁰, and those that stress the responsibilities of the child 'towards his family and society',⁶¹¹.

However, the Charter is of interest in relation to children in armed conflict. Article 22 provides:

1. States Parties to this Charter shall undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflicts which affect the child.
2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.
3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian

⁶⁰⁸ One writer points out that certain provisions in the African Charter on the Rights and Welfare of the Child (ACRWC), based on the 1989 CRC, in fact run counter to African traditions and customary law, e.g. in relation to marriage and legitimacy; B. Thompson, Africa's Charter on Children's Rights. 'A Normative Break with Cultural Traditionalism' 41 ICLQ 432 (1992).

⁶⁰⁹ Article 21, intended to apply, inter alia, to female circumcision.

⁶¹⁰ See Article 26 African Charter on the Rights and Welfare of the Child.

⁶¹¹ Ibid., Article 31.

population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, and strife.

A child is defined in Article 2 of the Charter as 'every human being below the age of 18 years', so the provisions of Article 22 apply to all persons under 18 years of age.

Article 22(1) simply reaffirms commitments already made by the State parties.⁶¹² The Article is a blanket prohibition of the recruitment of all children into the armed forces of parties to the Charter. The wording of Article 22(2) follows closely that of Article 38 of the CRC⁶¹³ in confirming that the obligation to refrain from recruiting children is an obligation of result and not a sub-set of obligation.

Although only the use of children to participate directly in hostilities is prohibited rather than their participation per se, by prohibiting their recruitment Article 22(2) renders children's participation in hostilities less likely. The Charter itself is a human rights treaty applying in times of both peace and war, so one should view the obligations set out in Article 22(2) as applying at all times. Article 22(3) appears to extend the States Parties' obligations under international humanitarian law by giving the states responsibility to protect the civilian population in armed conflicts and also to take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. These rules apply to children in situations of internal armed conflicts, tension and strife.

By prohibiting all recruitment of children, the Charter not only went further than the two Additional Protocols and the CRC but more so the Optional Protocol and ILO Convention 182.

⁶¹² This is a reaffirmation of their commitment under 1989 CRC.

⁶¹³ Article 22 of the African Charter on the Rights and Welfare of the Child concerning children in armed conflict is stronger than Article 38, the analogous Article in the 1989 CRC.

There is a certain irony that the highest standards have been developed in a continent having the greatest use of child soldiers. However, one can appreciate the situation as one where the most concerned states are attempting to deal with the problem. Although ratification was slow and the Charter only entered into force on 29 November 1999⁶¹⁴, some thirty-eight of the fifty-three Member States of the AU are now parties to it. Indeed, the African Charter seems to be the exception to the rule that efforts towards a 'straight-18' ban on the recruitment and use of children to participate in hostilities, despite their gaining considerable support, have been uniformly unsuccessful.

Though in contrast to the 1989 CRC, this treaty contains provision 'for the submission, to the Committee established thereunder, of communications from any person, group of persons or non-governmental organisation' relating to matters covered by the African Charter on the Rights and Welfare of the Child.⁶¹⁵

The African Charter on the Rights and Welfare of the Child is therefore a good example of the difference in emphasis between the approach of a global and regional treaty concerning children. It illustrates the potential of the latter to address issues of particular regional concern, and to raise international standards, including standards in the area under discussion here, namely those concerning children in armed conflict⁶¹⁶.

⁶¹⁴ African Charter on the Rights and Welfare of the Child (1990). Entered into force on 29 November 1999.

⁶¹⁵ Ibid., Article 44(1).

⁶¹⁶ See Jenny Kuper, *International Law Concerning Child Civilians in Armed Conflict*, Oxford University Press, 1997, p. 52.

CHAPTER SIX

The Treatment of Child Soldiers

6.1 Introduction

The rules governing recruitment of children, their enrolment and how they are made to participate in hostilities have been considered. The major question that is to be addressed is how international law treats children who participate in hostilities. This will be divided into three parts. Firstly, what is the status of child soldiers *qua* combatants? Secondly, how should child soldiers be treated when rendered *hors de combat* and in the hands of an enemy? Thirdly, what obligations exist with regard to the disarmament, demobilisation and reintegration of child soldiers at the end of a conflict?⁶¹⁷

6.2 Child Soldiers as Combatants

The prohibition on the recruitment of children and their involvement in hostilities is primarily directed at states and non-state armed groups. Recently, it has been directed at private agencies and individual recruiters of child soldiers⁶¹⁸. Although the direct consequence is not spelt out in Additional Protocol I, it is implicit in its provisions that child combatants in an international conflict, having fulfilled the relevant criteria,⁶¹⁹ benefits from the same protections as any other lawful combatants. As stated in Article 43 of Additional Protocol I, members of the armed forces of a party to a conflict are combatants and are thus entitled to participate directly in hostilities.

⁶¹⁷ Happold, n. 90 above, p. 100.

⁶¹⁸ See M.T. Dutli, 'Captured Child Combatants' 1990 ICRC No. 278, p. 421.

⁶¹⁹ Article 43 of Additional Protocol I, Common Article 13/13/4 of GC I/II/III, and Article 4(B) of Geneva Convention III.

Children under 15 who participate in hostilities are not necessarily ‘unprivileged belligerents’.⁶²⁰ Their status is determined not by their age but by the same criteria that determines whether other persons are entitled to participate directly in hostilities or not. Children under 15 are not banned from participating directly in hostilities as are civilians⁶²¹ or mercenaries.⁶²² However, if they fulfill the relevant criteria, children may be considered as civilians, mercenaries or members of unprivileged belligerents, such as spies. Although their activities do not amount to direct participation in hostilities, they do render them liable to punishment under the municipal law of an adverse party. However, a child cannot be penalized simply for having borne arms in an international armed conflict.

Thus it means that when participating in hostilities children are no more privileged than any other combatant. There are no additional rules restricting what the forces of an adverse power may do to them. The situation is clearly set out in the New Zealand Defence Forces Law of Conflict Manual.⁶²³ The Manual defines a child soldier as ‘any person taking a direct part in hostilities as part of the armed forces of a state, or as part of an armed group, who is under 18 years of age’.⁶²⁴ It then provides that:

Child soldiers who are part of the armed forces of a state or who would, if they were adults, otherwise qualify as combatants:

- (a) are entitled to carry out attacks on the adverse party;
- (b) may lawfully be the subject of attack for such time as they take a direct part in hostilities;

⁶²⁰ See R.R. Baxter, *So-called Unprivileged Belligerency: Spies, Guerrillas and Saboteurs* (1951) 28 BYIL 323; G.I.A.D. Draper, *‘Status of Combatants and the Question of Guerrilla Warfare’* (1971) 45 BYIL 173; also M. Happold, n. 90 above, p. 101.

⁶²¹ Who lose their protected status if they directly participate in hostilities and who may, subject to limitations imposed on an occupying power in Geneva Convention IV, be punished for doing so under that party’s municipal law.

⁶²² Who, under Article 45 of Additional Protocol I, are not granted Prisoner of War status on falling into the power of an adverse party and may similarly be punished for their activities. The customary position of this provision has been doubted by Happold, n. 90 above, p.101.

⁶²³ *Ibid.*, p. 101.

⁶²⁴ See section 5.2.11.1, New Zealand Defence Force, *Law of Armed Conflict Manual*.

(c) bear no criminal responsibility for killing or injuring members of the opposing force or for causing damage or destruction to property in accordance with the law of armed conflicts.⁶²⁵

Paragraph (b) is interestingly phrased and can be contrasted with the corresponding provision on child soldiers not entitled to combatant status⁶²⁶. It states that such persons 'may lawfully be the subject of attack only during such time as they are taking a direct part in the hostilities'.

Generally, lawful combatants may be attacked at any time, regardless of whether they are participating in hostilities or not, provided the methods and means of warfare used to do so are legal. The New Zealand policy seems to have been dictated by humanitarian considerations, as set out in the commentary to the rule, which states that:

By taking a direct part in hostilities a child soldier loses civilian status and may therefore be the object of lawful attack in the same way as an adult. However New Zealand recognizes that the circumstances under which children are recruited and employed as soldiers renders them victims of armed conflict regardless of their own actions. Where child soldiers are identified as such, and pose no direct threat to New Zealand forces, combat action against them is to be avoided.

However, it may be difficult to identify child soldiers as such. They may not be visible to their attackers when they are part of the crew of a military vehicle or vessel or when situated within a building used for military purposes. They may not be obvious as children, in that they look older than their age, or simply cannot be identified as such because they may be viewed from a distance, in adverse weather conditions or at night. Although it is clear that children do form an element of a military formation, they may be interspersed with adult combatants. This makes it difficult to separate the two groups from target. Even though it is

⁶²⁵ S.5.2.11.2, New Zealand Defence Force, Law of Armed Conflict Manual.

⁶²⁶ S.38(2) CRC.

argued that child soldier should not be lawful objects of attack, it is rightly submitted by Happold that this is undesirable and indeed pointless.⁶²⁷ The rule itself would unlikely be obeyed.⁶²⁸

6.3 Child Soldiers in the Power of an Adversary Party in International Armed Conflicts

The provisions governing the treatment of children in the power of an adversary party in an international armed conflict are extensive. This has traditionally been honoured in many cultures.⁶²⁹ One writer, for example, refers to a consensus among Islamic jurists that those 'who did not take part in fighting, such as women, children, monks etc were excluded from molestation'.⁶³⁰ Another writer confirms that 'the Prophet Mohammed forbade killing or molesting, *inter alia*, women, infants and minors'.⁶³¹ Similarly, children were excused from participating in *jihad*, defined as 'a form of religious propaganda that can be carried on by persuasion or by the sword'⁶³², until they were mature.⁶³³

In much of West Africa, too, fighting was subject to a genuine code of conduct. For instance, it was forbidden to kill women, children or old people'.⁶³⁴ In countries such as Senegal, Ghana, Togo, and Upper Volta, 'as fighting was always outside the village, the combatants, in this way, protected the village, the children and old people, or they removed the children and old people to a safe

⁶²⁷ Happold, n. 90 above, p. 102.

⁶²⁸ See Article 31(1) (c) of the Rome Statute of International Criminal Court.

⁶²⁹ See Jenny Kuper, *International Law Concerning Child Civilians in Armed Conflict*, Oxford University Press, 1997, p. 74.

⁶³⁰ M. Khadduri, *War and Peace in the Law of Islam*, New York, (1979), pp. 103-104.

⁶³¹ M. Elahi, 'The Rights of the Child under Islamic Law: Prohibition of the Child Soldier', 19 *Columbia Human Rights Law Review* 259 (Spring 1988), p. 274.

⁶³² Khadduri, n. 630 above, p. 56.

⁶³³ Elahi, n. 631 above, p. 274.

⁶³⁴ Y. Diallo, *African Traditions and Humanitarian Law: Similarities and Differences*, Geneva, (1976), p. 16.

place so that they would not be harmed during the fighting'.⁶³⁵ The writer stated that the rules regulating the conduct of armed conflict in West Africa can be seen as 'nothing more than the expression of the same humanitarian principles which inspired the authors of the Geneva Conventions'.⁶³⁶ However, another writer points out that there were no universal humanitarian laws applying to the many different peoples of Africa, and the conduct of armed conflict therefore varied considerably.⁶³⁷

In the international context, an attempt was made in 1939 to incorporate into international law a Convention for the Protection of Children in the Event of International Conflict or Civil War. A draft was prepared by the ICRC and the International Union for Child Welfare, but the outbreak of World War II put an end to this effort. After the war the principles in the draft Convention were incorporated into 1949 Geneva Convention IV, and a separate Convention providing specifically for children in armed conflict was abandoned.⁶³⁸

Prior to the 1949 Geneva Conventions, international humanitarian law made no specific mention of children as a particularly vulnerable group requiring special consideration. Article 77(3) of Additional Protocol I deals with the treatment of children under 15 who, despite the restrictions imposed in Article 77(2), do take a direct part in hostilities and, whether due to illness, injury or because they have surrendered to that party's forces, fall into the power of an adversary. Such children fall into three categories. The first category consists of prisoners of war (POWs) who benefit from the provisions of Geneva Convention III. The second category is child combatants who do not have the right to Prisoners of war status

⁶³⁵ Y. Diallo, *African Traditions and Humanitarian Law: Similarities and Differences*, Geneva, (1976), p. 9. See also E.M. Ressler, *Evaluation of Children from Conflict Areas*, Geneva, (1992), p. 15.

⁶³⁶ *Ibid*; pp.15-17.

⁶³⁷ E. Bello, *African Customary Humanitarian Law*, Geneva (1980), p.3. See for details Jenny Kuper, *International Law Concerning Child Civilians in Armed Conflict*, Oxford University Press, 1997, p.75.

⁶³⁸ See J. Pictet (ed), *Commentary on Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (Geneva 1958), p. 186. See also S. Singer, *The Protection of Children During Armed Conflict Situations: Extract of the International Review of the Red Cross* (Geneva May-June 1986), p.8 and R.C.Hingorani, 'Protection of Children During Armed Conflict' in F. Kalshoven (ed), *Assisting the Victims of Armed Conflict and other Disasters* (Dordrecht, 1989), p. 135.

but who are protected persons within the meaning of Geneva Convention IV. The last groups comprise others, such as children who have taken a direct part in hostilities and who are neither protected persons nor entitled to prisoner of war status but are still entitled to the protection of the fundamental guarantees set out in Article 75 of Additional Protocol I.

Geneva Convention III provides for the repatriation of prisoners of war prior to the termination of hostilities. It requires parties to a conflict to send back to their own country seriously sick prisoners of war,⁶³⁹ but it did not provide for child soldiers. Parties to a conflict do, however, remain free to conclude agreements for the repatriation of prisoners of war prior to the cessation of hostilities or for their interment in the territory of some willing neutral country.⁶⁴⁰ Article 37 of the CRC requires that the detention of a child shall only be used as a last resort and for the shortest appropriate period of time.⁶⁴¹ Happold argued that there is at least an obligation on the parties to a conflict to make good-faith efforts to conclude such agreements in respect of child prisoners of war.⁶⁴²

Additional Protocol I provides that a child soldier is entitled to a number of benefits by virtue of his/her age. Article 77(3) of Additional Protocol I states that if children under the age of 15 take a direct part in hostilities and fall into the power of an enemy, they shall continue to benefit from the 'special protection' accorded them by Article 77. Thus Article 77(1) provides that: "Children shall be the object of special respect and shall be protected against any form of indecent assault". It obliges the party to the conflict to provide them with care and aid they require, whether because of their age or for any other reason'. The nature of the special protection to be accorded to children can be summarized as follows.

⁶³⁹ Article 109(1) Geneva Convention III.

⁶⁴⁰ *Ibid.*, Article 109(2).

⁶⁴¹ It might be argued according to Happold that Article 37(b) of the CRC applies in penal matters. However, there is no such qualification expressed in the provision, which is drafted in wide terms, providing that: 'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'.

⁶⁴² Happold, n. 90 above, p. 102.

Firstly, there is a general obligation that children should be treated with respect and particular consideration in all circumstances.⁶⁴³ Secondly, the party holding child soldiers is obliged to protect them from indecent assault not only from its own forces, but also from the children's own comrades, both adults and children, and anyone else who might wish to cause them such harm. Measures should be in place to deter such behaviour (probably including, as a minimum, some segregation of children and adults, on the one hand, and boys and girls, on the other) and to investigate, prosecute and punish such offences if and when they occur.⁶⁴⁴ Thirdly, it is required that children be provided with aid and care, including in particular medical attention directed towards their special needs, with appropriate foodstuffs, and with schooling. This may also require the provision, as appropriate, of psychological help, trauma counseling and other rehabilitation services.⁶⁴⁵

Article 77(1) refers to children under the age of 15 years compared to Article 77(3) that refers to children generally. This means that it is only children below 15 years that benefit from this special protection accorded by Article 77(1) when in the hands of an adversary. However, Article 77(1) refers to obligations owed by all parties to a conflict. Article 77(4) which deals with children that have been arrested, detained or interned for reasons related to an armed conflict also regulates adverse parties' conduct, and refers to all children, not just those under 15 years of age. The better way to read Article 77(3) is to see it as attempt to ensure that children who have participated in hostilities despite the prohibitions in Article 77(2) are not penalized for having done so. The provision is *ex abundante cautionae*. It is not meant to imply that other older children do not partake in the same special protection. These benefits accrue to all children, that is, all persons below 18 years of age.⁶⁴⁶

⁶⁴³ See J. Pictet (ed.), *Commentary on the Geneva Convention of 12 August 1949*, Geneva: ICRC, 1955, Vol. IV, p. 135, for a detail discussion on the issue.

⁶⁴⁴ Happold, n. 90 above, p. 104.

⁶⁴⁵ Guy Goodwin-Gill et al. n. 3 above, p. 131. The authors cited Article 39 CRC in support of this interpretation.

Article 77(4) provides that children arrested or detained for reasons relating to an armed conflict shall be held in quarters separate from those of adults. All child soldiers, (and not only those under the age of 15), must be accommodated separately from their adult comrades. This is not to say that they should all be accommodated together, which might breach the detaining power's obligation to protect them from indecent assault. The only exception to this rule is where families are accommodated as family units. Article 75(5) requires that when families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

Finally, it should be recalled that when a child falls into the power of an adverse party, Article 77(2) continues to apply thus preventing that party from recruiting that child into its own armed forces.

6.4 Sanctioning Child Soldiers

Article 77(5) states that the death penalty for an offence related to the armed conflict shall not be executed on persons who have not attained the age of 18 years at the time the offence was committed. This provision is an improvement upon Article 68(4) of Geneva Convention IV, which merely provided that: 'the death penalty may not be pronounced against a protected person who was under 18 years of age at the time of the offence'. In general, child soldiers are not protected persons under Geneva Convention IV. However, it should be noted that Article 77(5) does not prohibit the sentencing of an individual to death for crimes related to an international armed conflict committed before that person's eighteenth birthday: it merely prohibits the carrying out of the sentence.

The inclusion and wording of the above provision was deliberate. The ICRC's original draft prohibited the pronouncement of the death penalty. However, in Committee III, one delegate argued that his country's legislation did not permit a prohibition of the death penalty being pronounced, although a prohibition of its

⁶⁴⁶ Article 37(c) of CRC also requires that: 'every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances'.

execution could be accepted.⁶⁴⁷ This objection was accepted by the Committee and, ultimately, by the plenary Conference. As drafted, however, the provision is open to abuse as no time scale for the commutation of the death penalty, if pronounced, is specified. Thus, sentencing of individuals to death and their indefinite detention on the death row is not a breach of Article 77(5) provided the person is not actually executed. In most cases, however, such behaviour is otherwise prohibited.

Article 37(a) of the CRC prohibits capital punishment being imposed for offences committed by children while Article 9 of the International Covenant on Civil and Political Rights provides that the death penalty shall not be imposed for crimes committed by persons below 18 years of age.⁶⁴⁸ In addition, in many cases such treatment would be inhuman and degrading punishment and, as such, contrary to the detaining power's international obligations under a number of human rights treaties.⁶⁴⁹

With regard to other sanctions that can be imposed on child offenders, the 1949 Geneva Conventions and Additional Protocol I have little to say. Article 119 of Geneva Convention IV provides that a detaining power shall take account of a civilian internee's age when imposing any disciplinary penalty on him or her, but this only applies to protected persons under the Convention. It does not protect children who are prisoners of war or who are not protected persons, the categories into which child soldiers are most likely to fall. The CRC does, however, provide some guidance.

Article 37 of the CRC provides that the imprisonment of a child shall only be used as a last resort and for the shortest appropriate period of time. Article 40 which deal with children's treatment in penal matters states that children are to be treated in a manner which takes account of the desirability of promoting their reintegration into society. Thus, rehabilitation rather than retribution should be the

⁶⁴⁷ W. A. Schabas, *The Abolition of the Death Penalty in International Law*, Cambridge: Cambridge University Press, (3rd ed.), 2002. pp. 136-138.

⁶⁴⁸ *Ibid.*

⁶⁴⁹ Happold, n. 90 above, p.105.

purpose of any sanction imposed on a child offender. But Additional Protocol I says nothing about a minimum age of criminal responsibility for offences related to international armed conflicts, although a suggestion was made that it should do so. Similarly, the CRC does not fix a minimum age of criminal responsibility, although it does offer some guidelines.⁶⁵⁰

In practice, few instances of child soldiers being captured by an adversary have arisen in recent international armed conflicts. Most contemporary armed conflicts in which child soldiers have been used in any numbers have been internal rather than international in nature. Large numbers of child soldiers, however, did become prisoners of war during the 1980-1988 Iran-Iraq War. Iran made extensive use of child soldiers during the conflict.⁶⁵¹ In February, 1984, the Speaker of the Iranian Parliament, Hashemi Rafsanjani, called on all Iranian males between 12 and 72 to volunteer for the 'holy war' against Iraq.⁶⁵² Fired by religious enthusiasm, and pleas of their teachers, more than 100,000 children below 16 years of age volunteered.⁶⁵³ Untrained and barely armed children were put into the front line and called upon to advance across minefields and charge Iraqi machine-gun positions. As expected, many died. Others, as young as 9 years old, were taken prisoners by the Iraqis and were verified by both the ICRC and a UN Security Council-mandated fact-finding mission.⁶⁵⁴

Concern was expressed by the ICRC at Iran's recruitment of children into its armed forces⁶⁵⁵ and breach of international obligations by both parties to the conflict with regard to the treatment of prisoners of War.⁶⁵⁶ However, nothing was

⁶⁵⁰ Ibid., pp. 143-146.

⁶⁵¹ See Alain Louyot, *Gosses de Guerre*, Paris: (ed.), Robert Laffont, 1989.

⁶⁵² Ibid.

⁶⁵³ Ibid.

⁶⁵⁴ See ICRC, 1983 Activity Report; and UN Doc. S/16962 (22 February 1985).

⁶⁵⁵ See P. Tavernier, '*La Guerre du Golfe – Quelques Aspects de l'Application du Droit des Conflits Armés et du Droit Humanitaire*' (1984) 30 AFDI 43, p. 57. Cited by Happold, n. 90 above, p. 107.

⁶⁵⁶ The ICRC made three public appeals during the conflict. See Y. Sandoz, '*Appel du CICR dans le Cadre du Conflit entre l'Irak et l'Iran*' (1983) 29 AFDI 161; E David, '*La Guerre du Golfe et le Droit*

said specifically about the situation of child prisoners of War. This may have been because Additional Protocol I was not applicable to the conflict.⁶⁵⁷ The inapplicability may have been because child soldier situation was only beginning to be recognized or that the issue was overlooked given the prevalence of what was seen as more serious violations of international humanitarian law.⁶⁵⁸

The USA held child combatants captured in Afghanistan at its military base at Guantanamo Bay. While the US Administration has denied that any of the Guantanamo detainees benefit from the protections provided by the 1949 Geneva Conventions, it stated that its treatment of them is in conformity with the standards set out in Geneva Convention III.⁶⁵⁹ A number of the detainees were reported to be children aged between 13 and 15 years old.⁶⁶⁰ It appears that juvenile detainees are accommodated separately from the adults in 'Camp Iguana'; that their guards are selected for their experience in working with young people: and that they receive some schooling, including English lessons, and regular group-therapy sessions.⁶⁶¹ Human Rights Watch has alleged that the US authorities are in breach of their obligations under Article 7 of the Optional Protocol which requires state parties to cooperate in the rehabilitation and social reintegration of persons who are victims of acts contrary to the Protocol.⁶⁶² However, the real issue seems to be whether the USA is entitled to detain the Guantanamo detainees without permitting them access to a tribunal to determine their legal status, an issue that has arisen with regard to all of the detainees,

International' (1987) 20 RBDI 153; and S. H. Lamar, 'The Treatment of Prisoners of War: The Role of the International Committee of the Red Cross in the War between Iran and Iraq' (1991), 5 *Emory International Law Journal*, p. 243.

⁶⁵⁷ Iran had only signed, but not ratified Additional Protocol I, while Iraq had neither signed nor ratified, so the treaty was not in force between them.

⁶⁵⁸ Happold, n. 90 above, p. 107.

⁶⁵⁹ See White House Fact Sheet, 'Status of Detainees at Guantanamo: United States Policy', 7 February 2002.

⁶⁶⁰ See Human Rights Watch. 'Letter to Secretary Rumsfeld on Child Detainees at Guantanamo'. 24 April 2003.

⁶⁶¹ T. Conover, 'In the Land of Guantanamo', *New York Times Magazine*. 29 June 2003. Cited by Happold, n. 90 above, p. 107.

⁶⁶² See Human Rights Watch. 'Letter to Secretary Rumsfeld on Child Detainees at Guantanamo'. 24 April 2003.

adults and children alike.⁶⁶³ The USA appears to have acted in a manner consonant with the requirements of Article 77 of Additional Protocol I, even though she is not a party to that Convention.

6.5 Child Soldier in the Power of an Adverse Party in Internal Armed Conflicts

Article 4(3)(d) of Additional Protocol II provides that: 'The special protection provided by this Article to children who have not attained the age of 15 years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured'. Article 4(3) of Additional Protocol II is the relevant provision concerning the treatment of children in internal armed conflicts.

Children that are captured in internal armed conflicts shall be provided with the care and aid they require, which specifically includes schooling.⁶⁶⁴ Although there is no requirement in Additional Protocol II to provide separate quarters for child and adult detainees, such an obligation does exist in Article 37(c) of the CRC. As with Additional Protocol I, child detainees cannot be recruited into the forces of the party into whose hands they have fallen.

Being a combatant does not confer any immunity on those taking part in internal armed conflicts. Insurgents can be punished for having violated national law.⁶⁶⁵ They can be prosecuted for treason for taking up arms against their government or for murder for the killing of government soldiers. With regards to child soldiers, however, this conclusion is subject to two caveats. First, no child can be punished for any acts committed when aged below the minimum age of criminal

⁶⁶³ See R.K. Goldman and B.D. Tittmore. 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian Law', American Society of International Law Task Force on Terrorism, December 2002; and M. Happold, 'The Detention of Al-Qaeda Suspects at Guantanamo: United Kingdom Perspectives' (2004) 4 Human Rights Law Review 57.

⁶⁶⁴ Article 4(3)(c) Additional Protocol II.

⁶⁶⁵ See Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Geneva: ICRC, 1987, p. 1325.

responsibility. Second, international law imposes a number of limits on the penalties that can be imposed on children for offences committed by them relating to armed conflicts, and the provisions regarding the imprisonment of children and their treatment in penal affairs apply both in internal and in international armed conflicts. Article 37 of the CRC provides that ‘States Parties shall ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment nor be deprived of his or her liberty unlawfully or arbitrarily. In the latter case, the child shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. She/he shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a competent court.

Article 40 of the CRC imposes a number of fair-trial guarantees for children accused of having committed offences. It requires that they

“be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”

In other words, if child insurgents are treated as criminals, they are all entitled to the rights which any child accused of a criminal offence has under the Convention. In any event, they may not be imprisoned unlawfully or arbitrarily. Article 37(c) of the CRC refers to other international obligations by state parties under international humanitarian law or international human rights law, whichever is applicable in the circumstances. Accordingly, in situations where an armed conflict does not exist (or where the government does not admit its existence) child insurgents cannot be interned without trial unless the government has lawfully derogated from its international obligations.⁶⁶⁶

⁶⁶⁶ Happold, n. 90 above, p. 109.

6.6 The Disarmament, Demobilization and Reintegration (DDR) of Child Soldiers

6.6.1 The Objective of DDR

Disarmament, demobilization, and reintegration (DDR) of ex-combatants is a first step in the transition from war to peace. Demilitarization can be used in times of peace as well to reduce the size of armed forces and redistribute public spending. However, DDR is much more complicated in a post-conflict environment, when different warring groups are divided by animosities and face a real security dilemma as they give up their weapons, when civil society structures have crumbled, and when the economy is stagnant. DDR supports the transition from war to peace by ensuring a safe environment, transferring ex-combatants back to civilian life, and enabling people to earn livelihoods through peaceful means instead of war.⁶⁶⁷ The three phases of DDR are interconnected, and the successful completion of each phase is essential to the success of the others. The goals of DDR are both short term and long term:

6.6.2 Short-term goals

The immediate goal is the restoration of security and stability, through the disarmament of warring parties. Demobilization of armed groups is another fundamental step in the improvement of security conditions at the end of an armed conflict. Progressive disarmament reduces the mistrust that fuels a security dilemma between the fighting factions, allows aid workers to intervene more effectively, and allows peaceful social and economic activities to resume.

6.6.3 Long-term goals

The final goal of DDR is the sustained social and economic reintegration of ex-combatants into a peaceful society. However, DDR programs are not comprehensive development projects; they are temporary measures to facilitate

⁶⁶⁷See Fusato, Massimo, Disarmament, Demobilization, and Reintegration of Ex-Combatants. Beyond Intractability. (eds.), Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: July 2003 <<http://www.beyondintractability.org/essay/demobilization/>>. (Last visited on 30 April 2007).

the transition from war to peace. If a DDR program is to be sustainable and successful in the long term, it must be integrated with, and supported by, interventions for post-conflict reconstruction and social and economic development.⁶⁶⁸

6.6.4 Conditions necessary for success of DDR

Demilitarization and demobilization involving large numbers of soldiers are complex processes that require great coordination among the different actors involved to enable it to be successful. The following five conditions are required before beginning a DDR program, and help to guarantee its success. These are security, inclusion of all warring parties, political agreement, competent approach and provision of sufficient funds.

6.6.5 Child Soldiers and DDR

Children, especially in developing countries, may be enrolled in armed groups involved in internal conflict; currently ravaging many countries in Africa. However, child soldiers are often neglected and are not able to benefit from DDR programs that do not take their special vulnerability into account. Child soldiers, having grown up within an armed group and having been exposed to atrocities since a very young age, are often the most difficult ex-combatants to reintegrate into society. Lessons learned from past DDR experiences suggest that child soldiers are best served when the following conditions are fulfilled:

First, when they are separated from other ex-combatants, so that their special needs can be addressed and so they can avoid abuse by military authorities, who may force them to enroll in new military forces; secondly, quickly discharged and reinserted into society; thirdly, placed in long-term reintegration programs that give priority to their family reunification; fourthly, provided with long-term psychological support, to help them recover from the negative experience of war and to limit anti-social attitudes and aggressive behaviors; lastly, provided with

⁶⁶⁸ Ibid.

education and professional training, which offer children with no professional experience an opportunity for a sustainable livelihood.

6.6.6 Phases of DDR

It is useful to distinguish between three phases of DDR, each with different goals and involving different actors. However, these phases should not be considered isolated or viewed in a chronological sequence. More realistically, different parts of a DDR Program overlap and are implemented in parallel, in different locations, and may target different groups.

6.6.6.1 Disarmament

Disarmament is the first phase of DDR, and logically precedes demobilization and reintegration. However, it is often a long-term process. A major problem is the collection of small weapons and light arms, which are easy to conceal and difficult to account for. The existence of large paramilitary groups and irregular forces also complicates disarmament which, under these conditions, becomes a long-term process to be carried out over a wide region, by peacekeepers, regular military forces, and civilian police. The creation of effective police forces becomes a high priority, both for their ability to control the territory more effectively than peacekeepers, and for the indirect effects of improved security. A safe environment greatly enhances the effectiveness of voluntary disarmament programs, by decreasing the need for civilians to retain their weapons.

Moreover, arms collection centers need security guarantees, both for center personnel and for ex-child soldiers. Collection and destruction of weapons should be completed quickly, to avoid having arms stolen from storage centers and used to restart fighting or another conflict.

Disarmament criteria may focus on specific weapons, individuals, or groups. However, firstly, an exclusive focus on weapons may attract individuals who seek the benefits connected to the disarmament program, but who are not ex-child soldiers willing to demobilize; Secondly, focusing on individual disarmament is

considered an aggressive attitude by military leaders, who may decide not to cooperate if they believe that they have lost control over the process; Thirdly, a combined approach requires both that surrender weapons and individual verification of child soldier status. This approach reduces abuse, and shifts the program entry criterion toward eligibility as a child soldier.

Identifying a specific group for disarmament has proven to be the most effective strategy in ensuring the cooperation of commanders, although it has some undesirable consequences: strengthening the commanders' control over the child soldiers, and enabling abuses by commanders who "sell" access to the DDR program. Nevertheless, disarmament is important not only for the material improvement of security conditions, but also for its psychological impact. There are added psychological benefits when ex-child soldiers physically disable their own weapons, and are led in doing so by their commanders, immediately upon entering the disarmament site. The process symbolically underscores the transition from military to civilian life. Additionally, public destruction of weapons is an important tool in sensitizing the population and promoting the DDR program.

6.6.6.2 Demobilization

Demobilization includes the dismantling of military units and the transition of ex-combatants from military to civilian life. In times of peace, demobilization programs can be gradual and tuned to the needs of the groups being demobilized. At the end of a conflict, demobilization presents the same logistical challenges as do programs of emergency relief and resettlement of displaced people.

Demobilization includes assembly of ex-child soldiers, orientation programs, and transportation to the communities of destination. These movements of large groups of people should be timed to coincide with phases of civilian life that facilitate reintegration, such as growing and harvesting crop and school cycles.

The assembly of ex-child soldiers helps to ensure their participation in the DDR program, through their disarmament, registration, and access to DDR benefits in

the form of goods and services. When ex-child soldiers are assembled, they are first registered and then receive civilian identification cards, which allow the holders to participate in the DDR program and receive benefits. Encampments are not intended to host ex-child soldiers for a long time, but adequate facilities, food supplies and medical assistance are important to maintain discipline and security. In addition, encampments' infrastructure should be built to meet not only the needs of ex-child soldiers, but also of the many dependents that may follow them.

Orientation is essential in establishing and reinforcing ex-child soldiers' beliefs that the DDR program offers viable alternatives to conflict as a livelihood.

Pre-discharge orientation has important practical and psychological functions. Practically, it provides ex-child soldiers and their dependents with basic information about the DDR program. Psychologically, it empowers DDR beneficiaries as free citizens by addressing their needs and doubts and enlisting for their interactive participation. The pre-discharge orientation typically focuses on the DDR program, the implementing agencies, the rights and obligations of participants, and how they can access the program's benefits. General information is also offered about reintegration into civilian life, such as health issues, education and employment opportunities, and access to land and credit.

Post-discharge orientation caters to more specific needs, in the context of the community of resettlement. Post-discharge orientation is the first step in the social and economic reintegration of ex-child soldiers. It provides information about the place of relocation, economic opportunities, and relevant local institutions and social networks, including religious groups, NGOs, veterans' associations, farmers' associations, women's groups, and others.

Transportation is a primary logistical challenge. Ex-child soldiers, their families, and their belongings are transported to the district of destination. If organized convoys cannot reach the communities of origin or destinations of choice, ex-child soldiers are provided with travel allowances, which ensure that they can finance their way home independently.

6.6.6.3 Reintegration

After ex-child soldiers have been demobilized, their effective and sustainable reintegration into civilian life is necessary to prevent a new escalation of the conflict. In the short term, ex-child soldiers who do not find peaceful ways of making a living are likely to return to conflict. In the longer term, disaffected veterans can play an important role in destabilizing the social order and polarizing the political debate, becoming easy targets of populist, reactionary, and extremist movements. Reintegration includes the followings:

Firstly, reinsertion, which addresses the most immediate needs of ex-child soldiers. Reinsertion assistance consists of short-term relief interventions, which provide a safety net for demobilized ex-child soldiers. Assistance may include housing, medical care, food, and elementary education for children. The distribution of cash allowances has proven to be the most effective and efficient way to provide reinsertion assistance. Cash payments are preferred over in-kind assistance because of reduced transaction costs, easier and more transparent accounting, and because cash payments can adapt more closely to the specific needs of beneficiaries. Additionally, cash allowances have the positive psychological effect of empowering ex-child soldiers to take charge of their lives.

However, cash payments present two dilemmas: they can give the negative impression of being "cash for weapons," and they can be easily lost or misused for consumption and pleasure. A common solution to this problem is to distribute allowances neither in advance, nor at the time of disarmament, but after arrival at the community of destination, in separate installments, and accompanied by post-discharge counseling. Initiatives aimed at full and self-sustained social and economic reintegration must follow temporary reinsertion assistance programs. Ex-child soldiers are a special group who present additional challenges, since: firstly, they constitute a potential security threat; secondly, they may be viewed with fear, suspicion, and resentment by the rest of the population; thirdly, they are often uprooted from their communities of origin and their social networks; and lastly, they may not know or may no longer accept basic social rules.

For these reasons, the first step in reintegration of ex-child soldiers is their inclusion in society. DDR programs provide cooperation with formal and informal local social networks, psychological support and counseling, and initiatives for the reunification of families.

Conclusively, economic integration is the final requirement for a DDR program to be successful and sustainable in the long term. The goal of economic reintegration efforts is to provide ex-child soldiers with financial independence through employment. Different initiatives should cater for the special needs of disabled ones who cannot reintegrate into the labour force for rural and urban settlers. Provisions for special education should be provided for them. Common economic integration programs that are essential include education and professional training, public employment, encouragement of private initiative through skills development and microcredit support, and access to land.

The Grac'a Machel Report submitted that the official acknowledgement of children's participation in war was vital, as without it there could be no effective recognition of their special needs in demobilisation programmes.⁶⁶⁹ Reintegration programmes should re-establish contact between child soldiers and their families and communities. Education, especially the completion of primary school, should be a priority, with vocational training and preparation for employment being provided for older children.⁶⁷⁰ The proliferation of UN peacekeeping operations coincides with an increase in UN-led programs to disarm and disband warring parties, as well as reintegrate ex-child soldiers into civilian life.

DDR have featured in post-conflict reconstruction from Afghanistan to Haiti. But the bulk of DDR interventions—twenty-four since 1992—have occurred in Africa.⁶⁷¹ The failure of early DDR programs in Somalia and Liberia, partly attributed to their vague mandates, prompted a shift in recent years toward more

⁶⁶⁹ Ibid.

⁶⁷⁰ Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms Grac'a Machel, submitted pursuant to General Assembly Resolution 48/157. UN Doc A/51/206 (26 August 1996), paras 50-57.

⁶⁷¹ Stephanie Hanson, (ed.), Council on Foreign Relations, Disarmament, Demobilization, and Reintegration (DDR) in Africa. http://www.cfr.org/bios/12300/stephanie_hanson.html (Last visited on 30 April 2007).

focused interventions, now codified in a new set of policy guidelines developed in 2005. Newer DDR programs in Sierra Leone, Ivory Coast, and the Democratic Republic of Congo have disarmed hundreds of thousands of child soldiers, but lack of funding and research has prevented practitioners from developing better reintegration programs.

6.6.7 Administering DDR programs

A number of agencies administer DDR programs. The United Nations adopts a lead role in most single-country DDR programs in Africa, but various non-governmental organizations (NGOs) and aid groups, are also typically involved. In Liberia, for example, UNICEF leads child DDR (for combatants aged seventeen and younger), and no less than six other groups—including the World Food Program, World Health Organization (WHO), ActionAid, and the United Nations Development Program (UNDP)—administer adult DDR.⁶⁷² The largest DDR program on the continent, a multi-country initiative in the Great Lakes region of Central Africa (known as MDRP), is run by the World Bank in conjunction with forty other Western and African governments, NGOs, and regional organizations. Though this program does not include disarmament (World Bank policy prohibits it), it currently supports some 455,000 ex-combatants.⁶⁷³

The multitude of agencies involved in DDR can often create confusion and management conflicts. But Ingo Wiederhofer, senior operations officer at the World Bank and an expert on DDR programs in Africa, cites the positive relationships between the World Bank and UN missions in Sierra Leone and the Congo.⁶⁷⁴ In a survey of ex-combatants in Sierra Leone, over 75 percent said the training component of DDR had prepared them well for employment; the most common complaint about the program was that it should have lasted longer. But in the Congo, the reintegration process was “chaotic and

⁶⁷² Ibid.

⁶⁷³ Ibid.

⁶⁷⁴ Ibid.

problematic,” according to a recent Amnesty International report. “We risked our lives to hand in our weapons,” said a former fighter interviewed for the report. “We are incapable of feeding our families and cannot even pay the rent. The solution is for these people to give us our weapons back.”⁶⁷⁵

In recent years, there has been a push to transfer the work of DDR from international groups to national commissions that coordinate the efforts of all international partners. Some experts praise transfer of oversight to the national government. An analysis of the Burundi DDR programme, state that the success of the country’s program was due in part to the ability of Burundian authorities to make their own decisions. Yet these national commissions draw criticism for encouraging corruption and inefficiency. The Democratic Republic of Congo (DRC), has been fingered out, where the government commission coordinating DDR, (known as “CONADER” *Commission Nationale pour la Demobilisation et la reinsertion*) has been blamed for long delays in the demobilization process, failures to provide resources to its provincial offices, and a lack of managerial and technical expertise.⁶⁷⁶

6.6.8 Simultaneous phases

Earlier DDR programs were executed sequentially, with one phase concluding before the next one began. But this linear process created numerous timing problems; ex-child soldiers waited for months in temporary camps before they could return to their communities and delays in transition payments left ex-child soldiers without means of support. Many experts stress the need to run the phases in tandem. An adult program cannot begin until there is a peace agreement that establishes parameters for DDR, but a child program can—and often does—start before a conflict has ended.⁶⁷⁷

⁶⁷⁵ Democratic Republic of Congo, Disarmament, Demobilization, and Reintegration (DDR) and the Reform of the Army. <http://web.amnesty.org/library/Index/ENGAFR620012007>. (Last visited on 30 April 2007).

⁶⁷⁶ Ibid.

In the disarmament phase, weapons belonging both to child soldiers and the civilian population are collected, documented, and disposed of (in most cases, destroyed). This process includes the assembly of child soldiers, often in an area guarded by external forces; collection of personal information; collection of weapons; certification of eligibility for benefits; and transportation to a demobilization center. Disarmament can also include the development of arms-management programs. Problems in this phase can include child soldiers who try to disarm multiple times to reap financial benefits, as well as commanders keeping back the best weapons.

During demobilization, armed groups are formally disbanded. At this stage, child soldiers are generally separated from their commanders and transported to cantonments, or temporary quarters, where they receive basic necessities and counseling. Eventually, they are transported to a local community where they have chosen to live permanently.

“Reinsertion” is the transitional assistance offered to ex-child soldiers during demobilization before longer-term reintegration begins. Such assistance can include cash payments, in-kind assistance (goods and services), and vocational training. According to Charles Achodo,⁶⁷⁸ funding often dries up at this phase in the process. Donors “forget that these people need assistance to become productive members of the community—psychological counseling, trauma healing support, access to employment”. Wiederhofer adds that the United Nations has difficulty accessing funds for reinsertion and reintegration, but the World Bank said there have not been any programs so far where she has run out of money.⁶⁷⁹

⁶⁷⁷ Edward Rackley, An independent evaluator of UNICEF- and World Bank-administered child DDR programs throughout Africa. See further details, Stephanie Hanson, (ed.), Council on Foreign Relations, Disarmament, Demobilization, and Reintegration (DDR) in Africa.

⁶⁷⁸ Head of the UN’s DDR program in Liberia. See for details, Stephanie Hanson, (ed), Council on Foreign Relations, Disarmament, Demobilization, and Reintegration (DDR) in Africa.

⁶⁷⁹ Ibid.

6.6.9 Reintegrating into Civil Society

Despite the logistical challenges of disarmament and demobilization, reintegration—the acquisition of civilian status and sustainable employment and income—is considered the most difficult phase of any DDR process. An Institute for Security Studies (ISS) paper calls it “the Achilles heel of DDR”. According to Rackley, donors have the mistaken idea that as soon as you get guns out of their hands, they are suddenly innocuous human beings again, but that is not the case at all.⁶⁸⁰ Others argued that reintegration’s difficulties push it beyond the scope of any DDR process, and thus this phase should be confined to reinsertion. Because DDR originally focused on short-term disarmament, reintegration is the least developed phase which in some cases is confined to vocational training in one or two fields. But in post-conflict countries, job opportunities are scarce, and sometimes communities are hesitant to employ ex-child soldiers. In Liberia, “there is no stigma,” but with unemployment around 80 percent, “It is still hard to find jobs.”⁶⁸¹

The increased emphasis on national commissions means international agencies are working to involve local communities in the reintegration process by incorporating local reconciliation customs. Yet little research exists on reintegration and its effects on nations recovering from conflict. “Although there are instances of “bad” DDR and a few of “good” DDR, the qualitative information necessary for better analysis and development of [reintegration] guidelines is generally lacking”.⁶⁸²

As recently as Sierra Leone’s DDR program in 2003, in which only seven thousand of an estimated 48,000 child soldiers were demobilized⁶⁸³, DDR interventions practiced a “one man, one gun” policy focused on disarming adult

⁶⁸⁰ Rackley, n. 677 above.

⁶⁸¹ Charles Achodo, Head of the UN’s DDR program in Liberia. www.reliefweb.int/rw/RWB.NSF/db900SID/JFRN-6YGRAB (last visited on 30 April 2007).

⁶⁸² Hanson, n. 671.

⁶⁸³ Ibid.

male combatants. Women and children associated with the fighting groups were often excluded from the process. Newer DDR programs have worked to include special groups, but some say these expanded mandates have sacrificed efficacy by trying to include too many people. Groups involved with security prefer to deal only with armed combatants, while humanitarian organizations want to include women and children in the DDR process. In Liberia's recent DDR program, the number of demobilized persons grew to 112,000 because women and children were considered under the same disarmament criteria as ex-combatants. Achodo argues that different criteria should be applied to special groups so that resources can be allocated to those who really need them.⁶⁸⁴

Some suggest that women and children should go through a parallel process that is not labeled DDR. Very few women have enrolled in DDR in the Democratic Republic of Congo because the program developed a cultural stigma. As non-combatants, women do not need the demobilization component of the program, and including them may perpetuate the relationships established during combat. Though children often do need demobilization, many agree that child soldiers need to be separated from adult combatants to break the psychological links between children and their military commanders.

Yet the degree to which child soldiers in need of special treatment varies widely; some have only been fighting for a few months and have families to return to, while others have been fighting for five or six years and may need extensive counseling. Another problem arises when children perceive that they do not receive the same benefits as adult ex-combatants. The World Bank notes that in Burundi, at least 80 percent of children were heads of households who thought of themselves as adults. If you start treating them as children, it is counterproductive to their reintegration and they resent it.⁶⁸⁵

6.6.10 Improving DDR

⁶⁸⁴ Ibid.

⁶⁸⁵ See Stephanie Hanson, n. 682 above.

The inclusion of women and children in newer DDR programs indicates the willingness among international groups to adopt lessons learned from earlier DDR programs and develop more effective interventions. Recent efforts such as the Stockholm Initiative on DDR, a year-long working group spearheaded by the Swedish Ministry of Foreign Affairs, and the United Nations' effort to develop the Integrated DDR Standards, have contributed to a growing body of research on the efficacy of DDR⁶⁸⁶. However, experts say DDR—flawed as it may be—is necessary to any post-conflict reconstruction program. In Iraq, the decision to disband the army without a DDR program was a massive boost to the forces of instability in the country.⁶⁸⁷

Consensus also exists among agencies and researchers that a DDR program is only as good as a country's peace agreement and overall reconstruction efforts. In a paper for the Netherlands Institute of International Relations, Nicole Ball and Luc van de Goor write that "DDR should be viewed as part of broader security stabilization, and recovery strategy, rather than a stand-alone intervention".⁶⁸⁸ If peace does not hold in a country, ex-child soldiers may quickly return to fighting because they can profit from it. Neighboring countries can also derail the process. In southern Sudan, phase one of DDR is underway after the Comprehensive Peace Agreement signed in 2005, but cross-border recruitment of Sudanese child soldiers by Uganda's Lords Resistance Army continues.⁶⁸⁹

6.7 Incorporation of Best Practices in DDR Programmes for Children

What constitutes appropriate measures towards the demobilisation and reintegration of former child soldiers will obviously vary from situation to situation. However, following the Security Council resolution 1539, paragraph 15 (c),

⁶⁸⁶ Ibid.

⁶⁸⁷ Writes Kenneth M. Pollack of the Brookings Institution. Cited by Stephanie Hanson, (ed.), Council on Foreign Relations, Disarmament, Demobilization, and Reintegration (DDR) in Africa.

⁶⁸⁸ Hanson, n. 677 above.

⁶⁸⁹ See Council on Foreign Relations, Disarmament, Demobilization, and Reintegration (DDR) in Africa (ed.), Stephanie Hanson, http://www.cfr.org/bios/12300/stephanie_hanson.html (Last visited on 30 April 2007).

requesting an update on the incorporation of the best practices for DDR programmes, the Secretary-General identified a number of common elements below.

During the reporting period by the Security Council to the Fifty ninth sessions of the General Assembly, the Secretary-General listed several over-arching considerations that should inform any DDR programmes for children in both conflict and post-conflict situations. While there is no single effective model for such programmes, important lessons have emerged, as reflected in the UN Secretary General report of 2003. Since then, these lessons were applied to DDR exercises in Afghanistan, Burundi, Colombia, the Democratic Republic of the Congo, Liberia and Sierra Leone to varying degrees.⁶⁹⁰ A United Nations inter-agency Working Group on DDR which is currently developing policies, guidelines and procedures for the planning, implementation and monitoring of DDR programmes, is incorporating into its initiatives best practices and lessons learned relating to DDR programmes for children.⁶⁹¹ These include the followings:

6.7.1 Demobilization of Children

The demobilization of children should be sought at all times, and separate and child-specific programmes should be organized for demobilized children. In Burundi, approximately 2,260 children were demobilized from armed forces and groups ahead of adult combatants, through the Child Soldiers National Structure. However, many children formerly associated with armed groups were cantoned in assembly areas where they waited for over eight months to return to their families. This delay was due to the lack of commitment of some leaders, lengthy negotiations over global demobilization and inadequate disarmament, demobilization and reintegration resources.⁶⁹²

⁶⁹⁰ United Nations General Assembly Security Council Report No A/59/695-S/2005/72, 9 February 2005, paras. 30-32. www.unama-afg.org/docs/_UN-Docs/_repots-SG/2005/2005-72 (last visited on 30 April 2007).

⁶⁹¹ Ibid.

In Liberia, child-specific programmes, including literacy classes, psychosocial care and recreational activities were organized by NGOs through interim care centres, where demobilized child soldiers could stay for up to three months. Peacekeeping missions and United Nations agencies should seek to benefit from local expertise and NGO child protection capacity in developing and implementing such comprehensive child-specific DDR programmes. Issues that require further attention and consideration include the duration of hosting and types of activities undertaken in care centres, appropriate ways to approach child drugs abuse and options for assisting children without families.⁶⁹³

6.7.2 Provision of Legal Status, Protection and Assistance

Children associated with fighting forces who have crossed into a country of asylum should be accorded a legal status, protection and assistance that promotes their rehabilitation and reintegration. Refugee status should be accorded to children who flee armed conflict due to their well-founded fear of being subjected to forced military recruitment, sexual slavery or other serious child rights violations. From 2002 to 2004, 168 disarmed Liberia child soldiers⁶⁹⁴ were granted *prima facie* refugee status in Sierra Leone and were placed in camps for Liberia refugees; children whose families were traced were voluntarily repatriated. This process incorporated child protection elements such as proper identification of children immediately upon entry to the country of asylum; prompt separation from commanders; accommodation in a civilian environment conducive to rehabilitation (instead of living together with adult foreign combatants in internment camps); sensitization of refugee communities to facilitate community-based integration; access to education, counseling and other psychosocial programmes; community-based interim care; family reunification and voluntary reparation in safety and dignity.

⁶⁹² Ibid.

⁶⁹³ Ibid.

⁶⁹⁴ See United Nations General Assembly Security Council, Report of the Secretary-General A/59/695-S/2005/72 of February 2005.

6.7.3 The Eligibility Criteria

The eligibility criteria should be sufficiently broad and based upon the Cape Town Principles for children associated with armed forces or groups. Children should not be required to hand in weapons in order to participate in DDR programmes, and there should be no cash remuneration for weapons relinquished. Unfortunately, even where DDR planning has incorporated these widely accepted principles, as in the case of Liberia, their application has been uneven. Some children associated with armed forces or groups in Liberia were actually prevented from entering demobilization sites because they were not armed. The promise of a cash allowance upon presentation of a weapon has also proved problematic in Liberia. Reports indicate that commanders have posed as guardians to former child soldiers, or have taken arms away from them and given the weapons to their own children, in order to obtain the cash payments. Commanders have even sold weapons to children so they could enter the DDR programmes. Alternatives to cash allowances should be employed in order to prevent these practices. Emphasis should be placed to programmes that contribute directly to the education and sustainable livelihood of former child soldiers.

6.7.4 Children as Combatants

Children who escape, released or are captured from any armed force or group should not be considered or treated as enemy combatants. In accord with this principle, and in implementing of Article 6 of the Optional Protocol on the Involvement of Children in Armed Conflict, a group of children associated with a Colombian armed group and arrested by the Venezuelan authorities were immediately offered protection and reintegration assistance.⁶⁹⁵ The Government of Colombia established legal and administrative procedures ensuring that children who leave armed groups are handed over to the Colombia Institute for Family Welfare which oversees the national DDR programme.⁶⁹⁶ Unfortunately,

⁶⁹⁵ United Nations General Assembly Security Council, Report of the Secretary-General A/59/695-S/2005/72 of February 2005 para. 143.

this principle has not been observed in a number of conflict situations where children were detained for their participation in armed groups and, subsequently, sometimes used for intelligence-gathering purposes.

6.7.5 Integrated Community Approach and Interventions

Reintegration activities should adopt an integrated community approach, and interventions should avoid singling out former child soldiers. Both these practices were employed in Afghanistan: demobilized child soldiers were provided the services as other war-affected children through the Afghanistan New Beginning Programme, in which communities played a central role in demobilization efforts by participating in the screening of eligible child participants.⁶⁹⁷ In Liberia, however, there was increased evidence that the payment of cash allowances to demobilized children adversely affected their acceptance and reintegration into the community.

6.7.6 Special Attention to the Girl Child

Special attention must be given to the specific needs of girls. Despite the establishment of separate facilities for boys and girls and gender-specific programmes in certain countries, such as the Democratic Republic of the Congo, girls in the majority of disarmament, demobilization and reintegration situations remain at a disadvantage in access to demobilization and in reintegration into their communities. In many conflict situations - such as in Liberia, Sierra Leone and the Democratic Republic of the Congo – combatants have been reluctant to release girls to transit care facilities, holding them captive as “wives”. Girls who have become pregnant in these circumstances have encountered stigmatization upon returning to their communities. As has been implemented in the Democratic

⁶⁹⁶ Ibid.

⁶⁹⁷ Ibid.

Republic of the Congo, DDR programmes should include special attention to girl victims of sexual exploitation and girl heads of households.

6.7.7 Donor Support

In order to support community reintegration activities for children formerly associated with armed forces or groups, long-term donor support is required. The Government of Sierra Leone requested continuing assistance for the reintegration of demobilized children through the Community Education Investment Programme, which provided educational materials to schools whose enrolment included demolished children and children returning from neighbouring countries.⁶⁹⁸ This support facilitated the reintegration of over 3,000 former child combatants and returnee children.

Child soldiers, particularly those who have been illegally recruited, would seem to fall into the category of victims of neglect, exploitation, abuse, cruel, inhuman or degrading treatment and/or armed conflict. Accordingly, Article 39 of the CRC places on states parties an obligation to take 'all appropriate measures' to promote their social reintegration.

Article 7 of the Optional Protocol to the CRC imposes additional obligations on states parties. It states:

1. States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations.
2. States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programmes or, inter

⁶⁹⁸ United Nations General Assembly Security Council, Report of the Secretary-General A/59/695-S/2005/72 of February 2005, para. 146.

alia, through a voluntary fund established in accordance with the rules of the General Assembly.

States Parties are obliged not only to promote the social reintegration of former child soldiers but also to cooperate with other states parties attempting to do so. A similar provision appears in ILO Convention 182. Article 1 of the Convention provides that states parties 'shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency'. Article 8 then requires that they 'take appropriate steps to assist one another in giving effect to the provisions of this Convention through enhanced international cooperation and/or assistance, including support for social and economic development, poverty eradication programmes and universal education'⁶⁹⁹.

Developed states have on occasion proved willing to assist programmes for the demobilization and rehabilitation of child soldiers. In his commentary on ILO Convention 182, Michael Dennis pointed out that the USA was the world's largest donor to the ILO International Programme on the Elimination of Child Labour,⁷⁰⁰ while the World Bank and donor governments undertook to provide a substantial amount to support the demobilization and reintegration of combatants in the Great Lakes region following a Security Council request for such assistance.⁷⁰¹

6.8 Implementing Comprehensive DDR Programmes

Article 39 of the CRC does not refer to child soldiers or child combatants, or even to children who have been recruited into armed forces or groups or used to participate actively in hostilities. It speaks of child victims of armed conflict. Its scope is very wide. As the Secretary-General's guidelines state, when designing and implementing DDR programmes, care must be taken to ensure that they include all war-affected children that might benefit from them.⁷⁰²

⁶⁹⁹ International Labour Conference, 87th Session, Geneva. June 1999. Report of the Committee on Child Labour, para. 242.

⁷⁰⁰ M. J. Dennis, 'The ILO Convention on the Worst Forms of Child Labor' (1999) 93 AJIL 943, p. 947.

⁷⁰¹ See Report of the Secretary-General: Children and Armed Conflict, 26 November 2002 (S/2002/1299), para. 55.

In situations of demobilisation, the use of the definition of child soldiers in the Cape Town principles would seem appropriate to determine who should be included in the process. Happold⁷⁰³ added one caveat to it: 'Not all recruitment of children is illegal'. Accordingly, it is difficult to see that states are under any legal obligation to demobilize child soldiers who have been lawfully recruited, unless for some other reason they fall outside the scope of Article 39 of the CRC.

Both the Secretary-General's assessment of best practices and the Cape Town principles also provide that any demobilisation programme must ensure the inclusion of girl children associated with armed forces. In Liberia, for example, hardly any girls were demobilised, and a subsequent study found that girl children faced greater barriers in going through the official demobilisation process and even greater difficulties in reintegrating with their families and communities.⁷⁰⁴ As the Secretary-General's first report on children and armed conflict stated: 'The social stigma attached to girls' experiences makes them reluctant to seek medical assistance or emotional support. They are often not adequately catered for in post-conflict educational and vocational training opportunities. Their special needs are rarely provided for in demobilization and reintegration programmes'.⁷⁰⁵

Although girls do serve as combatants, they are often found in auxiliary roles or as 'wives' of adult soldiers. Programmes that focus on combatants, by requiring, for example, the handing in of a serviceable weapon as a condition of demobilisation, may well exclude them. Armed groups may be more loath to release girls, seeing their relationships with adult soldiers as a private matter in which they should not meddle. Girl children associated with armed forces have particular needs that have to be addressed in any demobilisation and reintegration process, such as the psychological, physical and social consequences of sexual abuse, forced marriage and pregnancy.⁷⁰⁶

⁷⁰² Save the Children UK, *When Children Affected by War Go Home: Lessons Learned from Liberia* London: Save the Children UK, 2003, p. 35.

⁷⁰³ Happold, n. 90 above, p. 117.

⁷⁰⁴ Save the Children UK, *When Children Affected by War Go Home: Lessons Learned from Liberia* London: Save the Children UK, 2003, pp. 142-152.

⁷⁰⁵ Ibid.

⁷⁰⁶ Happold, n. 90 above, p. 117.

CHAPTER SEVEN

The Recruitment of Child Soldiers as a War Crime

7.1 Introduction

The International Criminal Court (ICC) was established in 2002 as a permanent tribunal to prosecute individuals for genocide, crimes against humanity, war crime, and the crime of aggression. The Court is the world's first permanent international criminal tribunal. The Court can only prosecute crimes committed on or after July 1, 2002, the date its founding treaty, the Rome Statute of the International Criminal Court, entered into force.⁷⁰⁷ As of May 2007, 104 states are members of the Court, and a further 41 countries have signed but not ratified the Rome Statute.

The Court can generally only exercise jurisdiction in cases where the accused is a national of a state party, the alleged crime took place on the territory of a state party, or a situation is referred to the Court by the Security Council. The Court is designed to complement existing national judicial systems: it can only exercise its jurisdiction when national courts are unwilling or unable to investigate or prosecute such crimes. The primary responsibility to exercise jurisdiction over suspected criminals is therefore left to individual states.

The official seat of the ICC is at The Hague, the Netherlands, but its proceedings may take place anywhere.⁷⁰⁸ The Court is separate from, and should not be confused with, the International Court of Justice (often referred to as the "World Court"), which is a Principal organ of the UN that settles international disputes between states.

⁷⁰⁷ See for further reading, Max du Plessis and S. Pete, 'Who Guards the Guards?' The International Criminal Court and Serious Crimes Committed by Peacekeepers in Africa, Institute for Security Studies, ISS Monograph Series No 121, 2006, p. 11.

⁷⁰⁸ Article 3 of the Rome Statute of the International Criminal Court (ICC).

Article 8 of the ICC⁷⁰⁹ includes the following in its list of war crimes within the jurisdiction of the Court:

(b)...serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely the following acts:

...

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c)...serious violations of the laws and customs applicable in armed conflicts not of international character, within the established framework of international law, namely any of the following acts:

...

(vii) Conscripting or enlisting children under the age of fifteen into armed forces or groups or using them to participate actively in hostilities.

In his report to the Second Assembly of States Parties to the ICC, the Prosecutor reported that he had selected the situation in Ituri in the Democratic Republic of Congo (DRC) as the first situation meriting analysis with a view to commencing a formal investigation.⁷¹⁰ In a description of the atrocities being committed in Ituri, the Prosecutor made specific references to the recruitment and use of child soldiers, stating that: 'Between 8,000 and 10,000 children are serving as soldiers in the strife-torn Ituri region. In total, it is estimated that more than 30,000 child soldiers serve among the ranks of the various belligerents in the entire DRC, representing between 40 and 60 per cent of the soldiers fighting this war'.⁷¹¹ On 19 April 2004, the Prosecutor announced that the Government of the DRC has

⁷⁰⁹ UN Doc. A/CONF. 183/9 (1998).

⁷¹⁰ International Criminal Court, Second Assembly of States Parties to the Rome Statute of the International Criminal Court, Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo, 8 September 2003.

⁷¹¹ Ibid., p. 3.

referred the situation in the country to the Court,⁷¹² and on 23 June his Office opened its first investigation into that situation.⁷¹³

On 29 January 2004, the Prosecutor announced that Uganda had referred the situation concerning the Lord's Resistance Army (LRA), and that he had determined that there was a sufficient basis to start planning for investigation. The LRA is particularly notorious for its abduction and forcible recruitment of children, some as young as 8 years old. A conservative estimate places the number of children kidnapped by the LRA during the course of the conflict between it and the Ugandan Government at more than 20,000 and it appears that the number of abductions rose after that year.⁷¹⁴

On 5 July 2004, the Presidency of the ICC assigned the situations in DRC and Uganda to Pre-Trial Chambers I and II.⁷¹⁵ Given the nature of these two situations, it seems likely that the first prosecutions before the ICC will include charges of recruiting children. Indeed, individuals are already being prosecuted and convicted on charges of child recruitment before another tribunal in the case of *Prosecutor v. Norman* brought before the Special Court for Sierra Leone.⁷¹⁶

Article 4 of the Rome Statute which deals with other violations of international humanitarian law, includes 'conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities', as a crime within the jurisdiction of the Court. All the defendants before the Special Court were indicted for conduct within Article 4(c).

⁷¹² Press release, Office of the Prosecutor, ICC, "Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo", 19 April 2004.

⁷¹³ Press release, Office of the Prosecutor, ICC, "The Office of the Prosecutor of the International Criminal Court Opens its First Investigation", 23 June 2004.

⁷¹⁴ See Human Rights Watch, *Stolen Children: Abduction and Recruitment in Northern Uganda*, New York: HRW, 2003. The report, published in March 2003, estimated that about 5,000 children had been abducted since June 2002, more than in any previous period.

⁷¹⁵ See Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I, ICC-01/04, 5 July 2004; and Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, ICC-02/04, 5 July 2004.

⁷¹⁶ Happold, n. 90 above, p.120.

However, in the Secretary-General's draft statute, Article 4(C) appeared in a different form. In his report on the establishment of a Special Court for Sierra Leone,⁷¹⁷ the Secretary-General stated that:

“While the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused.

Owing to the doubtful customary nature of the ICC Statutory crime which criminalizes the conscription or enlistment of children under the age of 15, whether forced or ‘voluntary’, the crime which is included in article 4(c) of the Statute of the Special Court is not the equivalent of the ICC provision. While the definition of crime as ‘conscripting’ or ‘enlisting’ connotes an administrative act of putting one’s name on a list and formal entry into the armed forces, the elements of the crime under the proposed Status of the Special Court are: (a) abduction, which in the case of the children of Sierra Leone was the original crime and is itself a crime under common article 3 of the Geneva Conventions; (b) forced recruitment in the most general sense – administrative formalities, obviously, notwithstanding; and (c) transformation of the child into, and its use as, among other degrading uses, a ‘child-combatant.’⁷¹⁸

Accordingly, Article 4(c) of the draft statute only criminalized: ‘Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities’.⁷¹⁹

The Security Council, however, did not agree with the Secretary-General proposal. In the only amendment proposed to the list of crimes within the jurisdiction of the Court, the Council suggested that draft article 4(c) be amended

⁷¹⁷ UN Doc. S/2000/915 (4 October 2000).

⁷¹⁸ Ibid., para. 17-18.

⁷¹⁹ Ibid.

to cover 'Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities'.⁷²⁰ The Council asked that the provision be so modified 'so as to confine it to the statement of the law existing in 1996 and as currently accepted by the international community'.⁷²¹ The amendment was accepted by the Government of Sierra Leone⁷²² and was included in the Statute establishing the Special Court.

The Security Council's action was as a result of protest from the NGOs to have the draft statute modified to reflect the provisions of the Rome Statute.⁷²³ This does not necessarily mean that the Council was wrong in its view of what the law was in 1996 but it does raise the question of whether their decision to overrule the Secretary-General's conclusions was based more on political expediency rather than legal considerations.⁷²⁴

7.2 Recruitment of Children Under-15 years as a War Crime

War crimes are violations of the laws and customs of war and can result in individual criminal responsibility.⁷²⁵ The four Geneva Conventions and Additional Protocol I provide for a regime of grave breaches of their provisions. Violations of Article 77(2) of Additional Protocol I do not appear in the list of grave breaches set out in Article 85 of the Protocol. However, it is generally agreed that grave breaches are criminal but it is well established that the failure of a rule of international humanitarian law to address the prohibition against individuals or

⁷²⁰ Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, Annex.

⁷²¹ *Ibid.*, p. 2.

⁷²² Ninth report of the Secretary-General on the United Nations Mission in Sierra Leone. UN Doc. S/2001/228 (14 March 2001), para. 54.

⁷²³ See Amnesty International news release, 'The Special Court for Sierra Leone'. 20 October 2000, AFR 51/081/2000; Human Rights Watch, 'Justice and the Special Court: Letter to the United Nations Security Council', 1 November 2000; and Coalition to Stop the Use of Child Soldiers, 'Appeal on Sierra Leone: Special Court Should Prosecute Recruiters, not Child Soldiers', 7 November 2000.

⁷²⁴ Happold, n. 90 above, p. 122.

⁷²⁵ See *Prosecutor v. Tadic (Jurisdiction)*, Case IT-94-1-A, decision of the Appeals Chamber, 2 October 1995, 105 ILR 453, p. 503.

specifically provide for criminal sanctions for its breach is not determinative of whether an issue is criminal or not.⁷²⁶ As stated at the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadic's* case: 'The individual criminal responsibility of the violator need not be explicitly stated in a convention for its provisions to entail individual criminal responsibility'.⁷²⁷

The distinction between grave and non-grave breaches of international humanitarian law is concerned with jurisdiction rather than criminality. All states are obliged to extradite and prosecute persons of having committed grave breaches. However, although states are to respect and to ensure respect⁷²⁸ of the other provisions of the Geneva Conventions and Additional Protocols, they have some discretion as to how this is to be achieved.

How to distinguish a violation that gives rise to individual criminal responsibility in international humanitarian law from one that does not is less clear. There seems to be three main approaches to this issue. The first is whether the breach is of a certain type: for example, whether it causes 'appreciable injury'.⁷²⁹ Such conduct is to be contrasted with 'technical' violations of international humanitarian law such as the failure by a commander of a prisoners of war camp to keep a complete record of disciplinary punishments⁷³⁰ or the failure of the commander of

⁷²⁶ See *Trial of German Major War Criminals*: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part 22, pp. 445 and 467; *US v. Ohlendorf et al.* (the '*Einsatzgruppen* case') 4 CCL No. 10 Trials 411, pp. 460-461; and *Tadic (Jurisdiction)*, Case IT-94-1-A, decision of the Appeals Chamber, 2 October 1995, 105 ILR 453, p. 524.

⁷²⁷ *Prosecutor v. Tadic (Jurisdiction)*, Case IT-91-1-T, decision of the Trial Chamber, 10 August 1995, 105 ILR 427, p. 449.

⁷²⁸ Common Article 1, 1949 Geneva Conventions and Article 1(1) of Additional Protocol I, 1977.

⁷²⁹ See H. Lauterpacht, 'The Law of Nations and the Punishment of War Criminals' (1944) BYIL 58, at pp 78-79; and B. V. A. Rolling, 'The Law of War and the National Jurisdiction since 1945' (1960) 1000 *Hague Recueil*, p. 340.

⁷³⁰ In breach of Article 96 of Geneva Convention III, 1949. The example is given in S. R. Ratner, 'War Crimes. Categories of', in R. Gutman and D. Rieff (eds.), *Crimes of War: What the Public Should Know*, New York: W. W. Norton & Co., 1999. Cited in M. Happold, *Child Soldiers in International Law*, Manchester University Press, 2005, p. 123.

a civilian internment camp to ensure that its canteen sells tobacco or soap ‘at prices not higher than local market prices’.⁷³¹

The second approach is a more positivist one. One has to show that violation of a rule of international humanitarian law has been specifically criminalised in international law.⁷³² For a violation of a rule of *jus in bello* to produce the special legal effect of entailing the criminal responsibility of the individual who commits it, one should prove not only the existence of the violated rule in international law, but also a parallel existence of a secondary rule, usually customary law, ascribing to the former rule this special legal effect in case of violation.⁷³³ No difficulties arise using this approach when violation of the rule has consistently been considered a war crime by national or international courts, or is described as a war crime in the statute of international tribunals. Thus there is a problem when both the case law and statutes of international tribunals are silent on it. According to Antonio Cassese, in seeking to answer the question one may have to resort to military manuals and national legislation or, if answers are lacking to the general principles of criminal justice, and the legislation and judicial practice of the state to which the accused belongs or on whose territory the crime was allegedly committed.⁷³⁴

However, a third approach takes the view that all violations of the laws and customs of law are criminal.⁷³⁵ There is substantial authority for this proposition,⁷³⁶ although it would seem to contradict the views of the Appeals Chamber in *Tadic*. The Chamber held that in order for Article 3 of the Tribunal’s

⁷³¹ In breach of Article 87 of Geneva Convention IV of 1949. The example is taken from Y. Sandoz, ‘Penal Aspects of International Humanitarian Law’, in M.C. Bassiouni (ed.), *International Criminal Law*, Ardsley: Transnational, 2nd edition 1999, p. 408.

⁷³² See Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p. 15.

⁷³³ G. Abi-Saab, ‘The Concept of “War Crimes”’, in Sienho Yee and Wang Tieya (eds.), *International Law in the Post-Cold War World: Essays in Memory of LI Haopei*, London: Routledge, 2001, p. 112.

⁷³⁴ See Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p. 15.

⁷³⁵ See Christopher Greenwood, ‘International Humanitarian Law and the *Tadic* Case’ (1996) 7 EJIL 265.

⁷³⁶ See the provisions in the UK, US and Canadian military manuals cited by Greenwood, ‘International Humanitarian Law and the *Tadic* Case’ (1996) 7 EJIL p. 280.

Statute to apply on violations of the laws and customs of war other than grave breaches, the violation must constitute a breach of a rule of international humanitarian law and the violation of the rule must entail the individual criminal responsibility of the person breaching it.⁷³⁷ It is implicit that the Chamber did not consider that all breaches of rules of international humanitarian law are war crimes; otherwise the second condition would be otiose. Earlier cases took the same view,⁷³⁸ as did all of the judges of the Appeals Chamber of the Special Court in *Hinga Norman*⁷³⁹. This third approach has the virtue of simplicity. Its basis is the view that ‘violations of the international laws of war have traditionally been regarded as criminal under international law’.⁷⁴⁰

Depending on the view that one accepts, one cannot consider the situation to be wholly satisfactory. The difficulty would seem to lie in the use of the customary law process to create criminal offences. The same issue, it might be said, arises from the development of the common law through judicial interpretation from case to case.⁷⁴¹

7.3 The Relationship between International Humanitarian Law and International Human Rights Law

There is undoubtedly a close relationship between International Humanitarian Law and International Human Rights Law. There has been extensive doctrinal discussion on the precise nature of the relationship, but academic opinion seems

⁷³⁷ *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2004-14-AR729E, Special Court for Sierra Leone (Appeals Chamber), decision on preliminary motion based on lack of jurisdiction (child recruitment), 31 May 2004, pp. 503-504.

⁷³⁸ See *Trial of Heinz Hagendorf*, 13Law Reports of Trials of War Criminals 146.

⁷³⁹ Case No. SCSL-2004-14-AR729E, Special Court for Sierra Leone (Appeals Chamber), decision on preliminary motion based on lack of jurisdiction (child recruitment), 31 May 2004, pp. 503-504.

⁷⁴⁰ See Christopher Greenwood, ‘International Humanitarian Law and the *Tadic* Case’ (1996) 7 EJIL 265, p. 280.

⁷⁴¹ See *R v. R* [1991] 1 WLR 767, where the House of Lords abolished the marital exception to rape. On a subsequent application by the defendant to the European Court of Human Rights, the Court found no violation of Article 7 of the European Convention (no punishment without law); See *C. R v. UK*, judgment of 22 November 1995, ECHR Series A No. 335-C.

to have crystallised into the view that although the two regimes are related, they are distinct.⁷⁴² Both are applicable during armed conflict. International Humanitarian Law is a set of international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts. It protects persons and property that are, or may be, affected by an armed conflict and limits the rights of the parties to a conflict to use methods and means of warfare of their choice.

The main sources of international humanitarian law applicable in international armed conflict are the four Geneva Conventions of 1949 and Additional Protocol I of 1977. While Article 3 common to the Geneva Conventions and Additional Protocol II of 1977 is applicable to non-international armed conflict.

On the other hand, International Human Rights Law is a set of international rules, customary and conventional, on the basis of which individuals and groups can expect and/or claim certain behaviour or benefits from government. Human rights are inherent entitlements which belong to every person as a consequence of being human. Numerous non-treaty based principles and guidelines (“soft law”) also belong to the body of international human rights standards. The main sources of International human rights law are: two the International Covenants and a myriad of international and regional instruments covering a wide range of specific or general rights. The protection of human rights is even more important in peace than in war time, because of the potential of rights being violated in such situation.

While International humanitarian and International human rights law have historically had a separate development, recent treaties include provisions from both bodies of law. Examples are the Convention on the Rights of the Child⁷⁴³, its

⁷⁴² J S.Pictet, *Humanitarian Law and the Protection of War Victims* (Leiden, 1975), pp. 14-15; Mario'n Mushkat, 'The Development of International Humanitarian Law and the Law of Human Rights (1978) 21 German YBIL 150; Dietrich Schindler, 'Human Rights and Humanitarian Law: Interrelationship of the Laws' (1982) 31 American University LR 935 and Yoram Dinstein, 'Human Rights in Armed Conflict: International Humanitarian Law ' in Meron, *Human Rights in International Law*, vol. II, 345.

⁷⁴³ Convention on the Rights of the Child (1989), United Nations, Treaty Series, Vol. 1577, p. 3. Entered into force on 2 September 1990.

Optional Protocols on the Involvement of Children in Armed Conflict⁷⁴⁴ and the Rome Statute of the International Criminal Court.⁷⁴⁵

Though the prohibition of the recruitment of children under 15 years old was first promulgated as a rule by international humanitarian law, it has since become part of international human rights law. With some exceptions, not every breach of human rights provisions gives rise to individual criminal responsibility⁷⁴⁶ unless specifically criminalised by the adoption of a treaty norm.⁷⁴⁷

The prohibition of child recruitment is a part of international humanitarian law. Article 77(2) of Additional Protocol I is addressed to 'States Parties to the conflict', rather than formally conferring rights on individual, that is, the children subject to recruitment and use in hostilities. This form of drafting was followed in Article 38 of the CRC, in distinction from most of the other substantive provisions of the Convention, which refer to states recognizing 'the right of the child' as beneficiaries. According to Rene Provost, this distinction is significant in that the humanitarian standards enunciated 'although grounded in the principle of humanity, are not directly attached to the human person, but instead stem from public order requirements'.⁷⁴⁸ However, as Theodor Meron has shown, as early as the 1949 Geneva Conventions, rights have been conferred upon individuals in

⁷⁴⁴ Optional Protocol to the Convention on the Rights of the Child on the involvement of the children in armed conflict (2000), A/RES/54/263. Entered into force on 12 February 2002.

⁷⁴⁵ Rome statute of the International Criminal Court (1998), United Nations, Treaty Series, Vol. 2187, p. 3. (Doc. A/CONF.183/9). Entered into force on 1 July 2002.

⁷⁴⁶ Happold, n. 90 above, p. 125: A state may be in default of its obligations if it fails to investigate and if the evidence warrants prosecute and punish certain serious human rights violations. However, in such cases it is the state that will be responsible under international law. Proceedings against the alleged violator take place under domestic law; it is simply that the adequacy of the proceedings is tested by reference to the state's human rights commitments and if they are held inadequate the state is itself responsible. Crimes against humanity, which are crimes under international law, must be part of a widespread or systematic attack on the civilian population.

⁷⁴⁷ See, e.g. Articles 5 and 7 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1985) 24 ILM 535.

⁷⁴⁸ Rene Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, 2002, p. 34.

international humanitarian law.⁷⁴⁹ All that can probably be said is that the wording of Article 38 shows its origins as an international humanitarian law provision.

However, there also substantive rather than formalistic arguments. The nature of the prohibition means that it is primarily directed to restricting the ways in which states can act towards their own nationals. International humanitarian law was traditionally concerned with how states treat other states' nationals.⁷⁵⁰ The provision applies in times of peace as well as in war times. War crimes can only be committed during periods of armed conflicts.⁷⁵¹ It is odd that that the breach of the rule incurs individual responsibility only if committed at a particular time, namely war time.⁷⁵²

Article 77, Additional Protocol I of 1977 is specifically an 'addition to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Geneva Convention, 1949'.⁷⁵³ Additional Protocol II, which expanded on the basic provisions in Common Article 3 of the Geneva Conventions, further extended the ambit of international humanitarian law into non-international armed conflicts, thus interfering with states' relations with their nationals in a very clear way. Both the Yugoslavia and Rwanda tribunals have held violations of international humanitarian law applicable in internal armed conflicts to be criminal.⁷⁵⁴ In addition, the Appeals Chamber of the International Criminal Tribunal for Yugoslavia (ICTY) has held that whether a victim of a war crime is a protected person 'should not be

⁷⁴⁹ Theodor Meron, 'The Humanitarian of Humanitarian Law' (2000) 94 AJIL 239.

⁷⁵⁰ The majority of the provisions of the Four Geneva Conventions apply only to 'protected persons', *Prosecutor v. Tadic (Jurisdiction)*, Case IT-94-1-A, decision of the Appeals Chamber, 2 October 1995, 105 ILR, p.513.

⁷⁵¹ *Prosecutor v. Tadic (Jurisdiction)*, Case IT-94-1-A, decision of the Appeals Chamber, 2 October 1995, 105 ILR, p. 488.

⁷⁵² See M. Happold, *Child Soldiers in International Law*, Manchester University Press, 2005, p.126.

⁷⁵³ Article 72, Additional Protocol I, is said to be additional to, in particular, Parts I and III of Geneva Convention IV, that is, the parts which only provide protection for protected persons.

⁷⁵⁴ See *Prosecutor v. Tadic (Jurisdiction)*, Case IT-94-1-A, decision of the Appeals Chamber, 2 October 1995, 105 ILR 453, p. 523; and *Prosecutor v. Akayesu*, judgment of 2 September 1998, Trial Chamber, ICTR, paras 608-609 and 616.

determined on the basis of formal national characterizations, but rather on an analysis of the substantial relations', such as ethnicity and allegiance.⁷⁵⁵ In other words, a war crime in an international armed conflict can be perpetrated by a person of the same formal nationality as the person against whom the crime is committed.

Similarly, the argument that the recruitment or use of children under 15 years of age to participate directly in hostilities is not a war crime is unfounded. Although several sorts of conduct are prohibited in times of peace as well as in times of war, they only give rise to criminal sanctions when linked to an armed conflict. Specifically, the prohibition on the recruitment and use of child soldiers was originally linked to situations of armed conflict. Its application in times of peace as well was only confirmed in the Convention on the Rights of the Child.

The prohibition of the recruitment of children can be seen as straddling both international human rights and international humanitarian law. However, in one particular respect, it sits firmly on international humanitarian law. International human rights law binds only states. A state cannot be held responsible for the actions of non-state actors, such as armed opposition groups, unless it is in breach of its obligation to effectively investigate allegations of human rights violations, since such groups and their members are not organs or agents of the state. This is very different from international humanitarian law which imposes numerous obligations on armed opposition groups.⁷⁵⁶

States did not explicitly criminalise the recruitment of children below 15 years of age in any treaty dealing with the issue prior to the Rome Statute. There is evidence that at least some states thought they were innovating when they adopted Articles 8(2)(b)(xxvi) and 8(2)(e)(vii). Some states had reservations about the provisions. Indeed, the USA argued that the prohibition of the recruitment of children under 15 years of age was more of a human rights than

⁷⁵⁵ *Prosecutor v. Delalic et al.*, Case No. IT-96-21/A, judgment of the Appeals Chamber, 20 February 2001, para. 84.

⁷⁵⁶ See, L. Zegveld. *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, 2002.

criminal law provision.⁷⁵⁷ On the other hand, when some states suggested raising the minimum age for recruitment from 15 to 18, this was rejected as not reflecting customary law.⁷⁵⁸ This seems to indicate that most states thought that there was a customary rule prohibiting the recruitment of children below 15 years of age. It might also be said that the majority of states considered that there was also a customary rule criminalising violations of the prohibition. This seems to have been the view of the situation taken by the Security Council in 2002,⁷⁵⁹ although the extent to which one should credit retrospective views on *opinio juris* is another matter.

7.3.1 Similarities and Differences between International Humanitarian Law and International Human Rights Law

Although both International Humanitarian Law and International Human Rights Law aim to protect human life and dignity,⁷⁶⁰ there are differences with respect to the principles and means by which they try to achieve their common purpose. Whereas International Human Rights Law uses limitation clauses like “prescribed by law”⁷⁶¹ or “as necessary in a democratic society”,⁷⁶² International Humanitarian Law requires the balancing of considerations of humanity with “military necessity”.⁷⁶³ This differentiation is reflected in the respective application of the proportionality principle, which becomes particularly obvious with regard to the

⁷⁵⁷ See H. von 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: Issue, Negotiations, Results*, Ardsley: Transnational, 1999, p. 117.

⁷⁵⁸ *Ibid.*, pp. 117-118.

⁷⁵⁹ Happold, n. 90 above, para. 4.

⁷⁶⁰ See IACHR, *Abella v Argentina*, OEA/Ser.L/V/II.98. (13 April 1998), para 158. Available on <http://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm> (last visited on 4 May 2007.)

⁷⁶¹ See Articles 18(3), 22(2) ICCPR and Articles 5(1), 9(2), 10(2), 11(2) ECHR.

⁷⁶² See Articles 21, 22(2) ICCPR, arts 8(2), 9(2), 10(2), 11(2) ECHR, art 2(3) of Protocol 4 ECHR.

⁷⁶³ Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 AJIL 1, p. 9.

use of force.⁷⁶⁴ In International Human Rights Law context, the use of force has to be strictly proportionate to the aim to be achieved.⁷⁶⁵

Under International Humanitarian Law, the use of force against valid targets like combatants and civilians that directly participate in hostilities is not specifically governed by proportionality.⁷⁶⁶ Typical are prohibitions such as not to cause “*superfluous* injury or unnecessary suffering”⁷⁶⁷ or not to cause “incidental loss of life, injury to civilians and damage to civilian objects, which would be *excessive* in relation to the concrete military advantage anticipated.”⁷⁶⁸ Secondly, International Humanitarian Law treaties depend, to some extent, upon reciprocity for their application.⁷⁶⁹ In cases where the adversary to a conflict is not a party to an International Humanitarian Law treaty, a state party is generally not obliged to observe the provisions of that treaty.⁷⁷⁰ Exceptions only apply where the adversary has otherwise accepted the treaty’s obligations⁷⁷¹ or provisions of the treaty can be regarded as declaratory of customary international law and, thus, apply to all states.⁷⁷² By contrast, once a state has become member to an

⁷⁶⁴ Ibid., p. 32.

⁷⁶⁵ Ibid

⁷⁶⁶ Ibid., p. 33.

⁷⁶⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) Entered into force on 7 December 1978.

⁷⁶⁸ Ibid., Article 51(4), (5) (b).

⁷⁶⁹ Theodor Meron, Human rights in internal strife: their international protection (Grotius Publications, Cambridge, 1987) 11. Christopher Greenwood, Rights at the Frontier - Protecting the Individual in Time of War in Barry Rider (ed.), Law at the Centre -The Institute of Advanced Legal Studies at Fifty (Kluwer Law International, London, Cambridge, MA, 1999), p. 284.

⁷⁷⁰ Common Article 2(1) Geneva Conventions states that the Conventions “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.” As the Conventions enjoy almost universal acceptance (190 member states) this restriction is rather relevant for the application of Additional Protocol I that refers to common Art 2 in Article 1(3) Protocol I.

⁷⁷¹ Common Article 2(3) Geneva Conventions.

⁷⁷² See Greenwood, Rights at the Frontier -Protecting the Individual in Time of War, Theodor Meron, Human rights in internal strife: their international protection (Grotius Publications, Cambridge, 1987) 11. Christopher Greenwood, “Rights at the Frontier - Protecting the Individual in Time of War” in Barry Rider

international human rights law treaty regime, it is bound to observe its obligations irrespective of whether other states are party to the treaty or not.⁷⁷³ However, this difference should not be overstated, as a state cannot invoke reciprocity to derogate from International Humanitarian Law provisions solely because an adversary has violated those same provisions.⁷⁷⁴

Moreover, another difference between International Humanitarian Law and International Human Rights Law is due to the fact that International Human Rights Law grants rights to nationals against their states, while International Humanitarian Law imposes obligations on the individual.⁷⁷⁵ This categorical differentiation is, somewhat formal and disguises the fact that International Humanitarian Law provisions might sometimes imply individual rights as well. For example, Article 13 of the Third Geneva Convention⁷⁷⁶ provides for humane treatment of prisoners of war and particularly prohibits “any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody.” When read together with Articles 6(1) and 7 of the Third Geneva Convention (which explicitly refers to “rights” conferred upon prisoners of war), this prohibition also suggests a right for prisoners not to be subject to inhumane treatment.⁷⁷⁷

Furthermore, the Geneva Conventions and other International Humanitarian Law treaties comprise provisions which are expressly formulated as individual

(ed.), *Law at the Centre - The Institute of Advanced Legal Studies at Fifty* (Kluwer Law International, London, Cambridge, MA, 1999) 284.

⁷⁷³ Ibid.

⁷⁷⁴ Ibid.

⁷⁷⁵ René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, Cambridge, UK, New York, 2002) 2, 5; Jochen Abr. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation* (1998) 28 *Isr YB Hum Rts* 1. Inter-American Commission on Human Rights (IACHR), *Abella v Argentina*, OEA/Ser.L/V/II.98. (13 April 1998), para 158.

⁷⁷⁶ Geneva Convention relative to the Treatment of Prisoners of War (1949), United Nations, Treaty Series, Vol. 75, p. 135. Entered into force on 21 October 1950.

⁷⁷⁷ Greenwood, n. 772 above, p. 282

rights.⁷⁷⁸ For example, Article 27(1) of the Fourth Geneva Convention⁷⁷⁹ provides that “protected persons are entitled ... to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs.” Article 75 of Additional Protocol I to the Geneva Conventions further lists a series of fundamental guarantees for persons in the power of a belligerent.⁷⁸⁰

The similarities between the two legal regimes become even more obvious when the substantive contents are examined. International Humanitarian Law and International Human Rights Law exhibit a large measure of parallelism between norms.⁷⁸¹ Examples of parallel provisions include the right to life; the prohibition of torture and cruel, inhumane, or degrading treatment or punishment; arbitrary arrest or detention; discrimination on grounds of race, sex, language, or religion; and due process of law.⁷⁸² However, the strict separation of International Humanitarian Law as the law of war and International Human Rights Law as the law of peace can no longer be upheld.

The duty to implement both International Humanitarian Law and International Human Rights Law lies first and foremost with states. States have a duty to take a number of legal and practical measures both in peacetime and in armed conflict aimed at ensuring full compliance with International Humanitarian Law. These include, among others, translating into domestic sphere International Humanitarian Law treaties; preventing and punishing war crimes through the enactment of penal legislation; protecting the red cross and red crescent emblems; applying fundamental and judicial guarantees; disseminating

⁷⁷⁸ Ibid.

⁷⁷⁹ Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949), United Nations, Treaty Series, Vol. 75, p. 287. Entered into force on 21 October 1950.

⁷⁸⁰ See particularly, the rights to human treatment and non-discrimination in Article 75(1). Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), Entry into force on 7 December 1978.

⁷⁸¹ Theodor Meron, n. 769 above, pp. 9, 12-18.

⁷⁸² Ibid., pp. 12-18.

International Humanitarian Law; training personnel qualified in International Humanitarian Law and appointing legal advisers to the armed forces.

International Human Rights Law also contains provisions obliging states to implement its rules, whether immediately or progressively. They must adopt a variety of legislative, administrative, judicial and other measures that may be necessary to give effect to the rights provided for in the treaties. This may include enacting criminal legislation to outlaw and repress acts prohibited under International Human Rights Law, or providing for remedies before domestic courts for violations of specific rights and equally ensuring that such remedies are effective.

As regards implementation, states have a collective responsibility under Article 1 common to the Geneva Conventions *to respect and to ensure respect for* the Conventions *in all circumstances*. States parties to Protocol I also undertake to act in cooperation with the United Nations in situations of serious violations of Protocol I or of the Geneva Conventions.

The International Committee of the Red Cross is a key component of the IHL system, by virtue of the mandate entrusted to it under the Geneva Conventions, the Additional Protocols and the Statutes of the International Red Cross and Red Crescent Movement. The Committee ensures protection and assistance to victims of war, encourages states to implement their International Humanitarian Law obligations and promotes and develops International Humanitarian Law. The Committee right of initiative allows the latter to offer its services or to undertake any action which it deems necessary to ensure the faithful application of International Humanitarian Law.

The International Human Rights Law supervisory system consists of bodies established either by the United Nations Charter or by the main International Human Rights Law treaties. The principal United Nations Charter based organ is the United Nations Human Rights Council (formerly the UN Commission on Human Rights). “Special procedures” have also been developed by the predecessor to the Council over the last two decades, i.e. thematic or country

specific special rapporteurs, and working groups entrusted with monitoring and reporting on the human rights situations in particular countries and within their mandates, which have been subject to review.

A key role is played by the Office of the High Commissioner for Human Rights which has primary responsibility for the overall protection and promotion of human rights. The Office aims to enhance the effectiveness of the United Nations' human rights machinery, increase United Nations system-wide implementation and coordination of human rights, build national, regional and international capacity to promote and protect human rights and to disseminate human rights texts and information.

The work of regional human rights courts and commissions established under the main regional human rights treaties in Europe, the Americas and Africa is a distinct feature of International Human Rights Law, with no equivalent in International Humanitarian Law. Regional human rights mechanisms are, however, increasingly examining violations of International Humanitarian Law.

7.3.2 Applicability of International Human Rights Law and International Humanitarian Law in Armed Conflict.

International Humanitarian Law and International Human Rights Law may interact in two situations. Firstly, International Human Rights Law may apply in an international armed conflict that traditionally was eligible only for International Humanitarian Law. Secondly, International Humanitarian Law may apply in a non-international armed conflict; thus in a domestic law enforcement context that historically was the exclusive domain of International Human Rights Law.⁷⁸³

International Human Rights Law must continue to apply even after the outbreak of war as armed forces in an international conflict usually operate outside their own territory. As most International Human Rights Law treaties regulate their application differently, this part will examine the applicability of International Human Rights Law separately with respect to each treaty.

⁷⁸³ Frowein, n. 775 above, p. 28.

7.3.3.1 European Convention on Human Rights (ECHR)

European countries are mainly responsible for colonization of African countries which obviously accounted for reasons why many African countries borrowed several laws from their colonial masters. We shall devote space on ECHR human rights system because it has one of the most developed Human Rights systems in the world. African can easily learn from the ECHR experience.

7.3.3.1.1 Applicability of the ECHR in Armed Conflicts

Article 15(1) of the European Convention on Human Rights (ECHR)⁷⁸⁴ may give a certain hint as to the general applicability of the Convention in armed conflicts.⁷⁸⁵ It provides that “[i]n times of war or other public emergency threatening the life of the nation any contracting party *may* take measures derogating from its obligations under the Convention”.⁷⁸⁶

As the International Law Commission (ILC) has remarked, this “competence to derogate ... certainly provides evidence that an armed conflict as such does not result in suspension or termination of the Convention’s rights”.⁷⁸⁷ The fact that Article 15(1) provides that a state *may* derogate from its obligation under the Convention in times of war, rather than that such provisions are automatically rendered inapplicable, is incompatible with the notion that the Covenant is applicable only in time of peace.⁷⁸⁸

⁷⁸⁴ European Convention on Human Rights (1950), formally entitled Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, European Treaty Series No. 5. Entered into force on 3 September 1953. Amended by Protocol No. 11 (European Treaty Series No. 155, entered into force on 1 November 1998), which replaced Protocols 2, 3, 5, 8, 9 and 10 and repealed Articles 25 and 46 of the Convention.

⁷⁸⁵ Frowein, n. 775 above, p. 2.

⁷⁸⁶ Ibid.

⁷⁸⁷ International Law Commission (57th session), First report on the effects of armed conflicts on treaties (by Mr. Ian Brownlie, Special Rapporteur) A/CN.4/552, Geneva (2 May-3 June and 4 July-5 August 2005) at 29, para 87.

⁷⁸⁸ Greenwood, Rights at the Frontier -Protecting the Individual in Time of War, 279.

As Frowein admits, it is not absolutely clear whether Article 15(1) actually refers to the application of the convention between a state party and nationals of other belligerent parties to an armed conflict, or merely to emergency measures taken by a state with regard to its own nationals.⁷⁸⁹ However, Article 15(2) more significantly indicates that the application of the Convention is not restricted to the relationship between a state and its citizens but generally affects the protection of all individuals during wartime.⁷⁹⁰ It stipulates that a state is not permitted, even in times of war to derogate from the right to life as protected under “Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4(1) and 7 of the Convention”.⁷⁹¹ However, as the European Court of Human Rights has observed, Article 15 does not provide sufficient evidence that the Convention applies extraterritorially since Article 15 “is to be read subject to the ‘jurisdiction’ limitation enumerated in Article 1 the same Convention”.⁷⁹²

7.3.3.1.2 Extraterritorial Applicability of the ECHR

Article 1 of ECHR states that “the high contracting parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in this Convention”. In *Cyprus v Turkey*⁷⁹³, the European Commission of Human Rights dealt with the occupation of Northern Cyprus by Turkish forces in the aftermath of a large-scale military intervention in July 1974.⁷⁹⁴ The European Commission of Human Rights held that the term “within their jurisdiction” would not be

⁷⁸⁹ Frowein, n. 775 above, p. 3.

⁷⁹⁰ Ibid.

⁷⁹¹ Ibid.

⁷⁹² *Bankovic v Belgium and Others*, Appl. No. 52207/99, (12 December 2001) 123 ILR 94, 110, para 62.

⁷⁹³ *Cyprus v Turkey* (Appl. No. 8007/77) (Decision on the Admissibility of the Application) (10 July 1978) 62 ILR 4.

⁷⁹⁴ Following a military coup in Cyprus against the government of Archbishop Makarios, led by Greek nationalist Cypriots and backed by the then military regime in Greece, Turkish armed forces, on 20 July 1974, landed on Cyprus and occupied the northern part of the island. A Turkish Federal State of Cyprus (TFSC) was set up in the occupied area in 1975. The government of the Republic of Cyprus and the vast majority of states did not recognise the TFSC. See Wikipedia, The Free Encyclopedia. Available on http://en.wikipedia.org/wiki/Turkish_Republic_of_Northern_Cyprus (last visited on 4 May 2007).

“equivalent to or limited to ‘within the national territory’ of the member state concerned”.⁷⁹⁵ It would emerge from the language ... and the objective of Article 1 ECHR and from the purpose of the Convention as a whole that the high contracting parties are bound to secure the rights and freedoms to all persons under their actual authority and responsibility, not only when that authority is exercised within the territory of the parties but also when it is exercised abroad.

This interpretation by the Commission has been confirmed by the European Court of Human Rights (ECtHR) which stated in *Loizidou v Turkey* that⁷⁹⁶: “bearing in mind the object and purpose of the Convention, the responsibility of a contracting party may also arise when, as a consequence of military action whether lawful or unlawful it exercises *effective control* of an area *outside its national territory*” (emphasised).

On the merits, the Court found that it was “obvious from the large number of troops engaged in active duties in Northern Cyprus that Turkey’s army exercised effective overall control over that part of the Island” and consequently could be held responsible even for policies and actions of the Turkish Republic of Northern Cyprus.⁷⁹⁷ The European Court of Human Rights concluded that “those affected by such policies and actions” would “therefore come within the ‘jurisdiction’ of Turkey for the purposes of Article 1 ECHR”.⁷⁹⁸

In *Bankovic v Belgium and Others*⁷⁹⁹ the Court addressed the bombing of the Radio-Television Serbia (RTS) headquarters in Belgrade by seventeen member

⁷⁹⁵ *Cyprus v Turkey* (Appl. No. 8007/77) (Decision on the Admissibility of the Application) (10 July 1978) 62 ILR 4, 74, para. 19.

⁷⁹⁶ The Court continued that “the obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.”; *Loizidou v Turkey* (Preliminary Objections) (23 February 1995) 103 ILR 622, 642, para 62. (Emphasis added). Recalled by the Court in *Loizidou v Turkey* (Merits) (18 December 1996) 108 ILR 443, 465, para. 52.

⁷⁹⁷ *Loizidou v Turkey* (Merits) (18 December 1996) 108 ILR 443, 466, para. 56.

⁷⁹⁸ *Ibid.*

⁷⁹⁹ *Bankovic v Belgium and Others*, Appl. No. 52207/99, (12 December 2001) 123 ILR 94, 112.

states of the North Atlantic Treaty Organisation (NATO) which were also parties to the ECHR. The bombing responded to attacks by the Government of the Federal Republic of Yugoslavia (FRY)⁸⁰⁰ on the population of Kosovo.⁸⁰¹ During the attacks on the RTS building, sixteen people were killed and an equal number were injured.⁸⁰² Relatives of those killed and one of the injured survivors brought proceedings before the ECtHR and maintained that the seventeen NATO members violated Articles 2 (right to life), 10 (freedom of expression) and 13 (right to an effective remedy) provided for under the Convention.⁸⁰³

Considering the application of the ECHR, the Court approved its *Loizidou position*⁸⁰⁴ but also emphasised that it would follow from the ordinary meaning of the term “jurisdiction” in public international law⁸⁰⁵ and from the *travaux preparatoires*⁸⁰⁶ that “Article 1 [ECHR] had to be considered to reflect primarily a territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case”.⁸⁰⁷ The Court concluded that such exceptions would comprise in particular situations in which⁸⁰⁸ a state, through the *effective control of the relevant territory and its inhabitants* abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public power normally exercised by that Government. Against this backdrop the Court denied the exercise of extraterritorial jurisdiction by the NATO members reasoning that the bombardment of the RTS, unlike an

⁸⁰⁰ The Federal Republic of Yugoslavia (FRY) is not a party to the ECHR.

⁸⁰¹ *Bankovic v Belgium and Others*, Appl. No. 52207/99, (12 December 2001) 123 ILR 94, 95.

⁸⁰² *Ibid.*

⁸⁰³ *Ibid.*

⁸⁰⁴ *Bankovic v Belgium and Others*, Appl. No. 52207/99, (12 December 2001) 123 ILR 94, 112, para 70.

⁸⁰⁵ *Ibid.*, 109, paras. 59-61.

⁸⁰⁶ *Ibid.*, 110-111, paras. 63-65.

⁸⁰⁷ *Ibid.*, 109, para. 61.

⁸⁰⁸ *Ibid.*, 113, para. 71.

occupation, could not be considered as “effective control” over the concerned territory.⁸⁰⁹

Hence, in *Bankovic v Belgium and Others*, ECtHR adhered to its reasoning that the exercise of “effective control” provides for the extraterritorial application of the rights under the Convention. Whether this reasoning is also true for the territories of states that are not party to the Convention will be discussed below.

7.3.3.1.3 Obligation to ensure the Rights of the ECHR in Territories of States that are not Party to the Convention

In *Bankovic v Belgium and Others*, the ECtHR pointed out that “the ECHR was not designed to be applied throughout the world, even in respect of conduct of contracting states”⁸¹⁰ and that the desirability of avoiding a gap or vacuum in HR’s protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that ... would *normally* be covered by the Convention⁸¹¹.

The Court concluded that “the FRY clearly does not fall within this legal space.”⁸¹² As the FRY is not party to the ECHR, some authors interpret this finding as to generally exclude the responsibility of states with respect to conduct in territories of non-party states.⁸¹³ On the other hand, Schilling doubts that this reasoning has to be coercively interpreted as to restrict the extraterritorial applicability of the ECHR to those cases in which a state party exercises effective control within the territorial scope of the Convention.⁸¹⁴ The Court dismissed the

⁸⁰⁹ Ibid., 114, para 75. The Court argued that otherwise “anyone adversely affected by an act imputable to a contracting state, wherever in the world that acts may have been committed” would be “thereby brought within the jurisdiction of that state”. According to the court such an approach would be contrary to the text of Article 1 ECHR.

⁸¹⁰ Ibid., 116, para. 80.

⁸¹¹ See in particular, *Cyprus v Turkey*, (Appl. No. 25781/94) (10 May 2001) 120 ILR 10, 39, para. 78.

⁸¹² *Bankovic v Belgium and Others* (Appl. No. 52207/99) (12 December 2001) 123 ILR 94, 116, para. 80.

⁸¹³ Watkin, n. 763 above, p. 26.

application essentially due to lack of effective control constituted by the bombing. Conversely, the Court did not expressly hold that the exercise of effective control constitutes extraterritorial jurisdiction over a territory only when that territory forms part of another member state to the ECHR.

Admittedly, it may be alleged that the wording of the Court's finding in *Bankovic v Belgium and Others* is relatively clear and that it barely accommodates the interpretation suggested by Schilling.⁸¹⁵ However, a restriction of the obligation of member states to ensure the Convention's rights to territories of other members would imply that states parties are free to violate their obligations as long as they exercise armed attacks on the population in territories of states that are not party to the Convention. Such an interpretation is hardly compatible with the aim of the Convention to secure the "universal and effective recognition and observance of the Rights"⁸¹⁶ and the object of the Council of Europe to maintain and further realize Human Rights and Fundamental Freedoms.⁸¹⁷ Therefore, it is more convincing to argue that member states are obliged to ensure the rights of the ECHR even if they exercise "effective control" in the territory of a state that is not party to the Convention.

7.3.3.2 International Covenant on Civil and Political Rights (ICCPR)

7.3.3.2.1 Applicability of the ICCPR in Armed Conflicts

Like the ECHR, the International Covenant on Civil and Political Rights (ICCPR)⁸¹⁸ contains a derogation provision that implies that the rights of the

⁸¹⁴ Theodor Schilling 'Is the United States bound by the ICCPR in Relation to Occupied Territories', p 8. Available on <http://www.jeanmonnetprogram.org/fellowsforum/Schilling%20Forum%20Paper%20100504.pdf> (last visited on 5 May 2007).

⁸¹⁵ Ibid.

⁸¹⁶ ECHR, preamble, para. 2.

⁸¹⁷ Ibid., para 3.

⁸¹⁸ International Covenant on Civil and Political Rights (1966), United Nations, Treaty Series, Vol. 999, p. 171. Entered into force 23 March 1976).

Covenant do not automatically cease in times of armed conflict.⁸¹⁹ Article 4 ICCPR provides that states parties “*may take measures derogating from their obligations under [the] Covenant ... in time of public emergency which threatens the life of the nation*”⁸²⁰ and prohibits any derogation with respect to certain provision.⁸²¹ The extraterritorial applicability of the ICCPR is less clear.

7.3.3.2 Extraterritorial Applicability of the ICCPR.

In contrast to Article 1 of the ECHR, the wording of the application clause of the ICCPR explicitly refers to the territory of member states. Article 2(1) of the ICCPR provides that “[e]ach state party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant”⁸²² (emphasis added).

7.3.3.3 International Covenant on Economic, Social and Cultural Rights

Unlike the ECHR and the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸²³ contains no provision regarding its scope of application. According to Dennis, the lack of an explicit application provision suggests that the ICESCR does not have extraterritorial application.⁸²⁴ He refers particularly to Article 29 of the VCLT.⁸²⁵ Article 29 states that “unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its *entire* territory”.⁸²⁶ Thus, Article 29 of the VCLT

⁸¹⁹ Ibid.

⁸²⁰ ICCPR, Article 4(1).

⁸²¹ Ibid., Article 4(2).

⁸²² Ibid.

⁸²³ International Covenant on Economic, Social and Cultural Rights (1966), United Nations, Treaty Series, Vol. 993, p. 3. Entered into force 3 January 1976.

⁸²⁴ Michael J. Dennis, Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation (2005) 99 AJIL 119, 127-128, 140.

⁸²⁵ Vienna Convention on the Law of Treaties, 1969. United Nations, Treaty Series, vol. 1155, p. 331. Entered into force on 27 January 1980.

stresses that a state, in the absence of specific regulations, cannot argue that the application of a treaty is excluded with respect to particular parts of its territory. This does not, however, suggest that the application of the treaty should be generally restricted to the territory of a state. Dennis further claims that the negotiating history of the ICESCR implies that states parties wanted to restrict the application of the Covenant to their territory.⁸²⁷ However, the negotiation record solely indicates that the contracting states, in 1966, omitted an explicit territorial application clause so as to avoid a cementation of territorial claims with respect to colonies. On the other hand, the contracting states naturally assumed that the Covenant applied to dependant territories abroad over which they exercised jurisdiction.⁸²⁸

Although the ICJ conceded that the “[ICESCR] guarantees rights which are essentially territorial”,⁸²⁹ it found in its *Wall* Advisory Opinion that “it is not to be excluded that [the Covenant] applies both to territories over which a state party has sovereignty and to those over which that state exercises territorial jurisdiction.”⁸³⁰ For example, Article 14 of the ICESCR which provides a right to education refers to the metropolitan territory of a party as well as to other territories under the party’s jurisdiction.⁸³¹ The Court further rejected Israel’s objection that the ICESCR neither applied during an armed conflict nor outside a state’s territory. It pointed out that a “state party’s obligations under the Covenant apply to all territories and populations under its *effective control*.”⁸³²

⁸²⁶ Ibid.

⁸²⁷ Dennis, n. 824 above, p. 99.

⁸²⁸ UN Doc. A/C.3/SR.1411 (1966) paras 4, 36, 38. (1966).

⁸²⁹ Wall Advisory Opinion, ICCPR, Article 4(1), para. 112.

⁸³⁰ Ibid.

⁸³¹ Ibid.

⁸³² Ibid., quoting the 2001 dialogue between the Committee on Economic, Social and Cultural Rights and Israel on Israel’s 1998 report under the ICESCR E/C.12/1/Add.90, paras. 15 and 31.

However, the Court explicitly referred to the “37 years ... [of Israel’s] territorial jurisdiction as the occupying Power”.⁸³³ Therefore, it is reasonable to assume that the principle of “effective control” should only be carefully applied to other situations of armed conflict. A cautious application of the ICESCR is necessary as the Covenant may oblige states to ensure rights which do not accommodate belligerent situations that are different from long-term occupations. For example, a state can hardly be expected to ensure fair working conditions (Article 7 ICESCR), the right to form and join a trade union (Article 8 ICESCR) or the right to an adequate standard of living (Article 11 ICESCR) to enemy nationals in situations where its agents exercise only a low degree of “effective control” over an enemy territory.

Furthermore, Article 4 ICESCR permits states to derogate from their obligations under the Covenant “solely for the purpose of promoting the general welfare in a democratic society.” It is hard to envisage a belligerent situation where a state could fulfill these requirements.⁸³⁴ To avoid a situation where a state is obliged to ensure human rights which it cannot reasonably be expected to guarantee, the application of the ICESCR should be subject to a test based on the exercise of a high degree of “effective control”. The replacement of a territory’s ordinary system of public order by the occupying state’s governmental structure, similar to the situation during a long-term occupation, is a strong indication for such a high degree of “effective control”.

7.3.3.4 Convention on the Rights of the Child

Article 2 of the Convention on the Rights of the Child (CRC) provides that “states parties shall respect and ensure the rights set forth in the present Convention to each child *within their jurisdiction*.”⁸³⁵ In its *Wall* Advisory Opinion the ICJ

⁸³³ Wall Advisory Opinion, ICCPR, Article 4(1), para. 112.

⁸³⁴ Judge Higgins, *Wall* Advisory Opinion, Separate Opinion of Judge Higgins, para 27. Available on <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited on 5 May 2007).

⁸³⁵ Convention on the Rights of the Child (1989), United Nations, Treaty Series, Vol.1577, p. 3. Entered into force on 2 September 1990.

concluded-without any further analyses of the provision-that the “Convention is therefore applicable within the occupied Palestinian Territory.”⁸³⁶

Dennis doubts the universal applicability of the CRC during wartime.⁸³⁷ He advocates that Article 38 of the CRC rather indicates that the provisions of the Convention generally do not apply outside the territory of a state during periods of armed conflict and military occupation.⁸³⁸ The provision reconfirms in para 1 that the “states parties undertake to respect and to ensure respect for rules of International Humanitarian Law applicable to them in armed conflicts which are relevant to the child” and further refers to certain specific International Humanitarian Law obligations in paras (2) - (4). Dennis argues that this reference would not be necessary if all other articles of the CRC applied in times of war anyway.⁸³⁹

However, the aim of the reference is to enhance the protection of the child in times of armed conflict.⁸⁴⁰ The Convention does not add anything to the level of protection that already exists under substantive provisions of the International Humanitarian Law. However, the main contribution of this reference can only be to subordinate the latter provisions to the monitoring of the CRC treaty body⁸⁴¹ in order ensure that these provisions are also applied by CRC member states that

⁸³⁶ Wall Advisory Opinion, ICCPR, Article 4(1), para 112.

⁸³⁷ Dennis, n. 824 above.

⁸³⁸ Ibid.

⁸³⁹ Ilene Cohn, *The Convention on the Rights of the Child: What it Means for Children in War* (1991) 3 IJRL 100, p. 105.

⁸⁴⁰ For further reference, see Frowein, n. 775 above.

⁸⁴¹ The Committee on the Rights of the Child, established by Article 43 of Convention on the Rights of the Child (20 November 1989), United Nations, Treaty Series, Vol. 1577, p. 3. Entered into force on 2 September 1990.

are not party to the relevant International Humanitarian Law conventions⁸⁴²
Therefore, the Convention must generally apply in situations of armed conflict.⁸⁴³

However, this does not imply that the whole set of CRC provisions remains in force during wartime.⁸⁴⁴ Although the CRC does not include a general derogation provision, several of its rights are subject to restrictions necessary to protect, in particular, “the national security, public order, public health or morals or the rights and freedoms of others”.⁸⁴⁵

Conclusively, International Human Rights Law and International Humanitarian Law simultaneously apply in an international armed conflict as the former remains applicable in times of war and also applies in enemies’ territory where a state is exercising “effective control”.

As the evaluation of “effective control” is often more complex than during the occupation of Northern Cyprus or the Palestinian territories, clearer and more reliable criteria need to be developed. The International Criminal Tribunal for the Former Yugoslavia (ICTY) elaborated a criterion that could also serve as a model for the assessment of “effective control” in an International Human Rights Law context. In *Prosecutor v Rajić* the Tribunal had to answer the question “whether the degree of control exercised by the [Bosnian Croat forces (HVO)] over the village of ‘Stupni Do’ was sufficient to amount to occupation within the meaning of Article 53 Fourth Geneva Convention.”⁸⁴⁶ The Tribunal found that “the requirement may be interpreted to provide broad coverage” and stated that “[t]here is no intermediate period between what might be termed the invasion

⁸⁴² This is particularly true for the application of the Additional Protocols to the Geneva Conventions; Jochen Abr. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation* (1998) 28 Isr YB Hum Rts 1, 7.

⁸⁴³ Ibid.

⁸⁴⁴ Ilene Cohn, *The Convention on the Rights of the Child: What it Means for Children in War* (1991) 3 IJRL 100, p. 105.

⁸⁴⁵ See Article 10(2) CRC (right to leave any country), Article 13(2) CRC (freedom of expression), Article 14(2) CRC (freedom to manifest one’s religion or beliefs) and Article 15(2) CRC (freedom of association and peaceful assembly).

⁸⁴⁶ Ibid 160-161, paras 38 – 43, Article 53 Fourth Geneva Convention provides for the protection of property in occupied territories (Section 111).

phase and the inauguration of a stable regime of occupation”.⁸⁴⁷ It considered a territory as occupied when:

- “(i) there is a military force whose presence in a territory is not sanctioned;
- (ii) the military force has displaced the territory’s ordinary system of public order and government, replacing it with its own command structure;
- (iii) there is difference of nationality and interest between the inhabitants [of the territory] and the [military] forces;
- (iv) there is a practical need for an emergency set of rules to reduce the dangers which can result from clashes between the military forces and the inhabitants.”⁸⁴⁸

Applying these criteria, the Tribunal held that Stupni Do came under the control of the HVO as soon as it was overrun.⁸⁴⁹

In International Human Rights Law context, a similarly differentiated criterion could provide further guidance to the applicability of International Human Rights Law provisions. As already stated, the degree of “effective control” may be too low to expect states to enforce rights of the ICSECR. On the other hand, it may be questionable why a lower degree of “effective control” over a territory should not be sufficient to require states to guarantee fundamental International Human Rights Law, such as the right not to be arbitrarily deprived of one’s life in Article 6(1) ICCPR, even in times of war.

A Criterion that provide for an application of International Human Rights Law in a manner proportionate to the level of “effective control” would accommodate more appropriately the conditions of modern warfare.⁸⁵⁰ “Effective control” over a

⁸⁴⁷ Ibid., 161, para 41, referring to and quoting the Commentary on Geneva Convention IV, at 60.

⁸⁴⁸ Ibid., quoting Adam Roberts, What is a Military Occupation? (1984) 53 BYIL 249, 274-275.

⁸⁴⁹ Ibid., 161, paras. 38, 42.

territory cannot only be exercised by military forces on the ground but also by military forces in the air. Sophisticated air campaigns may break the adversary defence much easier and provide for more control over a territory than ground troops that are involved in house-to-house fighting. In fact, it is doubtful why a state should be free to violate International Human Rights Law in a bombing during an air raid but is considered to be bound if it executes the attack with forces on the ground. It goes without saying that the former attack might imply more devastating consequences than the latter.

7.3.4 Applicability in Non-International Armed Conflicts

“In the case of armed conflict not of an international character”, Common Article 3 to the Geneva Conventions provides for the application of certain fundamental International Humanitarian Law obligations as a minimum standard.⁸⁵¹ As demonstrated above, International Human Rights Law does not automatically cease to apply with the outbreak of war.⁸⁵² The preamble of Additional Protocol II to the Geneva Conventions (Additional Protocol II)⁸⁵³ provides further evidence that International Human Rights Law should also continue to apply in non-international armed conflicts.⁸⁵⁴ Paragraph 2 of the preamble refers to the basic protection offered to the individual by International Human Rights Law instruments while para 3 emphasises “the need to ensure a better protection for

⁸⁵⁰ The applicants in *Bankovic v Belgium and Other* suggested a similar approach; *Bankovic v Belgium and Others* (Appl. No. 52207/99) (12 December 2001) 123 ILR 94, 114, para. 75. However, the ECtHR denied that Article 1 ECHR would accommodate such a “cause-and-effect” notion of jurisdiction. It found that “the wording of [Article 1] does not provide support for the applicants’ suggestion that the obligation in art 1 to secure ‘the rights and freedoms [of the Convention]’ can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question”.

⁸⁵¹ Article 3 (1) prohibits: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular humiliating and degrading treatment and (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

⁸⁵² *Ibid.*, See Part III A 1(a) and 2(a).

⁸⁵³ Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977). Entered into force on 7 December 1978.

⁸⁵⁴ Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, (2002), p. 210.

the victims of internal armed conflicts”⁸⁵⁵ An increased number of human rights thus find more detailed protection in Additional Protocol II than in common Article 3. This is perhaps not surprising, the Protocol being an entire instrument to develop and supplement the single Article 3.

The human rights provisions of Additional Protocol II are found largely in part II (Humane Treatment) Article 4 enumerates various fundamental guarantees, Article 5 addresses the rights of persons whose liberty has been restricted, while Article 6 deals with penal prosecutions, i.e. the rights of due process. That these provisions do indeed concern human rights is further underlined by the ICRC Commentary on the Additional Protocols, which states that:

“These are inalienable and fundamental rights, inherent in the respect due to the human person...bear[ing] the mark of international human rights law...inspired by the Covenant on Civil and Political Rights.

These fundamental guarantees constitute a minimum standard of protection which anyone can claim at any time, and they underlie the whole system of human rights”.⁸⁵⁶

In an internal armed conflict the obligation of states to guarantee International Human Rights Law should be equally subject to the exercise of “effective control” over their territory.⁸⁵⁷ A state cannot be expected to protect its nationals from violations of International Human Rights Law by insurgents or occupation forces when it has lost control over the part of the territory where the abuses occur.⁸⁵⁸ In such a situation, an obligation to protect individuals against International Human

⁸⁵⁵ Ibid., para 3.

⁸⁵⁶ Yves Sandoz, Christophe Swinarski and Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, 1987), 1365.

⁸⁵⁷ See Inter-American Court on Human Rights (IACtHR), *Velasquez-Rodriguez Case* (Judgment of 29 July 1988). Available on < <http://www1.umn.edu/humanrts/iachr/general.htm> (last visited on 6 May 2007).

⁸⁵⁸ Nowak, U.N. Covenant on Civil and Political Rights : CCPR commentary, above n. 97, 41, para. 27, n 73; Thomas Buergenthal, “To Respect and to Ensure: State Obligations and Permissible Derogations”, in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, New York, 1981) 72, 75; Theodor Meron, *Agora: The 1994 U.S. Action in Haiti: Extraterritorially of Human Rights Treaties* (1995), 89 AJIL 78, 79.

Rights Law violations by third parties would not be very reasonable as the state lacks power to enforce compliance.

Article 4(3) details certain measures for the protection of children, who are particularly vulnerable during armed conflict, and is accordingly a huge advance on common Article 3, which makes no special provision whatsoever. Very little protection of this kind had previously been set out in humanitarian instruments, although some inspiration was clearly drawn from Article 50 of Geneva Convention IV, addressed to the needs of children in occupied territories. It is therefore necessary to turn again to human rights law as an interpretative device.⁸⁵⁹

7.4 The Decision of the Special Court in Prosecutor v. Samuel Hinga Norman

7.4.1 Background Information of the Civil War in Sierra-Leone

The civil war in Sierra Leone erupted in March 1991 and lasted for more than a decade.⁸⁶⁰ It was among the most brutal and destructive of internal strifes.⁸⁶¹ It displaced more than half of the population of Sierra Leone. Between 100,000 and 200,000 people were killed with more than 40,000 maimed during the conflict.⁸⁶² The civil war witnessed heinous crimes which included, but not limited to, summary executions, rapes, sexual slavery, forced pregnancy, child abduction, use of child soldiers, use of drugs, trafficking in drugs and diamonds.⁸⁶³

⁸⁵⁹ See for details, Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, (2002), p. 219.

⁸⁶⁰ K. Peters, *Re-Examining Voluntarism: Youth Combatants in Sierra Leone*, Institute of Security Studies, (2004), pp. 9-12.

⁸⁶¹ The Special Court of Sierra Leone (2006) *Challenging impunity: Bringing Justice to the People of Sierra Leone*, Free Town: Special Court for Sierra Leone, p. 1.

⁸⁶² C. Schocken, 'The Special for Sierra Leone: Overview and Recommendations' (2002) 20 *Berkeley Journal of International Journal and Comparative law*, p. 436. See also N.K.Stafford, 'A Model War Crimes Court: Sierra Leone (2003) 10 *ILSA Journal of International and Comparative Law*, pp. 117-127.

⁸⁶³ Peters, n. 860 above, pp. 9-12.

Sierra Leone experienced several coups but in 1996 there was a democratic election which resulted in power being transferred to a democratic government led by Ahmed Tajan Kabbah⁸⁶⁴. The new elected President signed the Abidjan Peace Accord in Abidjan, in November 1996.⁸⁶⁵ The latter agreement did not last long partly due to the distrust that existed between the contracting parties as well as the poor implementation provisions of the Accord.⁸⁶⁶ As a result, human rights violations continued, worsening the situation in the country.

The grave violations of human rights heightened the national and international pressure on the government of Sierra Leone to negotiate with Revolutionary United Front (RUF).⁸⁶⁷ Consequently in July 1999, the government and RUF signed Lome Agreement.⁸⁶⁸ The Agreement, among other things, granted amnesty to the rebels who were members of three factions fighting during the civil war, in respect of anything done by them in pursuit of their objectives as members of these organisations, up to the time of signing the agreement itself.⁸⁶⁹ This amnesty attracted both national and international criticism for it fully exempted the perpetrators of heinous crimes from any criminal prosecutions.⁸⁷⁰ Accordingly, the United Nations Security Council established the United Nations Peacekeeping Mission in Sierra Leone (hereinafter UNAMSIL) to guard the fragile peace in the country.

⁸⁶⁴ C. Schocken, *'The Special for Sierra Leone: Overview and Recommendations'* (2002) 20 Berkeley Journal of International Journal and Comparative law, p. 438.

⁸⁶⁵ A Tejan-Cole, 'Painful peace: Amnesty under the Lome Peace Agreement in Sierra Leone' (1999) 3Law, Democracy and Development, 239.

⁸⁶⁶ Ibid., p. 240.

⁸⁶⁷ Ibid.

⁸⁶⁸ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, "Lome Agreement". 7 July, 1999 ><http://www.c-r.org/our-work/accord/sierra-leone/lome-agreement.php> (last visited on 6 May 2007).

⁸⁶⁹ Ibid., article IX.

⁸⁷⁰ C. Schuler, A wrenching Peace: Sierra Leone's 'See no Evil' pact, Christian Science Monitor, 15 September, 1999.

The Lome Agreement was not able to secure enduring peace as the RUF started to violate the agreement by launching attacks against the state institutions.⁸⁷¹ Human rights violations and war terror continued until President Ahmed Tajan Kabbah officially declared an end to the long civil war and the establishment of a fragile peace in 2002.⁸⁷² Grave crimes, massive in scale, had been committed in the civil war. The need to prosecute the ring leaders responsible for these crimes prompted the push to establish the Special Court for Sierra Leone only few months after the civil war was over. The Special Court for Sierra Leone is similar to the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda.⁸⁷³

7.4.2 The Special Court of Sierra Leone

At the request of the Government of Sierra Leone, the United Nations proposed the establishing an international court for prosecution of those most responsible for the commission of atrocities during the war in Sierra Leone. United Nations Security Council Resolution 1315, adopted on 14 August 2000, requested negotiations for the creation of a court to prosecute “crime against humanity, war crimes and other serious violations of international humanitarian law”⁸⁷⁴ and to try those “persons who bear the greatest responsibility”⁸⁷⁵ for these crimes. The Special Court for Sierra Leone has primacy over Sierra Leone national courts, and is independent from any government. The Special Court for Sierra Leone

⁸⁷¹ A. Stewart and N. Thomas, Peace Process Deteriorates in Sierra Leone as Rebels Continue to Hold UN Peace Keepers Hostage, ABC News World News, 9 May, 2000.

⁸⁷² Sierra Leone Civil War < <http://www.answers.com/topic/Sierra-Leone-civil-war> > (Accessed and last visited on 6 May 2007).

⁸⁷³ C. Anthony, Historical and Political Background to the Conflict in Sierra Leone, in: Kai Ambos/Mohammed Othman (eds) New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia. (2003), pp. 149-151.

⁸⁷⁴ UN Security Council Resolution 1315, adopted on 14 August, 2000 available at <http://www.specialcourt.org/documents/BackgroundDocs/SCRes1315e.pdf> (last visited on 6 May 2007).

⁸⁷⁵ Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Article 1 available at <http://www.un.org/Docs/sc/reports/2000/915e.pdf> or <http://www.specialcourt.org/documents/SpecialCourtAgreementFinal.pdf> (last visited on 6 May 2007).

cannot impose death penalty which has not been abolished in Sierra Leone criminal law.

In contrast with the previous experience of the International Criminal Tribunal for Yugoslavia and International Criminal Tribunal of Rwanda, the Special Court for Sierra Leone represents a new evolution of the international community on how to approach justice in post-conflict societies on several respects:

(i).The Special Court is not an international tribunal to the extent that it was not created by a resolution from the Security Council, but by a *negotiated Agreement* between the United Nations and the Security Council;

(ii).It is a Hybrid Juridical Institution with jurisdiction over acts committed in violation of international law as well as certain crimes under sierra Leonean law.⁸⁷⁶

(iii).The Court was established with a limited jurisdiction to try “those who bear the greatest responsibility”, a distinction that was not contained in the ICTY and ICTR Statutes. However, it should be noted that both tribunals have also experienced institutional limitations.⁸⁷⁷

(iv).Unlike both United Nations tribunals, the Special Court for Sierra Leone budget is funded through voluntary contribution.

(v).The Special Court for Sierra Leone is based on an Agreement between the United Nations and Sierra Leone. Unlike the ICTY and the ICTR, the Special Court for Sierra Leone cannot assert primacy over national courts of other states, thus limiting the Court’s capacity in terms of extradition.

(vi).After Charles Taylor’s indictment by the Special Court for Sierra Leone, many questions have been raised on the credibility and the capacity of Special Court to handle its mandate and the high goals it has given itself.

⁸⁷⁶ See Statute of the Special Court of Sierra Leone. Available at <http://www.sc-sl.org/scsl-statute.html> (last visited on 6 May 2007).

⁸⁷⁷ See ICTY proceedings factsheet at: <http://www.un.org/icty/glance/procfact-e.htm>; see also ICTY factsheets at: <http://www.icty.org/ENGLISH/factsheets/index.htm>. (last visited on 6 May 2007).

To be fair, the Special Court for Sierra Leone has proven already some of this critic wrong.⁸⁷⁸ However, it has also raised some concerns, for instance in the case of the indictment of Charles Taylor and the opportunity of such a move during the Liberian peace talks held in Accra (Ghana). The negotiated nature of the Agreement creating the Special Court for Sierra Leone is reflected on numerous aspect of the Court as for instance in its composition. Indeed the Special Court for Sierra Leone is composed of international and Sierra Leoneans staff, prosecutors and judges.⁸⁷⁹ The recent nomination of Special Court for Sierra Leone Appeal Judge Hassan Jallow (of Gambia) as the new Chief Prosecutor for the International Criminal Tribunal of Rwanda further indicates both the role of African judges in post-conflict justice jurisdiction in Africa, as well as the Special Court for Sierra Leone influence on international justice dynamics.⁸⁸⁰

7.4.3 Jurisdiction of the Special Court for Sierra Leone

While the jurisdiction of the Special Court for Sierra Leone seems to be opening some new possibilities for post-conflict countries to set up international (mixed) tribunals, many questions on the outcome of this new type of jurisdiction to address the legacy of war crimes remain unanswered.

The Special Court for Sierra Leone is to try ‘those who bear the greatest responsibility’ for the worst offenses committed since November 30, 1996. Since the war has been going on from 1991, this choice to start the Court mandate in 1996 was decided so that the Court would not be overburdened. It is to be noted that neither the Special Court for Sierra Leone Statute nor the Agreement between the UN and the Government of Sierra Leone address the question of the Court’s life span, though concordant declarations from Special Court for Sierra Leone officials have publicized a time-frame of three years.

⁸⁷⁸ For instance regarding the Special Court of Sierra Leone relations with the TRC.⁹²

⁸⁷⁹ Appointments to Sierra Leone Special Court. Further information on the given judges is available at <http://www.un.org/News/Press/docs/2002/sga813.doc.htm> (last visited on 6 May 2007).

⁸⁸⁰ See the nomination of former Special Court of Sierra Leone appeal judge Hassan Jallow (Gambia) as the new ICTR Chief Prosecutor on August 29th, 2003 is available at <http://news.bbc.co.uk/2/hi/africa/3190833.stm>. (last visited on 6 May 2007).

The Court has jurisdiction over acts committed in violation of international humanitarian law such as crimes against humanity, war crimes as well as other serious violations of international law, namely, attacks against peacekeepers and conscription of children under age fifteen. Moreover, the Special Court for Sierra Leone's jurisdiction comprises certain crimes under Sierra Leonean law like abuse of girls younger than fourteen and wanton destruction of property.⁸⁸¹

While the Lomé Agreement offers amnesty to former combatants, excepting the case of violations of International Humanitarian Law and the given crimes under Sierra Leonean law, the Prosecutor of the Special Court for Sierra Leone, David Crane, has challenged this agreement. However, due to the Special Court for Sierra Leone limited capacity, if only financial, such an option appears rather unlikely.

7.4.4 Recognition of child recruitment as a crime under international criminal Law

The Special Court for Sierra Leone is the first international tribunal to have tried the crime of child recruitment and also the first to have developed a new international criminal law with regard to the recruitment of child soldiers.⁸⁸² Samuel Hinga Norman of the 'Civil Defence Forces' (CDF) stood trial before the Special Court for Sierra Leone for recruiting child soldiers during the Sierra Leone civil war⁸⁸³. A preliminary motion was filed before the Court on his behalf objecting to the charge against the use of child soldiers. The objection was based on the argument that child recruitment was not a crime under customary international law in 1996 when the Special Court for Sierra Leone's temporary jurisdiction started. It was argued that child recruitment has become a crime only

⁸⁸¹ See Statute of the Special Court of Sierra Leone. Available at: <http://www.sc-sl.org/scsl-statute.html>. (last visited on 6 May 2007).

⁸⁸² A Smith 'Child Recruitment and the Special Court for Sierra Leone' (2004) 2 *Journal of International Criminal Justice*, p. 1141.

⁸⁸³ Appeals Chamber, *Prosecutor v Norman*, " Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)" 31 May 2004. Available at <http://socrates.berkeley.edu/~warcrime/SL-Reports/004.pdf> (last visited on 6 May 2007).

since the adoption of the 1998 Rome Statute for the International Criminal Court. Thus, this indictment would breach the principle of non-retroactivity.

But the Appeals Chamber held that the recruitment of children under the age of 15 years was a crime under international law in 1996⁸⁸⁴. In reaching its decisions the Court noted that various international instruments to which Sierra Leone is party such as the 1949 Geneva Conventions and their two Additional Protocols of 1977, the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child, all of which have prohibited the recruitment of child soldiers long before 1996⁸⁸⁵. The widespread recognition and acceptance of the prohibition of child soldiers in the aforementioned international instruments indicate that child recruitment had already crystallized as a crime under customary international law⁸⁸⁶. Therefore, the Court held that the recruitment of children was already a crime by the time of the adoption of the Rome Statute⁸⁸⁷. As a result, the 1998 Rome Statute only codified and ensured that the customary law norm be implemented at the national level.

For these reasons, the preliminary motion was dismissed and the Court added a new dimension to the body of international criminal law⁸⁸⁸. Given the prevalence of the use of children in armed conflict in African states, this charge is likely to be brought again in future cases before the International Criminal Court or similar international criminal fora in Africa.

7.4.5 Special Court decision in *Prosecutor v. Samuel Hinga Norman*

⁸⁸⁴ Summary of decision on Preliminary Motion (Child Recruitment), *Prosecutor V. Sam Hinga Norman*, Case Number SCSL-2003-14-AR72 (E) < <http://www.sc-sl.org/summary-childsoldiers.html> (accessed and last visited on 6 May, 2007). Or <http://www.sc-sl.org/CDF-decisions.html> (last visited on 6 May 2007).

⁸⁸⁵ Article 77(2), Additional Protocol I; Article 4, Additional Protocol II; Article 38 of CRC and Art 22 of ACRWC. Available at https://www.up.ac.za/dspace/bitstream/2263/1236/1/tsegay_tn_1.pdf (last visited on 6 May 2007).

⁸⁸⁶ Summary of decision on Preliminary Motion (Child Recruitment), *Prosecutor V. Sam Hinga Norman*, Case Number SCSL-2003-14-AR72 (E). Available at: <http://www.sc-sl.org/CDF-decisions.html> (last visited on 6 May 2007).

⁸⁸⁷ Ibid., para 4

⁸⁸⁸ Ibid.

The Applicant, Chief Samuel Hinga Norman, was charged together with Moinina Fofana and Allieu Kondewa on an indictment containing eight counts, the last of which alleged his command responsibility for a serious violation of international humanitarian law, namely: enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities. He applied by preliminary motion to the Appeals Chamber of the Special Court, arguing that the Court had no jurisdiction to try him for crimes under Article 4(c) of the Court's Statute. To do so would violate the principle of *nullum crimen sine lege* as no such crime existed at any times relevant to the indictment. The majority of the judges of the Appeals Chamber disagreed. They held that: 'Child recruitment was criminalized before it was explicitly set out as a criminal prohibition in treaty law and certainly by November, 1996, the starting point of the time frame relevant to the indictments'.⁸⁸⁹

The Court considered that prior to November 1996; the prohibition on child recruitment has crystallized as customary international law on the grounds of the wide ratification of the Geneva Conventions, Additional Protocol II and the Convention on the Rights of the Child and the lack of reservations made by the States to Article 38 of the CRC.⁸⁹⁰ The Court adopted the ICTY's conclusion in *Tadic* case that it was necessary to show that the violation must constitute an infringement of a rule of international humanitarian law which must be 'serious', and entail the individual criminal responsibility of the person breaching the rule.⁸⁹¹

However, the Court emphasized that the prohibition of the recruitment and use of children to participate in hostilities was one of the 'fundamental guarantees' in Additional Protocol II, which was itself an expansion of Common Article 3 of the

⁸⁸⁹ Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, Annex, para.53.

⁸⁹⁰ *Ibid.*, paras 17-20.

⁸⁹¹ "It might be thought that the second criterion was jurisdictional rather than substantive". Happold, n. 90 above, p. 129.

Geneva Conventions. The Court also made reference to a 1996 Security Council resolution on the situation in Liberia,⁸⁹² which condemned the ‘inhuman and abhorrent’ practice of recruiting, training and deploying children for combat.⁸⁹³ Thus the Court seems to have elided the second and third criteria, purporting to adopt the conclusions of the ICTR in *Akayesu*⁸⁹⁴ that a breach of a rule protecting important values was a ‘serious violation’ entailing individual responsibility.

Moreover, considering Article 4(2) of the Optional Protocol, which requires states parties to take all feasible measures to prevent the recruitment and use in hostilities of children by armed groups, ‘including the adoption of legal measures necessary to prohibit and criminalize such practices’, the Court argued that the provision demonstrated that ‘the aim at this stage was to raise the standard of the prohibition of child recruitment from age 15 to age 18 years, proceeding from the assumption that the conduct was already criminalised at the time in question’. The Court concluded this stage of its decision by stating that:

“The prohibition of child recruitment constitutes a fundamental guarantee and although it is not enumerated in the ICTR and ICTY Statutes, it shares the same character and the same gravity of the violations that are explicitly listed in those Statutes. The fact that the ICTY and the ICTR have prosecuted violations of Additional Protocol II provides further evidence of the criminality of child recruitment before 1996”⁸⁹⁵

⁸⁹² SC Res. 1071 of 30 August 1996 on the Situation in Liberia. Available at: <http://www.un.org/Docs/sc/committees/Liberia/6262e.html> (last visited on 6 May 2007).

⁸⁹³ *Ibid.*, para 29.

⁸⁹⁴ *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Decision of 2 September 1998, para. 582

⁸⁹⁵ *Ibid.*, para 39.

The Court again considered that the wording of Article 38 and 4 of the CRC included criminal sanctions as means of enforcement.⁸⁹⁶ It found that a few states had criminalised child recruitment prior to 1996.⁸⁹⁷ The Court also considered it significant that other states had prohibited child recruitment in military law, had done so indirectly by criminalising any breaches of law by civil servants generally, or had made it impossible for individuals to recruit children.⁸⁹⁸ It concluded that 'the period during which the majority of states criminalized the prohibited behaviour was the period between 1994 and 1996'.⁸⁹⁹ Thus the Applicant's motion was accordingly dismissed.

However, Justice Robertson, in his dissenting opinion, took a very different line. He considered that the more narrowly drawn offence in the Secretary-General's draft Statute was a war crime by November 1996, as it amounted to a most serious breach of Common Article 3.⁹⁰⁰ However, Article 4(c), as adopted, was in a different form, and could be committed in three different ways:

- (i) by conscripting children (which implies compulsion, albeit in some cases through force of law);
- (ii) by enlisting them (which merely means accepting and enrolling them when they volunteer); or
- (iii) by using them to participate actively in hostilities (i.e. taking the more serious step, having conscripted or enlisted them, of putting their lives directly at risk in combat).

Offence number (ii) extended liability considerably, as the prosecution would need only to show that the defendant knew that the person he enlisted was under 15 at the time. Justice Robertson commented that:

⁸⁹⁶ Ibid., para 41.

⁸⁹⁷ Ibid., para 45.

⁸⁹⁸ Ibid., para 47.

⁸⁹⁹ Ibid., para 51.

⁹⁰⁰ Dissenting Opinion of Justice Robertson, at para. 4.

It might strike some as odd that the state of international law in 1996 in respect to criminalization of child enlistment was doubtful to the UN Secretary-General in October 2000 but very clear to the President of the Security Council only two months later. If it was not clear to the Secretary-General and his legal advisers that international law by 1996 criminalized the enlistment of child soldiers, could it really have been any clearer to Chief Hinga Norman or any other defendant at that time, embattled in Sierra Leone?...If international criminal law adopts the common law principle that in cases of real doubt as to the existence or definition of a criminal offence, the benefit of that doubt must be given to the defendant, then this would appear to be such a case..⁹⁰¹

Following the language of Security Council resolution 1071 relied upon by the majority, Justice Robertson agreed that the enlistment of under-15 years old was 'abhorrent' but stressed that abhorrence alone did not make conduct a crime in international law.⁹⁰² Justice Robertson emphasized that showing that child enlistment as distinct from the forcible recruitment of children or their subsequent use in combat was a war crime required not only showing that child enlistment was prohibited as a matter of international law but also that the rule had 'metamorphosed' into a rule of criminal law for breach of which individuals might be punished.⁹⁰³ He laid particular stress on the *nullum crimen sine lege* principle, which he considered should be interpreted strictly.⁹⁰⁴ Justice Robertson, as did the majority, referred to the *Tadic* case. However, he relied on a passage from the decision of the Appeals Chamber, rather than from that of the Trial Chamber, which stated that:

“The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur

⁹⁰¹ Ibid., para 6.

⁹⁰² Dissenting Opinion of Justice Robertson, at para. 9.

⁹⁰³ Ibid., para 10.

⁹⁰⁴ Happold, n. 90 above, p. 131.

individual reasonability: the clear and unequivocal recognition of the rules of warfare in international law and state practice indicating an intention to criminalise the prohibition, including statements by government officials and international organisations as well as punishment of violations by national courts and military tribunals. Where these conditions are met, individuals must be held criminally responsible”⁹⁰⁵

Justice Robertson did not consider these criteria required in 1996 in relation to the prohibition on child enlistment. The material supplied by UNICEF in its *amicus* brief upon which the majority had relied did not evidence that the majority of states had explicitly criminalised child enlistment prior to November 1996, and there had been no suggestion of any prosecution for such an offence having taken place under the national law of any state.⁹⁰⁶ Thus Justice Robertson concluded that:

What had emerged, in customary international law, by the end of 1996 was a humanitarian rule that obliged states, and armed factions within states, to avoid enlisting under 15 years or involving them in hostilities, whether arising from international or internal armed conflict. What had not, however, evolved was an offence recognizable by international criminal law 'which permitted the trial and punishment of individuals accused of enlisting (i.e. accepting for military service) volunteers under the age of 15 years. It may be that in some states this would have constituted an offence against national law, but this cannot be determinative of the existence of an international law crime.'⁹⁰⁷

⁹⁰⁵ *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, p. 520, para. 128. Para. 23 of the dissenting judgment.

⁹⁰⁶ *Ibid.*, para. 23.

⁹⁰⁷ *Ibid.*, para. 33.

However, Justice Robertson's conclusions cannot be said to be entirely convincing either. Although, following the Secretary-General, he stated that he considered the conscription of children under 15 years of age and their use to participate actively in hostilities to have been war crimes at all relevant times, he did not explain why. It will be recalled that the Secretary-General's report stated that the abduction of children violated Common Article 3, while their transformation into 'child combatants' amounted to degrading treatment. The problem is, however, that Common Article 3 does not specifically prohibit such conduct, nor is there any evidence additional to that adduced in the majority opinion to suggest that states had criminalised it prior to 1996. Applying Justice Robertson's own standards, one might consider that no case can be made that any recruitment or use of children to participate in hostilities was a war crime prior to the adoption of the Rome Statute.

7.5 The Recruitment of Children as a War Crime in Contemporary International law

All the judges in this case of *Prosecutor v. Norman* agreed that the recruitment of use of children under 15 years to participate actively in hostilities was a war crime in contemporary international law. It seems there is no reason to doubt this conclusion of the judgment. Although not made explicit in the President of the Security Council's letter to the Secretary-General, it seems that the Council considered the recruitment of under-15 years or their use to participate actively in hostilities to be a customary crime regardless of the nature of the conflict during which it was committed (the Sierra Leone conflict was an internal armed conflict). States Parties are now incorporating the provision into their domestic criminal law in compliance with their obligations as parties to the Rome Statute.⁹⁰⁸

The elements of the war crime of using, conscripting or enlisting children under Article 8(2) (b) (xxvi) of the Rome Statute and which were adopted by consensus states are that:

⁹⁰⁸ Happold, n. 90 above, p. 132.

Firstly, the perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities;

Secondly, such person or persons were under the age of 15 years;

Thirdly, the perpetrator knew or should have known that such person or persons were under the age of 15 years;

Fourthly, the conduct took place in the context of and was associated with an international armed conflict;

Lastly, the perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

The elements of the war crime of using, conscripting or enlisting children under Article 8(2)(e)(vii) into an armed conflict of non-international character are similar to those enumerated above. Although the two provisions are almost identical, a number of additional comments can be made.

Article 77(2) of Additional Protocol I and Article 38 of the CRC prohibit all recruitment of children less than 15 years. The Rome Statute only criminalises such conduct if the perpetrator knew or should have known that the persons recruited were under 15 years of age. Apparently, at the Preparatory Commission for the ICC, some states argued that there should be no mental element to the crime.⁹⁰⁹ If a person recruited children under 15 years of age, she/he would be guilty of the offence regardless of whether she/he had any reason to know or suspect what their ages were. This position was justified on the basis that it was for recruiters to satisfy themselves that recruits were not underage. On the other hand, it was argued that such an approach was inconsistent with Article 67(1) (i) of the Rome Statute, which provides that an accused before the ICC has the right not to be imposed on him/her any reversal of the burden of proof or any onus of rebuttal.⁹¹⁰ Strictly speaking, this counter-argument missed the point, as making an offence a crime of strict liability does neither of those things. However, Article 30(1) of the Statute provides that:

⁹⁰⁹ K. Dormann. 'Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary. Cambridge University Press, 2003, p. 375.

⁹¹⁰ Ibid.

‘Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with knowledge and intent’.

Article 30(3) states that for the purpose of the Article “knowledge” means awareness that a circumstance exists, so the prosecutor must prove that the accused was aware of that the relevant circumstances existed. However, there was general agreement at the Preparatory Commission for the ICC that such a stringent test should not apply.⁹¹¹ This is uncalled for knowing that Article 77(2) of Additional Protocol I and Article 38 of the CRC require the taking of ‘all feasible measures’ to prevent children under 15 taking a direct part in hostilities. However, adolescents develop physically at different rates and the systems for the recording of births are rudimentary and ineffective in many countries, not least those embroiled in conflict. The drafting adopted avoids penalising persons who recruited children whom they genuinely considered to be over 15 years of age and who took reasonable measures to confirm their belief, while requiring good faith efforts from recruiters in order to ensure that those recruited are not underage.

7.6 The Recruitment and Use of Child Soldiers as the Crime of Enslavement

Though prior to 1998, aside from being a violation of the laws and customs of war, the recruitment and use of child soldiers was an international crime - at least in some circumstances. The Secretary-General's draft of the Statute of the Sierra Leone Special Court listed the ‘abduction and forced recruitment of children under the age of 15 years old into armed forces or groups for the purpose of using them to participate actively in hostilities’ as a serious violation of international humanitarian law. The wording of the provision suggests that what was objectionable was not the recruitment of children under 15 *per se* but their recruitment by forcible or coercive means and their use for a particular degrading purpose.

⁹¹¹ Ibid.

Holding a person in slavery or servitude or subjecting him or her to forced or compulsory labour is contrary to international law. It is prohibited in a number of treaties⁹¹² and under customary international law.⁹¹³ The Fourth Geneva Convention prohibits the employment of interned protected persons as forced labourers,⁹¹⁴ and, while other protected persons can be compelled to work, the circumstances in which this can be done are severely limited, with guarantees in respect of wages, hours of work and working conditions.⁹¹⁵ In the Charter of the International Military Tribunal 'deportation to slave labour' was listed as one of the war crimes as within the Tribunal's jurisdiction, while 'enslavement' was included within the list of crimes against humanity. Enslavement was also listed as a crime against humanity in Control Council Law No. 10, and is a crime within the jurisdiction of the ICTY, the ICTR, the ICC and the Special Court for Sierra Leone.

According to the *travaux préparatoires* of the International Covenant on Civil and Political Rights, slavery has a limited and technical meaning, implying the destruction of one's juridical personality. It is primarily a legal category. Servitude, on the other hand, is a more general idea, encompassing all possible forms of humankind's domination over human beings.⁹¹⁶ Tribunals ruling on charges of enslavement have taken the wider view, looking to the factual situation to determine whether the crime has been committed. Cases after the Second World War included forced or compulsory labour under enslavement as a crime against humanity.⁹¹⁷

⁹¹² Slavery Convention, 60 LNTS 253 (1926); Convention Concerning Forced or Compulsory Labour, 39 UNTS 55 (1930); Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 266 UNTS 3 (1956); European Convention on Human Rights, ETS No. 5 (1950); International Covenant on Civil and Political Rights, 999 UNTS 171 (1966), American Convention on Human Rights; African Convention on Human and Peoples' Rights: AP II, Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, Annex.

⁹¹³ See *Barcelona Traction case (Belgium v. Spain)*, ICJ Reports (1970) 3, at p. 32; and American Law Institute, *Restatement of the Law*. The Third, the Foreign Relations Law of the United States (1987), Vol. 2, para. 702.

⁹¹⁴ Article 95, Geneva Convention IV, 1949.

⁹¹⁵ Articles 40 (concerning the treatment of aliens in the territory of a party to the conflict) and 51 (concerning the treatment of protected persons in occupied territories), Geneva Convention IV, 1949.

⁹¹⁶ Marc J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights*, Dordrecht: Martinus Nijhoff. 1987, p. 167.

In the recent case before the ICTY, *Prosecutor v. Kunarac, Kovac and Vukovic*,⁹¹⁸ Kunarac and Kovac were charged with enslavement as a crime against humanity under Article 5(c) of the Tribunal's Statute in respect of acts committed during the period 1992-1993. Accordingly, the Trial Chamber had to determine the customary international law content of the offence at the relevant time. It held that: 'at the time relevant to the indictment, enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person'.⁹¹⁹ The *actus reus* of the offence was the exercise of any or all of the powers attaching to the right of ownership over a person. The *mens rea* was the intentional exercise of such powers.⁹²⁰ This definition can be seen as including instances of slavery, servitude, and forced and compulsory labour.

The Appeals Chamber agreed that whether a particular phenomenon is a form of enslavement depends on the operation of the factors identified by the Trial Chamber.⁹²¹ It also considered that the Trial Chamber's definition of the crime of enslavement reflected customary international law at the time the alleged crimes were committed.⁹²²

Child soldiers have been subject to treatment within the definition of enslavement. However, conscription for military service, at least of adults, is generally viewed as lawful. Although individuals have a right not to be subjected to slavery or servitude, or be required to perform forced or compulsory labour, an exception is usually made

⁹¹⁷ See the cases cited in *Prosecutor v. Kunarac and others*. Case No. IT-96-23-T and IT-96-23/I-T, judgment of the Trial Chamber, 22 February 2001, paras. 523-7. Available at http://midia.pgr.mpf.gov.br/pfdc/corte_penal/Kunarac%20et%20al%20IT-96-23%20%20IT-96-23-1%2022-Feb-2001.pdf (last visited on 6 May 2007).

⁹¹⁸ Ibid.

⁹¹⁹ Ibid., para. 539.

⁹²⁰ Ibid., para. 540.

⁹²¹ Judgment of the Appeals Chamber, 12 June 2002, para. 119.

⁹²² Ibid., para. 124.

for service of a military character.⁹²³ Children under 15 are immune from conscription. Strength is added to this argument by the provisions of ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. The Convention defined 'the worst forms of child labour' as including: 'all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.'⁹²⁴

However, the draft Statute also included enslavement *per se* as a crime against humanity within the jurisdiction of the Special Court.⁹²⁵ This can be explained as the result of a concern that a particular form of behaviour characteristic of the conflict in Sierra Leone be specifically criminalised in the Statute. On the other hand, the inclusion of enslavement as a crime against humanity and the forced or compulsory recruitment of children for use in armed conflict as a war crime could also be seen as reflecting some confusion about how to categorise the offence.⁹²⁶ For behaviour to amount to a war crime it must have taken place during an armed conflict and there must be a link between the armed conflict and the commission of a crime. Crimes against humanity, by contrast, can be committed in times of peace as well as in war, but they must be part of a widespread or systematic attack against the civilian population.

7.7 Conclusion

There are two offences related to the recruitment of children into armed forces and groups and their use to participate in hostilities. First, it is a war crime to conscript or enlist children under the age of 15 into armed forces or groups or use them to

⁹²³ See Article 4(3) (b), European Convention on Human Rights, ETS No. 5 and Article 6(3) (b), American Convention on Human Rights (1970) 9 ILM 673.

⁹²⁴ Article 3(a), ILO Convention 182.

⁹²⁵ The provision also appears in the adopted Statute as Article 2(e).

⁹²⁶ It will be recalled that the Secretary-General appears to have considered that child abduction was a breach of Common Article 3 of the 1949 Geneva Conventions. Happold, n. 90 above, p. 139.

participate actively in hostilities. Second, the abduction and forced recruitment of children under the age of 15 years into armed forces or groups also amount to crime against humanity of enslavement. Thus, the abduction and use of children for war-related activities and sexual purposes, amounts to enslavement even if they are not formally enrolled into an armed force or group or used to actively participate in hostilities. Both offences are crimes under customary international law. Though, conscription or enlistment of children under the age of 15 into armed forces or groups or their use to participate actively in hostilities have just recently become a crime under customary law with the judgment of Special Court for Sierra Leone in *Norman's case*.

Conclusively, war crime of enlisting children under the age of 15 years old into armed forces and groups or using them to participate in hostilities can be committed in both international and non-international armed conflicts. But, an armed conflict must be in existence at the time the offence was committed and there must be a nexus between the conflict and the commission of the crime. This latter requirement is not particularly onerous. The offence is committed if only a child under 15 years of age is recruited or used to participate actively in hostilities. To prove the crime against humanity of enslavement there is no requirement of the existence of armed conflict; it only have to be shown that the offence was part of a widespread or systematic attack against the civilian population.⁹²⁷

⁹²⁷ Ibid., p. 140.

CHAPTER EIGHT

The Responsibility of Child Soldiers for War Crimes

8.1 Introduction

There is need to consider the circumstances in which child soldiers themselves might be held criminally responsible for their actions. Having considered that child soldiers often act in an undisciplined manner, the use of child soldiers to commit atrocities is a problem which international law must address.

Governments often seek to penalise child soldiers for their activities when they are arrested as members of armed or insurgent groups. For example, in late 2002, the Ugandan authorities brought treason charges against two former Lord's Resistance Army (LRA) fighters: two boys aged 14 and 16 years old. According to Human Rights Watch, these boys had been kidnapped and forcibly induced into the LRA and had voluntarily surrendered to the Ugandan People's Defence Force.⁹²⁸ In an open letter, Human Rights Watch urged the Ugandan Government to drop the charges and release the boys to a rehabilitation centre. In April 2003, the Ugandan Government indicated that it would withdraw the charges and asked the two boys to apply for amnesty, which, on the advice of the Ugandan Director of Public Prosecutions, they promptly did.⁹²⁹

In 2001 Human Rights Watch again intervened with the Government of the Democratic Republic of Congo (DRC), urging that death sentences imposed on four child soldiers should not be carried out.⁹³⁰ The four aged between 14 and 16 years old at the time they were arrested, had been tried, convicted and

⁹²⁸ Human Rights Watch, 'Uganda: Letter to Minister of Justice', 19 February 2003, See also Human Rights Watch press release, 'Uganda: Drop Treason Charges Against Child Abductees', 4 March 2003.

⁹²⁹ See J. Eremu, 'Treason Suspects Apply for Amnesty', New Vision. 5 April 2003; and 'Treason Charges Against Child Soldiers Dropped', Human Rights Watch, monthly e-mail update, April 2003. Cited by M. Happold, n. 90 above, p.141.

⁹³⁰ 'Human Rights Watch Letter to Foreign Minister of Democratic Republic of Congo', 2 May 2001.

sentenced by the Court of Military Order. The four children were not executed by the government, but in January 2000, the Congolese Government did execute a 14 year old child soldier.⁹³¹

In these cases, the crimes charged were based upon domestic law. In internal armed conflicts, governments in power are entitled to punish those arrested with arms against the government. Rebels can be found guilty of treason and, unlike in international armed conflicts, insurgents who kill their opponents in combat are liable to be charged with murder. But conduct can be criminal under domestic law and international law. In a number of recent armed conflicts, child soldiers have behaved in ways that violate international humanitarian law. For example, In Sierra Leone, child soldiers committed numerous atrocities against the civilian population. The negotiations of the Statute of the Special Court for Sierra Leone were marked by controversy over whether the Court should have jurisdiction to prosecute individuals who were children at the time they allegedly committed crimes.⁹³²

Every person, whether combatants or not,⁹³³ has a duty to comply with international humanitarian law. Failure to do so can give rise to criminal sanctions. However, one of the reasons why armed forces and groups recruit child soldiers is that they are more suggestible than adults. Children are less socialised, and more docile and malleable than adults, and hence are more obedient and easily coerced into committing atrocities. Even if not specifically recruited for such purposes, children's lack of mettle and moral development may mean that they are more prone to behave badly than adult troops. In addition, children often do not serve willingly, but because they have been abducted or forcibly recruited; they are subjected to abuse and brutalising

⁹³¹ 'Congo: Don't Execute Child Soldiers: Four Children to be Put to Death', Human Rights Watch press release, 2 May 2001.

⁹³² Happold, n. 90 above, p. 142.

⁹³³ See Heinrich Gerike and others, British Military Court sitting at Brunswick, verdict of 3 April 1946, in G. Brand (ed.), *Trial of Heinrich Gerike*, William Hodge & Co, London, Edinburgh and Glasgow, 1950; and Bruno Tesch and Others, British Military Court sitting at Hamburg, verdict of 8 March 1946, I Law Reports of Trials of War Criminals 93.

treatment; their continued participation is maintained through threats and coercion. At times child soldiers have been given drugs and/or alcohol by their commanders to lessen their inhibitions. The question is: to what extent should such factors serve to exclude, or at least mitigate, child soldiers' legal culpability for their actions?⁹³⁴

There is also a need to consider the consequences of children's mental and moral immaturity for the criminal responsibility for their actions. Similarly, the availability of defences in respect of child soldiers' responsibility for atrocities committed, given that their participation in hostilities is frequently coerced. Moreover, International law provides only vague guidelines with regard to the minimum age of criminal responsibility and only permits duress as a defence to international crimes in very limited circumstances.

8.2 Individual Criminal Responsibility

In almost all jurisdictions, before a person can be held blameworthy and punished in criminal law, his/her behaviour must have contained an element of fault. To be guilty of a crime, particularly with regard to serious offences, it is not enough simply to have done a particular prohibited act; there must be the requisite *mens rea* as well as the *actus rea*⁹³⁵ Consequently, it is possible to escape criminal liability by showing that one was lacking a guilty mind, for example, that the act was committed accidentally rather than intentionally or while in a state of automatism.

In respect of one class of person, however, lack of *mens rea* is presumed. As Simester and Sullivan write in relation to the defence of infancy: 'Although it is a defence of status, no-one under 10 years of age [the minimum age of criminal responsibility in England and Wales] can commit a crime, the status is predicated on assumptions concerning a person's mental development and

⁹³⁴ Happold, n. 90 above, p.142.

⁹³⁵ K.S. Chukkol, 'The Law of Crimes in Nigeria', ABU University Press, Zaria, 1988, p. 30. See also A. Ashworth, Principles of Criminal Law, Oxford University Press, 3rd ed., 1999, pp. 87-88.

consequent moral irresponsibility for his/her actions'.⁹³⁶ Children are considered incapable of evil: *doli incapax*. As a result of this presumption, they escape criminal liability for their acts.⁹³⁷ However, with regard to the criminal responsibility of child soldiers, a problem immediately arises. It is unclear what the minimum age of criminal responsibility in respect of international crimes actually is. It is also not clear whether international law fixes a minimum age of criminal responsibility at all. It is clear that setting the minimum age of criminal responsibility too low will breach international law, but no minimum age for criminal responsibility has been specified.

8.2.1 Additional Protocol I

This issue came up for discussion during the negotiations of Additional Protocol I. There, the representative of Brazil proposed that what is now Article 77(5) of the Protocol⁹³⁸ be amended by adding the sentence: 'Penal proceedings shall not be taken against, and sentence not pronounced on, persons who were under sixteen years at the time the offence was committed'.⁹³⁹ This proposed amendment was not accepted. However, the Italian representative, without objecting to the article as it was adopted, stated that he would have wished that it included an additional paragraph prohibiting criminal prosecution and conviction of children for offences which, at the time of commission, were too young to understand the consequences of their actions.⁹⁴⁰

Committee III, to whom the draft article had been assigned, agreed that there was a general principle that a person cannot be convicted of an offence if, at the time

⁹³⁶ A.P. Simester and G.R. Sullivan, *Criminal Law: Theory and Doctrine*, Oxford: Hart, 2000, p. 644.

⁹³⁷ *Ibid.*, pp. 644-645.

⁹³⁸ Article 77(5) prohibits the execution of the death penalty for offences related to an international armed conflict on persons who had not attained the age of 18 years at the time when the crime was committed.

⁹³⁹ O.R. III, p. 307, CDDH/III/325.

⁹⁴⁰ O.R. XV, p. 219, CDDH/II/SR.59.

he/she committed it, he/she was unable to understand the consequences of his/her act. The Committee decided, however, to leave the issue to national regulation. One might consider such a rule as a general principle of law and, as such, a rule of international law.⁹⁴¹ But, the rule would seem to permit states either to fix a minimum age below which children are presumed not to be criminally responsible or to determine culpability on an individual basis. This could be determined by applying a test of whether an accused understood the consequences of the act at the time it was committed.

However, it has also been argued that Article 77(2) itself fixes the minimum age of criminal responsibility for war crimes at 15. This argument is based on the interpretation that if a child under 15 is too young to fight in hostilities, he/she should also be considered to be too young to be held criminally responsible for his/her actions. Such a reading of Article 77(2) is, however, unwarranted. It is unsupported by the text itself, which makes no reference to child soldiers' criminal responsibility. Thus, the negotiators specifically decided not to include such provision in the final text of Article 77. This is not to say, however, that the ideas behind such a reading of Article 77(2) have not been influential in debates about what should be the minimum age of criminal responsibility for international crimes.

8.2.2 The Convention on the Rights of the Child

The CRC made some progress on this matter. Article 40(3)(a) provides that state parties to the CRC shall seek to establish a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law. However, no minimum age of criminal responsibility is stipulated. All that the CRC requires of states is that they establish a minimum age of criminal responsibility. It is left to each state to decide what that age should be.⁹⁴²

⁹⁴¹ See G. Van Bueren, *The International Law on the Rights of Child*, Dordrecht: Martinus Nijhof, 1995, p. 173.

⁹⁴² Happold, n. 90 above, p. 145.

The relevant provisions of the United Nations Standard Minimum Rules on the Administration of Juvenile Justice ('the Beijing Rules') and their commentary⁹⁴³ are, however, more enlightening. Article 40 of the CRC was drafted so as to reflect the approaches to juvenile justice taken in from Beijing Rules.⁹⁴⁴ Although the Rules and their commentary are not in themselves binding, they do provide an indication of the shared thinking of states on the issue. Rule 4, on the age of criminal responsibility, is not particularly helpful; it merely stated that: 'In those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age limit, bearing in mind the facts of emotional, mental and intellectual maturity'. This seems to require even less than the CRC provides, as there is no obligation to establish a minimum age of criminal responsibility.⁹⁴⁵

Thus, criminal responsibility should only be imposed when there is some element of fault, that is, sufficient mental and moral awareness on the part of the individual committing the prohibited act and the consequences or potential consequences of his/her actions. The commentary also links the imposition of criminal responsibility to the granting of civil rights, such as the right to marry and the right to vote. Such rights are frequently only granted from age 16, 17 or 18. The commentary ends by stating that efforts should be made to agree on an international standard minimum age of criminal responsibility. Unfortunately, no such agreement has yet been agreed.

Explanation of the requirements of Article 40(3)(a) of the CRC has been given by the Committee of the Rights of the Child, established under the CRC to monitor states' compliance with its provisions.⁹⁴⁶ In its comments on states' periodic reports, the Committee has expressed on a number of occasions concern when

⁹⁴³ G.A. Res. 40/33, annex, 40 UN GAOR Supp. (No. 53) at 207, UN Doc. A/40/53 (1985).

⁹⁴⁴ See S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, Dordrecht: Martinus Nijhof, 1998, p. 700.

⁹⁴⁵ Happold, n. 90 above, p. 145.

⁹⁴⁶ See Article 43, CRC.

no minimum age of criminal responsibility has been fixed.⁹⁴⁷ In a general discussion on the administration of juvenile justice,⁹⁴⁸ the Committee considered that criminal responsibility should not be determined by reference to subjective factors, such as 'the attainment of puberty, the age of discernment or the personality of the child'⁹⁴⁹, as doing so will lead to invidious discrimination. The implication is that only objective factors, such as age, constitute appropriate criteria. The reason for this was given during the discussion of Senegal's initial report to the Committee. There, a Committee member expressed concern that:

"She was concerned that children's judges were given the possibility of considering that a child could be criminally responsible on the basis of her personality. However, if there was a minimum age below which the law recognized that no child could infringe the criminal law, then there could be no possibility for differences of interpretation".⁹⁵⁰

The Committee, however, has been less definite on what age the minimum age of criminal responsibility should be fixed. The Committee has frequently expressed concern that the minimum age set by states has been too low,⁹⁵¹ but it has not expressed a view or suggested what the minimum age should be.

8.2.3 The European Court of Human Rights

An interesting discussion on this issue did take place in the judgments of the European Court of Human Rights in the case of *T. v. United Kingdom* and *V. v. United Kingdom*.⁹⁵² Both T and V were 10 years old when they abducted and killed

⁹⁴⁷ For further details see R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, London: UNICEF, 1998, p. 551.

⁹⁴⁸ See Committee on the Rights of the Child, Report on the Tenth Session (Geneva, 30 October-17 November 1995), UN Doc. CRC/C/46 (18 December 1995) paras. 203-238.

⁹⁴⁹ *Ibid.*, para. 218.

⁹⁵⁰ UN Doc. CRC/C/SR/248, para. 26.

⁹⁵¹ See R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, London: UNICEF, 1998, p. 551-552.

⁹⁵² *T. v. United Kingdom* and *V. v. United Kingdom* (2000) 30 EHRLR 121. The two cases heard together.

a 2-year-old boy. Aged 11, they were tried in public in an adult court before a judge and jury (although some allowances were made for their age). They were convicted of murder and abduction and sentenced to an indefinite period of detention. They applied to the European Court of Human Rights on the ground, among others, that their treatment had violated Article 3 of the European Convention on Human Rights, which prohibits torture and other inhuman, degrading treatment or punishment.

The Court concluded that the attribution to the applicants of criminal responsibility for their acts did not violate Article 3. It found that Article 4 of the Beijing Rules and Article 40(3)(a) of the CRC of little help, even though the Committee on the Rights of the Child had recommended that the UK give serious consideration to raising its minimum age of criminal responsibility.⁹⁵³ Neither did the court consider that there was any common standard as to the minimum age of criminal responsibility among the Member States of the Council of Europe.⁹⁵⁴ Considering the ages of responsibility in different countries, the Court held that: 'Even if England and Wales is among the few European jurisdictions to retain a low age of criminal responsibility, the age of ten cannot be said to be so young as to differ disproportionately from the age-limit followed by other European States'. The Court concludes that the attribution of criminal responsibility does not in itself give rise to a breach of Article 3 of the Convention.⁹⁵⁵

It might be reasonable to note that the fact that a practice is common is not enough to legitimise it. A number of common practices breach the human rights of those subjected to them. In addition, in basing its conclusions on the lack of consensus among the contracting states, the Court granted states a wide 'margin of appreciation' in respect of an issue within the scope of Article 3, which is an absolute,

⁹⁵³ See Concluding Observations on the United Kingdom's Initial Report, UN Doc. CRC/15/add. 34, (1995), para. 34.

⁹⁵⁴ See *T. v. United Kingdom* and *V. v. United Kingdom* (2000) 30 EHRLR 121. The two cases were heard together.

⁹⁵⁵ At the time, the age of criminal responsibility was 7 in Cyprus, Ireland, Liechtenstein and Switzerland; 8 in Scotland; 13 in France; 14 in Austria, Germany, Italy and many eastern States; 15 in the Scandinavian States; 16 in Andorra, Portugal and Poland; and 18 in Belgium, Luxembourg and Spain. See M. Happold, *Child Soldiers in International Law*, Manchester University Press, 2005, p. 146.

non-derogable right. In a dissenting opinion, Judges Pastor Ridruejo, Ress, Makarczyk; Tulkens; and Butkevych disagreed with the majority's assessment and asserted that standards could be ascertained from the relevant international instruments and the practice of the Member States of the Council of Europe.

Taking the age of criminal responsibility together with the trial procedure and sentencing, there had been a breach of Article 3.⁹⁵⁶ The minority stated that: "Bringing the whole weight of the adult criminal process to bear on children as young as eleven is, in our view, a relic of times where the effect of the trial process and sentencing on a child's physical and psychological conditions and development as a human being was scarcely considered, if at all".⁹⁵⁷ Considering the reasoning for fixing the minimum standards for the age of criminal responsibility, the reasoning of the minority of the Court sounds reasonable.

8.2.4 The Statute of the Special Court for Sierra Leone

Examination of the minimum age for criminal responsibility also recently took place during the drafting of the Statute of the Special Court for Sierra Leone. The statutes of international criminal tribunals drafted previously had ignored or avoided the issue. The statutes of the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda did not include any provisions governing the age of criminal responsibility.⁹⁵⁸ This issue was addressed in the Rome Statute of the ICC, but not in any enlightening manner. Article 26 of the Statute provides that: 'The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of the offence'. It is clear both from the language of the article and its drafting history that the provision is procedural

⁹⁵⁶ *T. v. United Kingdom and V. v. United Kingdom* (2000) 30 EHRLR 121 at 202.

⁹⁵⁷ *Ibid.*

⁹⁵⁸ See the Report of the Secretary-General Pursuant to para. 2 of SC Res. No. 808 (1993). UN Doc. S/25704, reprinted in (1993) 32 ILM 1170, at para. 58: 'The international tribunal [for the former Yugoslavia] will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon the general principles of law recognised by all nations.'

rather than substantive in nature. It is simply the jurisdiction of the ICC that is excluded, leaving the treatment of child war criminals to national courts.⁹⁵⁹

One of the reasons for the exclusion of jurisdiction was to avoid arguments as to what the minimum age of responsibility for international crimes should be.⁹⁶⁰ The Non Governmental Organisation Caucus on Children's Rights in the ICC had called for the Statute to determine a minimum age at which individuals could be held criminally responsible for crimes within the Court's jurisdiction, which they argued should be 18 years old.⁹⁶¹ However, national approaches differ considerably and during the negotiations suggestions put forward for the minimum age of criminal responsibility varied between 12 to 18 years of age.⁹⁶² A jurisdictional solution was adopted to downplay these disagreements.

The issue could not be avoided with regard to the Statute of the Special Court for Sierra Leone. Child soldiers were tortured, maimed, raped and killed during the conflict. Those same children, however, had frequently been abducted and forcibly recruited into armed groups, and subjected to sustained abuse by their comrades. In his report on the establishment of a Special Court, the UN Secretary-General acknowledged the difficulty of prosecuting child soldiers for war crimes and crimes against humanity, given their dual status as both victims and perpetrators.⁹⁶³ His report described considerable disagreement as to how juvenile offenders should be dealt with. According to the Secretary-General:

“The question of child prosecution was discussed at length with the Government of Sierra Leone ... It was raised with all the

⁹⁵⁹ See R.S. Clark and O. Triffterer, 'Article 26: exclusion of jurisdiction over persons under eighteen', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes. Article by Article*. Baden-Baden: Nomos Verlag. 1999, p. 499.

⁹⁶⁰ Ibid.

⁹⁶¹ Caucus on Children's Rights in the ICC. 'Recommendations and Commentary for the December 1997 Preparatory Committee Meeting on the Establishment of an International Criminal Court.

⁹⁶² R.S. Clark et al, n. 959 above.

⁹⁶³ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000.

interlocutors of the United Nations team: the members of the judiciary, members of the legal profession and the Ombudsman, and was vigorously debated with members of civil society, non-governmental organizations and institutions actively engaged in child-care and rehabilitation programmes.

The Government of Sierra Leone and representatives of Sierra Leone civil society clearly wish to see a process of judicial accountability for child combatants presumed responsible for the crimes falling within the jurisdiction of the Court. It is said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability. The international non-governmental organizations responsible for child-care and rehabilitation programmes, together with some of their national counterparts, however, were unanimous in their objections to any kind of judicial accountability for children below 18 years of age for fear that such a process would place at risk the entire rehabilitation programme so painstakingly achieved.”⁹⁶⁴

In October 2000, eleven members of the Security Council visited Sierra Leone, and reported that:

“The possibility that children should be prosecuted by the Special Court was the subject of animated debate in Sierra Leone and there appeared to be no prevailing view. In the view of the Government of Sierra Leone, the Court should prosecute those child combatants who freely and willingly committed indictable crimes. On the other hand, non-governmental and United Nations agencies, especially those engaged in the protection of children, favoured excluding those under the age of 18 years”.⁹⁶⁵

⁹⁶⁴ Ibid., paras. 34-35.

At the end, the mission made no recommendations in relation to the establishment of the Special Court, stating that the issues required further discussion by the Security Council.⁹⁶⁶

Article 7(1) of the Secretary-General's draft Statute provided that: 'The Special Court shall have jurisdiction over persons who were 15 years of age at the time of the alleged commission of the crime'. Why the Secretary-General fixed 15 as the minimum age of criminal responsibility was not made clear, but it seems likely that the decision was made to mirror the provisions of the Additional Protocols and the CRC, on the ground that if children under 15 are too young to be recruited, they must be too young to be held responsible for trial and sanctions. The Secretary-General's draft also provided that:

"At all stages of the proceedings, including investigation, prosecution and adjudication, an accused below the age of 18 (hereinafter 'a juvenile offender') shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society."⁹⁶⁷

There followed a number of guarantees for juvenile offenders: only exceptionally should a juvenile offender be denied bail; a juvenile offender should be tried before a specially constituted 'Juvenile Chamber'; a juvenile offender's trial should be separated from those of any co-accused adults; the parent or legal guardian of a juvenile offender should be permitted to participate in the proceedings; the Special Court should provide protective measures, including but not limited to the protection of his identity and trial *in camera*, to ensure the juvenile offender's privacy; the Court could not punish a juvenile offender by imprisonment. These provisions

⁹⁶⁵ See the Report of the Security Council mission to Sierra Leone. UN Doc. S/2000/992 (16 October 2000), para. 50.

⁹⁶⁶ Ibid., para. 54(b).

⁹⁶⁷ See Article 7(2), draft Statute.

closely followed (and went beyond) those concerned with juvenile justice in the ICCPR and the CRC.⁹⁶⁸

The Secretary-General's advocacy of these provisions cannot be seen as unreserved. In his report, he considered "that it would be most prudent to demonstrate to the Security Council for its consideration how provisions on prosecution of persons below the age of 18 ... before an international jurisdiction could be formulated".⁹⁶⁹ The report concluded by saying that: "ultimately, it will be for the Prosecutor to decide if, all things considered, action should be taken against a juvenile offender in any individual case".⁹⁷⁰ However, all the Security Council did to Article 7 was to shorten it so that it read:

"Should any person who was at the time of the alleged commission of the crime below 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with human rights standards, in particular the rights of the child".⁹⁷¹

This provision was thought less satisfactory than the Secretary-General's draft, as it failed to set out the human rights standards that should apply to the trial of any juvenile offenders. Even more significantly, the revised Article 7 failed to include any minimum age of criminal responsibility for crimes within the Special Court's jurisdiction. However, the wording of the revised provision implied that any such prosecutions would be exceptional. Such a reading is confirmed in the Security Council's comments on the Secretary-General's draft. 'The simplified and more general formulations suggested' were considered appropriate because the Council considered that the Special Court should concentrate on prosecuting persons who

⁹⁶⁸ See, particularly, Articles 10(2)(b), 10(3), 14(1) and 14(4) of the ICCPR; and Articles 37(b), 37(c), 37(d), 40(1), 40(2) (b)(ii), 40(2) (b)(vii) and 40(4) of the CRC.

⁹⁶⁹ *Ibid.*, para. 36.

⁹⁷⁰ *Ibid.*, para. 38.

⁹⁷¹ Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, Annex.

played a leadership role in the conflict in Sierra Leone.⁹⁷² The Council thought that the Truth and Reconciliation Commission established under the Lome Peace Agreement⁹⁷³ should play a major role in the case of juvenile offenders.⁹⁷⁴

The Secretary-General suggested in his reply to the Council an amendment to the revised Article 7. He stated that even if jurisdiction of the Court was limited to persons bearing the greatest responsibility for crimes committed during the conflict in Sierra Leone, the determination of which individuals bore such responsibility would be made, in the first instance, by the Prosecutor, and would therefore 'have to be reconciled with an eventual prosecution of juveniles ... even if such prosecutions are unlikely'.⁹⁷⁵ The Secretary-General expressed his understanding that the Security Council's revised draft was not intended to allow the prosecution of persons for crimes committed below 15 years of age and that the reference to human rights standards encompassed all the guarantees of juvenile justice set out in his draft,⁹⁷⁶ and therefore suggested that Article 7 be amended.

Paragraph 2 reproduced *verbatim* the provisions of Article 7(3)(f) of the Secretary-General's original draft. The Secretary-General's suggested amendments were accepted by the Security Council and the Government of Sierra Leone and were incorporated into the Statute of the Special Court.

None of the persons indicted by the Prosecutor of the Special Court is accused of crimes committed while she/he was a child, and it does not appear that the Special Court will see any prosecutions of juvenile offenders. The Special Court's Statute provides that its function is 'to prosecute persons who bear the greatest

⁹⁷² Ibid., para. 1.

⁹⁷³ UN Doc. S/1999/777.

⁹⁷⁴ Happold, n. 90 above, p.150.

⁹⁷⁵ Letter dated 12 January, 2001 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/2001/40, para.2.

⁹⁷⁶ Ibid., paras 7-8.

responsibility for the atrocities committed during the conflict in Sierra Leone'.⁹⁷⁷ Security Council Resolution 1315,⁹⁷⁸ which requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone establishing the Special Court, stated that the Court:

“Should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2 [crimes against humanity, war crimes and other serious violations of international humanitarian law as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone], including those leaders who, in committing such crimes, have threatened the establishment and implementation of the peace process in Sierra Leone.”⁹⁷⁹

The Secretary-General's draft omitted the leadership criterion, arguing that the term 'persons most responsible' should be viewed as including not only the political and military leadership but also others responsible for particular grave or serious crimes.⁹⁸⁰ Reading this, according to the Secretary-General, children could fall within the Court's personal jurisdiction.⁹⁸¹ However, the Security Council restored the reference to those persons who played a leadership role,⁹⁸² and the Special Court's Statute again categorises 'those leaders who, in committing such crimes, have threatened the establishment and implementation of the peace process' as among those persons most responsible. Given this focus, it was always unlikely that any juvenile offenders would be tried before the Special Court.⁹⁸³ The general view,

⁹⁷⁷ Statute of the Special Court for Sierra Leone, Article 1(1).

⁹⁷⁸ SC Res. 1315 of 14 August 2000.

⁹⁷⁹ *Ibid.*, para. 3.

⁹⁸⁰ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para. 30.

⁹⁸¹ *Ibid.*, para 31.

⁹⁸² See UN Doc. S/1999/777, para. 1.

expressed by both the Security Council⁹⁸⁴ and the Secretary-General,⁹⁸⁵ was that juvenile offenders were best dealt with by the Truth and Reconciliation Commission. Thus, the Prosecutor took an early opportunity to state that, as a matter of policy, he did not intend to indict persons for crimes committed when they were still children.⁹⁸⁶

8.3 The Distinction between War Criminals and Unlawful Combatants

War criminals must be distinguished from unlawful combatants.⁹⁸⁷ The distinction drawn between lawful and unlawful combatant is a corollary of the fundamental distinction between combatants and civilians: the paramount purpose of the former is to preserve the latter.⁹⁸⁸ The Law of International Armed Conflict can effectively protect civilians from being objects of attack in war only if they can be identified by the enemy as non-combatants. There are eight respects in which the concepts of war crimes and unlawful combatancy are distinct from each other.

Firstly, an unlawful combatant must be a combatant. A civilian, by definition, is a non-combatant and, as such, can be neither a lawful nor an unlawful combatant. On the other hand, a war criminal need not be a combatant. A civilian can also commit war crimes. For instance, a declaration that no quarter shall be given to the enemy, a war crime under Article 8(2)(b)(xii) of the Rome Statute, can be issued by a civilian member of the cabinet and

⁹⁸³ See the comments of Hans Corell, UN Under-Secretary-General for Legal Affairs, in C. McGreal, 'Unique Court to Try Killers of Sierra Leone', *Guardian*, 17 January 2002, and David Crane, Special Court Prosecutor, in R. Dowden, 'Justice Goes on Trial in Sierra Leone', *Guardian*, 3 October 2002.

⁹⁸⁴ Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, Annex.

⁹⁸⁵ Letter dated 12 January, 2001 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/2001/40, para.2.

⁹⁸⁶ See Special Court Prosecutor Says 'He Will Not Prosecute Children', Special Court for Sierra Leone, Public Affairs Office, Press Release. 2 November 2002.

⁹⁸⁷ Yoram Dinstein, 'The Conduct of Hostilities under the Law of International Armed Conflict', Cambridge University Press, 2004, p. 233.

⁹⁸⁸ See T. Meron, 'Some Legal Aspects of Arab Terrorists' Claims to Privileged Combatancy', 40 NTIR 47, 62 (1970).

recruitment of children by civilians for soldiering as in the case of Norman in Sierra Leone.

Secondly, when the Law of International Armed Conflict negates the status of lawful combatancy, it exposes the perpetrator to ordinary penal sanctions for acts criminalized by the domestic legal system. In other words, international law merely removes a shield otherwise available to (lawful) combatants as a means of protection. Conversely, when the Law of International Armed Conflict directly labels an act a war crime, a sword is provided by international law against the accused. A war criminal is tried by virtue of the law of International Armed Conflict, whereas an unlawful combatant is prosecuted under domestic law.

Thirdly, an unlawful combatant may simultaneously be a war criminal. This is in case where he/she intentionally commits a serious breach of Law of International Armed Conflict in flagrant disregard of condition of lawful combatancy requiring respect for the Law of International Armed Conflict. Since the same person is both an unlawful combatant and a war criminal, the enemy State has an option whether to proceed against him/her under international law or under domestic law.

Fourthly, a spy may also be put on trial as an unlawful combatant only if he/she is captured in the act, before he/she has had an opportunity to rejoin the armed forces to which he/she belongs. The same legal regime is possibly applicable to some unlawful combatants other than spies.⁹⁸⁹ Be it as it may, that is not the case when a war crime is committed since the perpetrator is subject to prosecution and punishment at any future time. The non-prescriptive character of war crimes is corroborated by Article 29 of the Rome Statute, whereby 'the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations,'⁹⁹⁰ and by a 1968 Convention on the Non-

⁹⁸⁹ See R. R. Baxter, 'The Municipal and International Basis of Jurisdiction over War Crimes', 28 BYBIL 382, (1951). Cited by Yoram Dinstein, 'The Conduct of Hostilities under the Law of International Armed Conflict', Cambridge University Press, 2004, p. 234.

Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.⁹⁹¹ Admittedly, a 1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes applies to offences committed before its entry into force only 'in those cases where the statutory limitation period had not expired at that time'.⁹⁹² The implication is that in the absence of an express treaty provision to the contrary, a domestic statute of limitations may cover war crimes. Even if this is the case, it must be appreciated that the prescription of war crimes for purposes of domestic prosecution in a given country does not affect the position within other domestic legal systems. It certainly leaves no impact on the non-prescribed nature of war crimes in compliance with international law.

Fifthly, an unlawful combatant is disentitled to the privileges of a prisoner of war. Article 5, paragraph two of Third Geneva Convention proclaims that, 'Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy,' are entitled to the status of prisoners of war, 'such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal'.⁹⁹³ The question of when 'doubt' arises is itself not free from doubt.⁹⁹⁴ Article 45 of Protocol I creates a presumption in favour of any person who claims a prisoner of war status or appears to be entitled to it.⁹⁹⁵ Yet, despite the precautions taken by the drafters of this article, cases of doubt may arise: the doubt may concern the presumption itself', e.g., when an

⁹⁹⁰ Rome Statute of the International Court, (1998), 37 ILM 999.

⁹⁹¹ Convention on the Non-Availability of Statutory Limitations to War Crimes and Crimes against Humanity, (1968) UNJY 160, 161 (Article I).

⁹⁹² European Convention on the Non-Availability of Statutory Limitations to Crimes against Humanity and War Crimes, (1974), 13 ILM 540, 541 (Article 2(2)).

⁹⁹³ Geneva Convention relative to the Treatment of Prisoners of War (1949), United Nations, Treaty Series, Vol. 75, p. 135. Entered into force on 21 October, 1950.

⁹⁹⁴ See R. R. Baxter, 'The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)', International Dimensions of Humanitarian Law 93, 108-9 (UNESCO, 1988).

⁹⁹⁵ Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977). Entered into force on 7 December 1978.

individual's claims are contradicted by his comrades.⁹⁹⁶ In any event, the legal opportunity to prosecute an unlawful combatant for crimes under domestic law exists only if the status of a prisoner of war is denied to him.

The position of a war criminal is entirely different. The scenario relates to a combatant, otherwise entitled to a prisoner of war status, who is charged with a serious violation of Law of International Armed Conflict and the culpability can only be determined in civil or criminal judicial proceedings. As long as the accused has not been convicted by a court of last resort, his/her entitlement to a prisoner of war status does not lapse.

Thus after conviction, Article 85 of Third Geneva Convention stipulates:

'Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention'.⁹⁹⁷ The meaning of Article 85, in so far as the post-conviction time-frame is concerned, is extremely controversial.⁹⁹⁸ The legislative history of this clause unequivocally demonstrates that it pertains to war criminals.⁹⁹⁹ The wording of the face of it is apposite to prosecution under the laws of the detaining power, and not to war crimes trials which are conducted in conformity with international law. For this reason, it was held by the Supreme Military Tribunal in Italy, in the *Kappler* case of 1952, that war crimes are excluded from the compass of Article 85.¹⁰⁰⁰

Even if prisoners of war convicted of war crimes retain the benefits of the Third Geneva Convention, they may still be sentenced in a manner commensurate

⁹⁹⁶ See J. de Preux, 'Article 45', Commentary on the Additional Protocols 543, pp. 550-551.

⁹⁹⁷ Third Geneva Convention relative to the Treatment of Prisoners of War (1949), United Nations, Treaty Series, Vol. 75, p. 135. Entered into force on 21 October, 1950.

⁹⁹⁸ See Commentary, Third Geneva Convention. pp 415-416, 423-5 ICRC, J. de Preux ed., 1960). Cited by Yoram Dinstein, 'The Conduct of Hostilities under the Law of International Armed Conflict', Cambridge University Press, 2004, p. 235.

⁹⁹⁹ Ibid., p. 416.

¹⁰⁰⁰ *Kappler* case (Italy, Supreme Military Tribunal, 1952), 49 AJIL 96, 97 (1957).

with the gravity of their offences. All that Article 85 seems to connote is that certain due process requirements prescribed in the Convention are to be satisfied.¹⁰⁰¹ It is clearly stated in Article 119 of the Convention that prisoners of war convicted of indictable offences need not be released at the time of general repatriation of prisoners of war.¹⁰⁰²

Sixthly, when an unlawful combatant is indicted for having committed a crime under the domestic penal code of the enemy, the prosecuting State must establish jurisdiction over the defendant by either showing a legitimate linkage with the crime or the criminal. In the case of an unlawful combatant, this legitimate linkage is likely to be territoriality, active personality (nationality of the perpetrator), passive personality (the nationality of the victim) or the protective principle.¹⁰⁰³ When charges are preferred against a war criminal, the overriding consideration in the matter of jurisdiction is that the crimes at issue are defined by international law itself. The governing principle is then universality: all States are empowered to try and punish war criminals.¹⁰⁰⁴ The upshot is that a belligerent State is allowed to institute penal proceedings against an enemy war criminal, irrespective of the territory where the crime was committed or the nationality of the victim. In all likelihood, a neutral State (despite the fact that it does not take part in the hostilities) can also prosecute war criminals.¹⁰⁰⁵

Seventh, assuming that an unlawful combatant commits crimes under its domestic penal code, the enemy State is at liberty to indict or not to indict.

¹⁰⁰¹ See *Commentary, Third Geneva Convention*, pp 415-416, 423-5 ICRC, J. de Preux ed., 1960), p. 423.

¹⁰⁰² *Geneva Convention relative to the Treatment of Prisoners of War* (1949), United Nations, *Treaty Series*, Vol. 75, p. 135. Entered into force on 21 October, 1950. See for further details, Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, 2004, p. 236.

¹⁰⁰³ See Y Dinstein, *The Extra-Territorial Jurisdiction of states: The Protective Principle*, 65 (II) AIDI 305, 306-11 (Milan, 1994). On the protective principle, and its differentiation from the territoriality and passive personality principle.

¹⁰⁰⁴ See Y Dinstein, *The Universality Principle and War Crimes*, 71 ILS 17-37 (*The Law of Armed Conflict: Into the Next Millennium*, M. N. Schmitt and L. C. Green eds., 1998).

¹⁰⁰⁵ See R. R. Baxter, *The Municipal and International Basis of Jurisdiction over War Crimes*, 28 BYBIL 382, (1951).

Since the punishable crimes *ex hypothesi* are committed only against its domestic legal system, the prosecutorial discretion of that State is unfettered by international law. As an antithesis, all States are bound by international law to suppress war crimes through prosecution or, alternatively, extradition (in harmony with the postulate of *aut dedere aut judicare*).

Regarding grave breaches of the Geneva Conventions - which, as noted, constitute war crimes - the *aut dedere aut judicare* obligation is set out unambiguously in the text of the Conventions.¹⁰⁰⁶ It stands to reason that some prosecutorial discretion is permitted on the merits of the individual case.¹⁰⁰⁷ However, in principle, the duty of States to bring war criminals to justice is categorical.

Lastly, as long as unlawful combatants do not commit any crime under international law, their prosecution can only take place before domestic courts. Proceedings against war criminals may be conducted before an international tribunal, if vested with such jurisdiction¹⁰⁰⁸

8.4 Admissible and Inadmissible Defences

War crimes, like any other international crimes, have two constituent elements: the criminal act i.e. *actus reus*, and a criminal intent or at least a criminal

¹⁰⁰⁶ *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1949), United Nations, *Treaty Series*, Vol. 75, p. 31. Entered into force on 21 October 1950. *Laws of Armed Conflicts* 373, 391 (Article 49, first Paragraph); *Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1949), United Nations, *Treaty Series*, Vol. 75, p. 85. Entered into force on 21 October 1950. *Laws of Armed Conflicts* 373, 418 (Article 50, second Paragraph); *Geneva Convention (III) relative to the Treatment of Prisoner of War* (1949), United Nations, *Treaty Series*, Vol. 75, p. 135. Entered into force on 21 October 1950. *Laws of Armed Conflicts* 373, 476 (Article 129, second Paragraph); *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War* (1949), United Nations, *Treaty Series*, Vol. 75, p. 287. Entered into force on 21 October 1950. *Laws of Armed Conflicts* 373, 547 (Article 146, second Paragraph).

¹⁰⁰⁷ See Anonymous, 'Punishment for War Crimes: Duty or Discretion?' 69 Mich. LR 1312, 1330-4 (1970-1). Cited by Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, 2004, p. 237.

¹⁰⁰⁸ Ibid.

consciousness i.e. *mens rea*.¹⁰⁰⁹ The indispensability of *mens rea* as an intrinsic component of intentional crimes is enshrined in Article 30 of the Rome Statute which provides that:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

Firstly, in relation to conduct, that person means to engage in the conduct;

Secondly, in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

'Know, and 'knowingly' shall be construed accordingly.¹⁰¹⁰

Also, as articulated by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in the case of *Prosecutor v. Blaskic*, the degree of *mens rea* required need not amount to an outright guilty intent; it may take the form of 'recklessness which may be likened to serious criminal negligence'.¹⁰¹¹

8.4.1 Defences

Lack of *mens rea* can be translated into assorted defences.¹⁰¹² The principal defences which are relevant to war crimes are:

¹⁰⁰⁹ See Y. Dinstein, 'Defences', 1 Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts', 371, 371-2 (G. K. McDonald and O. Swaak-Goldman eds., 2000).

¹⁰¹⁰ Rome Statute of the International Criminal Court (1998), United Nations, Treaty Series, Vol 2187, p. 3. (Doc. A/CONF.183/9). Entered into force on 1 July 2002.

¹⁰¹¹ International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor v. Blaskic* (2000), Case IT-95-14-T, para. 332.

¹⁰¹² Continental lawyers tend to differentiate between two categories of defences-justifications and excuses-and some scholars attempt to introduce the distinction into international criminal law. See A. Cassese, 'Justifications and Excuses in International Criminal Law', 1 Rome Statute Commentary 379 at 951, 951-3. However, no such distinction has been drawn in practice so far, either in customary or in treaty law.

8.4.1.1 Duress

The defence of duress is incorporated in Article 31 (l)(d) of the Rome Statute as follows:

“1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control”.¹⁰¹³

This provision draws a distinction between duress by threat and duress by circumstances, looking at it from the wording of the last words.¹⁰¹⁴ In the former scenario (frequently called ‘coercion’), the dire consequences that the accused is trying to avert are presented as a threat by another human being. The latter setting (best described as ‘necessity’) unfolds when the accused tries to avoid fatal results brought about by circumstances beyond anybody’s control (for instance, a raging fire).

Whatever its contours, the defence of duress means that the accused will not be held criminally accountable for an act otherwise deemed an international offence, if the Court is satisfied that he/she committed the act in the absence of moral choice, namely, that the choice available to him/her was morally nullified by the constraints of the situation. Moral choice, as the ‘true test’ of criminal

¹⁰¹³ The Rome Statute of the International Criminal Court, 1998, 37 ILM 999 at 1018-19.

¹⁰¹⁴ K. Ambos, ‘Other Grounds for Excluding Criminal Responsibility’, 1 Rome Statute of International Criminal Court: A Commentary (A. Cassese, P. Gaeta and J.R.W.D. Jones eds., 2002), p. 1019.

responsibility, is highlighted in the 1946 Judgment of the IMT at Nuremberg.¹⁰¹⁵ Lack of moral choice means that the accused committed the act only because of a reasonable apprehension that failure to do so would bring about death or grievous harm either to himself or to another person close to him.

One must be mindful of three serious qualifications limiting the applicability of the defence of duress: firstly, if it is to succeed, the defence of duress must be predicated on firm evidence that the accused was genuinely unwilling to perpetrate the war crime with which he/she is charged, and that he/she would have avoided action but for the duress.¹⁰¹⁶

Secondly, as affirmed in the case of *Einsatzgruppen*, the defence of duress cannot prevail if it is proved that the actual harm caused by the crime was disproportionately greater than the potential harm to the accused which would have ensued had he abstained from committing the offence.¹⁰¹⁷ But, if an accused was threatened with a few days of confinement, and the war crime charged is the killing of another person, the defence of duress would be rejected absolutely as disproportional.¹⁰¹⁸

Lastly, the crucial question is whether the defence of duress can ever be accepted in case of murder. In the *Einsatzgruppen* case it was stated, in the context of mass killings of Jews by Nazi extermination squads:

“there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns”.¹⁰¹⁹

¹⁰¹⁵ International Military Tribunal (Nuremberg), Judgment and Sentences, 1946, 41 AJIL 172 at 221.

¹⁰¹⁶ Y. Dinstein, ‘Defences’, 1 Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts’, (G. K. McDonald and O. Swaak-Goldman eds., 2000), p. 374.

¹⁰¹⁷ *Einsatzgruppen* case (*USA v. Ohlendorf et al.*) (American Military Tribunal, Nuremberg, 1948), 4 NMT 411 at 471.

¹⁰¹⁸ *Ibid.*

Thus, the defence of duress was dismissed here on factual grounds,¹⁰²⁰ but the whole legal thesis put forward in the quoted passage has been seriously criticised.¹⁰²¹

In the 1997 judgment of the *Prosecutor v Erdemovic*, a majority of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stated:

“duress cannot afford a complete defence to a soldier charged with war crimes in international law involving the taking of innocent lives”.¹⁰²²

The majority found that ‘the *Einsatzgruppen* decision is in discord with the preponderant view of international authorities’.¹⁰²³ The majority surveyed numerous domestic legal systems, showing a divergent approach - mostly, albeit not strictly along the lines of division between ‘civil law’ and ‘common law’ countries. The former usually recognize duress as a general defence to all crimes, and the latter basically excepting murder.¹⁰²⁴ Assessing this inconsistent State practice, the majority arrived at the conclusion that no general principle of law has emerged and that no customary rule has crystallized.¹⁰²⁵ But in light of policy considerations, the majority applied the ‘common law’ exception to war crimes when such crimes involve the taking of innocent lives.¹⁰²⁶ This approach is reasonable if the war crime is murder.

¹⁰¹⁹ Ibid., p. 480.

¹⁰²⁰ Ibid.

¹⁰²¹ L. Oppenheim, 2 International Law 571-572 (H. Lauterpacht ed, 7th edn, 1952). Cited by Y Dinstein, ‘The Conduct of Hostilities under the Law of International Armed Conflict’, Cambridge University Press, 2004, p. 247.

¹⁰²² International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Prosecutor v Erdemovic* (1997), Case IT-96-22-A, 111 *ILR* 298 at 373.

¹⁰²³ Ibid., p. 338.

¹⁰²⁴ Ibid., p. 346-355.

¹⁰²⁵ Ibid., p. 344, 363.

¹⁰²⁶ Ibid., p. 373-374.

This proposition is founded on the simple rationale that neither ethically nor legally can the life of the accused be regarded as more valuable than that of another human being let alone a number of human beings. Hence, there is no excuse for the deprivation of the victim's life only because the accused felt that he had to act in order to save his own life and to serve deterrence for people in the future.

An attempt to circumvent the issue has been made in a dissent Judgment on Appeal in the *Erdemovic* case. The Judge opined:

“It is noteworthy that even this passage, while conceding that in some cases of duress moral choice is eliminated, confines itself to the choice between the victim's life or the life of the actor who is subjected to duress. It does not go to the necessarily stronger case where the victim's fate is sealed and all that remains for the actor is whether or not to join the victim in death”.¹⁰²⁷

However, the question whether the fate of the victim is really sealed, no matter how the accused responds to the duress, and what in all probability would happen to the accused if he/she resists duress, can only be speculated upon at the time of action. At that critical moment, the accused is not allowed to play God.¹⁰²⁸

8.4.1.2 Intoxication

Stanley Beck and Graham Parker observed¹⁰²⁹ that intoxication, whether brought about by drink or drugs, has the effect of impairing perception, judgment and muscular co-ordination. Thus it does affect the capacity and responsibility, a fact recognized under many legal systems around the world.¹⁰³⁰ Nevertheless, a

¹⁰²⁷ International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Prosecutor v. Erdemovic* (1997), Case IT-96-22-A, 111 *ILR* 298 at 455.

¹⁰²⁸ See Y Dinstein, 'The Conduct of Hostilities under the Law of International Armed Conflict', Cambridge University Press, 2004, p. 248.

¹⁰²⁹ S. Beck & G. Parker: 'The Intoxicated Offender-a Problem of Responsibility', (1966) 44 *Can. Bar. Rev.* 563. Cited by K.S. Chukkol, 'The Law of Crimes in Nigeria', ABU Press, (1988), p. 88.

distinction ought to be made between voluntary and involuntary intoxication. The former is a defence only in restricted circumstances,¹⁰³¹ but the latter affords a complete defence.

In Nigeria, involuntary intoxication affords a valid ground for complete exculpation provided that it renders the accused unable to know what he/she was doing or unable to appreciate the wrongfulness of the act. Both the Criminal Code applicable in the Southern States and the Penal Code applicable in the Northern States of Nigeria avoid recognising voluntary intoxication.¹⁰³²

Article 31(I)(b) of the Rome Statute excludes criminal responsibility if at the time of conduct:

The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the court."¹⁰³³

Intoxication is caused by the consumption of alcohol or drugs, and it is generally self-induced. Subject to an exception applying when the state of incapacity is procured *mala fide* i.e. intoxication with awareness of the risk of committing war crimes, Article 31(I)(b) allows for exculpation in other instances of voluntary intoxication.¹⁰³⁴

¹⁰³⁰ Ibid.

¹⁰³¹ See M.I. Khalil, 'Criminal Law Reform in Nigeria' Proceedings of the Law Teachers Conference held at Ife, 1974 p. 138. Cited by Prof.K.S. Chukkol, *The Law of Crimes in Nigeria*, ABU Press, (1988), p.88. Under Islamic Law and the Criminal Codes of Russia (Art. 12) and Norway (Sect. 45) voluntary intoxication is never a sufficient ground for exemption.

¹⁰³² See Section 29 Criminal Code, Cap 42 and Section 52 of the Penal Code, Cap 89, Laws of the Federation of Nigeria, 1990.

¹⁰³³ The Rome Statute of the International Criminal Court, 1998, 37 ILM 999 at 1018.

¹⁰³⁴ W.A. Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute (Part III)', (1998) 6 EJCLCJ 400 at 423.

8.4.1.3 Mistake of fact

A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.¹⁰³⁵ The mistake must be “a mistaken belief in the existence of any state of things”. Thus if a person is mistaken as to the existence of a certain state of facts his conduct may produce harmful results which he/she neither intends nor foresees.¹⁰³⁶ The defence of mistake of fact is readily recognised in Article 32(1) of the Rome Statute.

An act which would otherwise be a war crime may be excused should the Court be satisfied that the accused committed it under an honest but mistaken belief in the existence of facts which, if true, would have made his conduct legal. The defence of mistake of fact rests on the well-established principle *ignorantia facti excusat*. The International Committee of the Red Cross Model Manual offers the following example: an artillery commander opens fire at a building, believing that it is an enemy command post, while unknown to him it later turns out that the building was a school.¹⁰³⁷ Surely, the success of such defence depends entirely on the credibility of the defendant’s belief in a mistaken version of the facts.

8.4.1.4 Mistake of law

The defence of mistake of law is also admitted, under certain circumstances, by Article 32(2) of the Rome Statute. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in Article 33.¹⁰³⁸

The implication is that the norm *ignorantia juris non excusat* - widely accepted within national legal systems - does not apply automatically in war crimes trials.

¹⁰³⁵ The Rome Statute of the International Criminal Court, 1998, 37 ILM 999.

¹⁰³⁶ K.S. Chukkol, ‘The Law of Crimes in Nigeria’, ABU Press, (1988), p. 41.

¹⁰³⁷ A.P.V. Rogers and P. Malherbe, Model Manual on the Law of Armed Conflict 250 (ICRC, 1999).

¹⁰³⁸ The Rome Statute of the International Criminal Court, 1998, 37 ILM 999 at 1019.

As put by the Judge Advocate in the *Peleus* case of 1945: 'no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject'.¹⁰³⁹ The Geneva Conventions, as well as Protocol I, obligate the Parties to the conflict to disseminate their texts, both in peacetime and in wartime, so that they become known both to the armed forces and to the civilian population.¹⁰⁴⁰ Even if fully implemented, no programme of instruction in the Law of International Armed Conflict can be widespread, comprehensive and meticulous enough to cover all combatants and all contingencies. In certain conditions there may be no choice but to admit that, as a result of mistake of law, *mens rea* is negated.¹⁰⁴¹

Mens rea cannot be negated if the illegality of the war crime is obvious to any reasonable person. When an act is objectively criminal in nature, the accused will not be exculpated on the ground of an alleged subjective belief in the lawfulness of his behaviour. One can say that, when an act is manifestly illegal, an irrebuttable presumption (a *praesumptio juris et de jure*) is created and no evidence will be allowed as regards the subjective state of mind of the accused.¹⁰⁴²

8.4.1.5 Insanity

The rationale for exempting an insane person from criminal responsibility stemmed from the need to view the blameworthiness of the accused's mind as

¹⁰³⁹ *In re Eck and Others (The Peleus case)*, [1946] AD 248 at 249.

¹⁰⁴⁰ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), United Nations, Treaty Series, Vol. 75, p. 31. Entered into force on 21 October 1950. Laws of Armed Conflicts 373, 391 (Article 47); Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), United Nations, Treaty Series, Vol. 75, p. 85. Entered into force on 21 October 1950. Laws of Armed Conflicts 373, 418 (Article 48); Geneva Convention (III) relative to the Treatment of Prisoner of War (1949), United Nations, Treaty Series, Vol. 75, p. 135. Entered into force on 21 October 1950. Laws of Armed Conflicts 373, 476 (Article 127); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), United Nations, Treaty Series, Vol. 75, p. 287. Entered into force on 21 October 1950. Laws of Armed Conflicts 373, 547 (Article 144).

¹⁰⁴¹ Y Dinstein, 'The Conduct of Hostilities under the Law of International Armed Conflict', Cambridge University Press, 2004, p. 245.

¹⁰⁴² Y Dinstein, *The Defence of 'Obedience to Superior Orders' international Law* (1965), pp. 29-30.

the basis of criminal responsibility. Insane persons are for the most part unable to comply with the law and it will be morally unjustifiable to punish them. It will not serve its objective to punish an insane person for punishment in this instance cannot deter them nor can it deter others like them.¹⁰⁴³ Thus, as Bentham observed,¹⁰⁴⁴ punishment should be restricted to those who have a vicious will and an insane person ought to be excluded since on strict utilitarian grounds there is no wisdom in causing useless suffering. A similar view was expressed by the 17th century English writer, Coke, who remarked:

“A mad man does not know what he is doing and is lacking in mind and reason and therefore cannot have a felonious intent.”¹⁰⁴⁵

Article 31 (l)(a) of the Rome Statute excludes criminal responsibility if at the time of conduct:

“The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.”¹⁰⁴⁶

Insanity is thus a defence barring prosecution for war crimes. The presumption naturally is that every person is of sound mind. Under Article 31 (1)(a) quoted above, two cumulative elements must be established: (i) the existence of a mental disease or defect from which the accused suffers; and (ii) the destruction as a result of that disease or defect of the capacity of the accused to appreciate the unlawfulness of his/her act or to control his/her

¹⁰⁴³ See K.S. Chukkol, *The Law of Crimes in Nigeria*, ABU Press, (1988), p. 64.

¹⁰⁴⁴ J. Bentham, *The Principles of Morals and Legislation*, (ed.), H.A.L. Hart) Oxford, Cap. 13, p. 131 cited by K.S. Chukkol, *The Law of Crimes in Nigeria*, ABU Press, (1988), p. 64

¹⁰⁴⁵ *Beverley's Case* 2 Coke's Rep.571 (1603) cited by K.S. Chukkol, *The Law of Crimes in Nigeria*, ABU Press, (1988), p. 65.

¹⁰⁴⁶ The Rome Statute of the International Criminal Court, 1998, 37 ILM 999 at 1018.

conduct.¹⁰⁴⁷ The second element postulates that such capacity is destroyed, not merely diminished.¹⁰⁴⁸

8.4.1.6 Legitimate defence of oneself and others

One of the most fundamental rights of man is the right of self-preservation. There is a natural instinct to defend one and his/her property and positive law cannot but recognize this natural phenomenon. Article 31(l)(c) of the Rome Statute erases criminal responsibility if at the time of conduct:

“The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph”.¹⁰⁴⁹

Legitimate defence of oneself and of other persons clearly excludes liability for war crimes. In some specific situations, the defence extends to the protection of property.¹⁰⁵⁰ Whether the action taken is designed to protect the body or property, the principal condition for the applicability of the defence is that the person concerned behaves reasonably and in a manner proportionate to the

¹⁰⁴⁷ See P. Krug, ‘The Emerging Mental Incapacity Defense in International Criminal Court: Some Initial Questions of Implementation’, 94 AJIL 317, 322 (2000).

¹⁰⁴⁸ See A. Eser, ‘Article 31’, Commentary on the Rome Statute of the International Criminal Court 537, 546 (O. Triffterer ed, 1999).

¹⁰⁴⁹ The Rome Statute of the International Criminal Court, 1998, 37 ILM 999 at 1018.

¹⁰⁵⁰ See K. Ambos, ‘Other Grounds for Excluding Criminal Responsibility’, 1 Rome Statute of International Criminal Court: A Commentary (A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), 2002), p. 379 at 1033 and Prof K.S. Chukkol, ‘The Law of Crimes in Nigeria’, ABU Press, (1988), p. 100.

danger.¹⁰⁵¹ Thus, it is not allowed to cause disproportionately greater harm than the one sought to be avoided.

8.4.2 Inadmissible Defences

There are a number of spurious defence pleas, typical of war crimes trials, which must be dismissed.

8.4.2.1 Obedience to national law

“When the Law of International Armed Conflict directly imposes obligations on individuals, any national law which runs counter to these obligations is annulled by international law”.¹⁰⁵²

In *Justice Case* of 1947, another American Military Tribunal remarked that the defence plea of obedience to national law is founded on a basic misconception: when a national law, like the Nazi German law, obligates the commission of war crimes, the very enactment or enforcement of that law amounts to complicity with the crime, and complicity is no defence.¹⁰⁵³

8.4.2.2 Obedience to superior orders

The plea of obedience to superior orders is most characteristic of war crimes trials, but under Article 8 of the London Charter the fact that a defendant acted pursuant to orders does not free him from responsibility, although it may be considered in mitigation of punishment.¹⁰⁵⁴ The proper meaning of this provision is that obedience to superior orders must not play any part at all in the evaluation of criminal responsibility, in connection with any defence whatever, and it is only relevant in the assessment of punishment.¹⁰⁵⁵ The International Military Tribunal

¹⁰⁵¹ See A. Eser, ‘Article 31’, Commentary on the Rome Statute of the International Criminal Court 537, (O. Triffterer ed, 1999) at 549.

¹⁰⁵² The High Command case (USA v. von Leeb et al.) (American Military Tribunal, Nuremberg, 1948), 11 NMT 462.

¹⁰⁵³ Justice case (USA v. Altstoetter et al.) (American Military Tribunal, Nuremberg, 1947), 3 NMT 954 at 984.

¹⁰⁵⁴ Charter of the International Military Tribunal, Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 1945, Law of Armed Conflict 911 pp 914-915.

at Nuremberg fully endorsed the provision of Article 8, while introducing in a somewhat improper context the moral choice test.¹⁰⁵⁶

Article 33(1) of the Rome Statute employs a distinct language:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a government or of a superior, whether military or civilian shall not relieve that person of responsibility unless:

(a) The person was under a legal obligation to obey orders of the government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.¹⁰⁵⁷

The basic precept of the Rome Statute is the same as that of the London Charter obedience to superior orders is not a defence. All the same, unlike the latter, the Statute recognizes an exception related to the defence of mistake of law as defined in Article 32(2). When three cumulative conditions are met; namely, the existence of a legal obligation to obey the order; the lack of knowledge of the order's illegality; and the fact that the order is not manifestly unlawful, then criminal responsibility can be relieved. This text provides a fragmented solution to a wider-ranging problem. There is nothing wrong with looking at obedience to superior orders through the lens of the defence of mistake of law, in the context of knowledge of the law and manifest illegality. At the same time, it is wrong to focus on obedience to superior orders as an exclusive defence. The framers of Article 33(1) disregarded other possible combinations between obedience to superior orders and the defences of mistake of fact and duress.

¹⁰⁵⁵ Y Dinstein, *The Defence of 'Obedience to Superior Orders'* international Law (1965), p. 117.

¹⁰⁵⁶ International Military Tribunal (Nuremberg), Judgment and Sentences, 1946, 41 AJIL 172, (1947) at 221.

¹⁰⁵⁷ The Rome Statute of the International Criminal Court, 1998, 37 ILM 999 at 1019.

However, there is no difference in this respect between mistake of law, mistake of fact and duress, which in practice are all often intertwined with the fact of obedience to superior orders. When the evidence shows that the accused obeyed orders under duress, she/he ought to be relieved of criminal responsibility provided that the mistake was within the legitimate scope of that defence; or it was without being aware of the true state of affairs or the illegality of the order, and within the permissible bounds of the dual defence of mistake.¹⁰⁵⁸

The fact that a defendant acted in obedience to superior orders cannot constitute a defence *per se*. However, it provides a factual element which may be taken into account in conjunction with other circumstances within the compass of an admissible defence based on lack of *mens rea*, especially, duress or mistake. This statement of the law was subscribed to in the Judgment of the majority of the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia in the *Erdemovic* case.¹⁰⁵⁹

8.4.2.3 Official position and immunities

According to H. Kelsen and others, war crimes are imputed by international law to the State, and no criminal responsibility can be attached to individuals acting in their capacity as organs of that State.¹⁰⁶⁰ However, Article 7 of the London Charter takes the opposite stand: the official position of a defendant does not free her/him from responsibility, nor will it mitigate his punishment.¹⁰⁶¹ The International Military Tribunal at Nuremberg absolutely repudiated the thesis of official immunity from responsibility:

¹⁰⁵⁸ See Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, 2004, p. 251.

¹⁰⁵⁹ International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Prosecutor v. Erdemovic* (1997), Case IT-96-22-A, 111 *ILR* 298 at 333.

¹⁰⁶⁰ See H. Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals', (1942-3) 31 *CLR* 530 at 549-552.

¹⁰⁶¹ Charter of the International Military Tribunal, Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 1945, *Law of Armed Conflict* 911 at 914.

“The principle of international law, which under certain circumstances protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings”.¹⁰⁶²

Article 27(1) of the Rome Statute is even more detailed:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.¹⁰⁶³

As a general rule today, the attribution of an act to the State does not remove the criminal liability of individuals whether they acted on behalf of the State or on their own.¹⁰⁶⁴

The existence of individual criminal responsibility for acts of State does not invalidate the possibility of jurisdictional immunity, either *ratione personae* or *ratione materiae*, of some State officials most especially, diplomats and Heads of State - applicable to war crimes. The significance of the matter gained much attention when the International Court of Justice, in the *Arrest Warrant* case of 2002, pronounced that Belgium must respect the immunity from jurisdiction

¹⁰⁶² International Military Tribunal (Nuremberg), Judgment and Sentences, 1946, 41 AJIL 172, (1947) at 221.

¹⁰⁶³ The Rome Statute of the International Criminal Court, (1998), 37 ILM 999 at 1017.

¹⁰⁶⁴ See Article 58 and Commentary, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission, 53rd Session (2001), pp. 363-365.

enjoyed by the incumbent Foreign Minister of Congo, even when the charge is commission of war crimes¹⁰⁶⁵

Although the Court addressed the subject of jurisdictional immunity only in so far as national courts are concerned,¹⁰⁶⁶ it would be improper to ignore the issue in international criminal proceedings. However, Article 27(2) of the Rome Statute prescribes:

“Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.¹⁰⁶⁷

This provision amounts to a waiver by States Parties of any jurisdictional immunity that might otherwise benefit the accused.¹⁰⁶⁸ Such a waiver is entirely legitimate, since jurisdictional immunity must not be confused with release from criminal responsibility. As the Court in the *Arrest Warrant* case rightly emphasized:

“while jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility”.¹⁰⁶⁹

A defence plea held to be inadmissible for relieving the accused of responsibility may be considered in mitigation of punishment like in the *Arrest Warrant* case. Article 8 of the London Charter removes the plea of obedience

¹⁰⁶⁵ *Case Concerning the Arrest Warrant of April 2000 (Congo v. Belgium)*, (2002), 41 ILM 536 at 557.

¹⁰⁶⁶ *Ibid.*

¹⁰⁶⁷ The Rome Statute of the International Criminal Court, (1998), 37 ILM 999 at 1017.

¹⁰⁶⁸ See P. Gaeta, ‘Official Capacity and Immunities’, Rome Statute Commentary (A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.)), (2002), pp. 975, 992-995.

¹⁰⁶⁹ *Case Concerning the Arrest Warrant of April 2000 (Congo v. Belgium)*, (2002), 41 ILM 536 at 551.

to superior orders from the purview of any defence but allows weighing that fact in mitigation of punishment, 'if the court determines that justice so requires'.¹⁰⁷⁰ Evidently, when alleviation of punishment is permitted, it is not mandatory but merely within the discretion of the court. Strictly speaking, it should be noted that obedience to superior orders may be entirely rejected as a mitigating factor.

However, there are multiple illustrations of lenient sentences imposed on persons acting in obedience to superior orders where the crimes are less egregious.¹⁰⁷¹ In the *Erdemovic* case, the Trial Chamber recorded that tribunals have tended to show more leniency in cases where the accused arguing a defence of superior orders held a low rank in the military or junior civilian official.¹⁰⁷² The Trial Chamber rightly added, however, that obedience to superior orders may serve in mitigation of punishment only when the orders had an influence on the behaviour of the accused, and not when she/he was nonchalantly prepared to carry out the criminal act.¹⁰⁷³

¹⁰⁷⁰ Charter of the International Military Tribunal, Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 1945, *Law of Armed Conflict* 911 at 914-915.

¹⁰⁷¹ Y Dinstein, *The Defence of 'Obedience to Superior Orders' international Law* (1965), p 117 at 188, 205-206.

¹⁰⁷² International Criminal Tribunal for the former Yugoslavia, Trial Chamber, *Prosecutor v. Erdemovic* (1996), Case IT-96-22-T, 108 ILR 180 at 199.

¹⁰⁷³ *Ibid.*, p. 200.

CHAPTER NINE

Conclusions and Recommendations

9.1 General Conclusions

In considering the future of child soldiers, the world should look beyond what seems immediately possible and find new ways and means to shield children from the ghastly consequences of war. This requires a concerted effort to address the causes of conflicts and to deal with potential areas of conflict. The good thing is that the legal development for child soldiers has made great advances in the past twenty years. When the CRC was adopted in 1989, it received a record number of signatures and entered into force only after ten months. Before then, there was little to protect or even acknowledge the existence of child soldiers. There is now a clear and overwhelming moral case for protecting all children while seeking the peaceful resolution of wars and challenging the justification for any armed conflict. That children are still being so shamefully abused is a clear indication that we have barely begun to fulfil our obligations to protect them. The immediate wound to child soldiers, the physical injury, sexual violence, psychosocial distress, affronts each and every humanitarian impulse that inspired the adoption of CRC. The Convention commits States to meet a much broader range of children's rights, to fulfil their rights to health, to education and to growth and development within, a caring and supportive environment within families and communities.

The flagrant abuse and exploitation of children during armed conflict can and should be eliminated. For too long, states (and non state actors) had given ground to spurious claims that the involvement of children in armed conflict is regrettable but inevitable. It is not. Children are regularly caught up in warfare as a result of conscious and deliberate decisions made by governments, driven by adults. We must challenge each of these decisions and we must refute the flawed political and military reasoning and the cynical attempts to disguise child soldiers as merely the youngest volunteers.

International organizations and every element of civil society should initiate and support global action to protect children from recruitment as soldiers. All possible efforts should be made to maintain education systems during conflicts. The international community should insist that Government or non-state actors involved in conflicts do not target educational facilities, and indeed promote active protection of such services; Preparations should also be made for sustaining education outside of formal school buildings, using community facilities and strengthening alternative education through a variety of community channels. The establishment of educational activity, including the provision of teaching aids and basic educational materials, should be accepted as a priority component of humanitarian assistance. International communities can establish camps for refugees or internally displaced persons where children should be brought together for education. Incentives for attendance would also be encouraged through, for example, measures to promote safety and security. Special emphasis should be placed on providing appropriate educational activities for adolescents.

Besides promoting access to secondary education, international agencies and NGOs should also develop age-appropriate educational programmes for out of school youth in order to address their special needs and reflect their rights to participation, support for the establishment and continuity. Education should be a priority strategy for donors and NGOs in conflict and post-conflict situations. Training should equip teachers to deal with new requirements. These will include recognizing signs of stress in ex-child soldiers as well as imparting vital survival information on issues such as landmines, health and promoting respect for human rights.

The international community should ensure that whenever sanctions are imposed they provide for humanitarian, child-focused exemptions. The international community should establish effective monitoring mechanisms, develop clear guidelines and impact assessment on child soldiers. Humanitarian assistance programmes of the United Nations specialized agencies and of NGOs should be exempt from approval by the Security Council Sanctions Committee.

A primary concern when planning a targeted sanctions regime should be to minimize its impact on vulnerable groups, and particularly ex-child soldiers. Sanctions or other measures taken by the Security Council should not target ex-child soldiers that the international community wishes to change. The Security Council Sanctions Committee should closely monitor the humanitarian impact of sanctions and amend sanctions immediately if they are shown to cause undue suffering to ex-child soldiers.

The international community should ensure the task of rebuilding war-torn societies. Reconstruction must relate to the ex-child soldiers and their families especially where these children acted as the heads of families. Programmes designed during reconstruction can lay the foundations for ex-child soldiers' protection and strengthen social infrastructure, particularly in relation to health and education. Child soldiers are rarely mentioned in reconstruction plans or peace agreements, yet children must be at the centre of rebuilding post-conflict societies.

Governments should give priority to preventive measures by ensuring balanced economic, social and human development through capacity building and the equitable reallocation of resources. States should enact measures to eliminate discrimination, particularly against ex-child soldiers and should carry out their responsibilities to ensure their protection.

Governments should create enabling environments within which civil society can work on issues related to ex-child soldiers and should actively encourage and support coalitions that represent the views of parliamentarians, the judiciary, religious communities, educators, the media, professional associations, the private sector, NGOs and ex-child soldiers themselves. Such coalitions will facilitate service delivery, social mobilization and advocacy of ex-child soldiers affected.

Following conflicts and during periods of transition, the International community should ensure that health, education and psychosocial support are central to reconstruction efforts. DDR of all armed groups discussed in paragraphs 6.6 above must become immediate priorities. To achieve reconciliation, it is essential for the international community to engage in national-level dialogues with the military, to strengthen their judicial systems, to carry out human rights monitoring and to establish investigative mechanisms, tribunals, and if feasible, truth commissions that consider violations of children's rights. Multilateral, bilateral and private funding sources should be committed to the implementation of the CRC as part of the process of development and post-conflict reconstruction.

It is necessary continue to monitor the measures adopted by States Parties to ensure compliance with the principles and provisions of the CRC. Particular consideration should be given to steps undertaken to promote respect for children's rights and to prevent the negative effects of conflicts on children especially eradication of children recruitment into military services, as well as to any violation of children's rights committed in times of war.

The International community should work closely with UN agencies such as FAO, UNHCR, UNICEF, WHO, UNESCO etc to develop, implement and share guidelines on appropriate support, to strengthen the capacity of the states to care for their ex-child soldiers, and to ensure that programmes are linked to development activities. Education has a crucial preventive and rehabilitative part to play in fulfilling the needs and rights of children, particularly those in conflict and post-conflict situations. UNESCO's expertise in education, curricula development and teacher training should be utilized in support of educational programmes run by operational agencies in all phases of conflict, but especially during emergency situations and in the critical period of rehabilitation and reconstruction.

Moreover, African countries can play a leading role in ensuring that the standard adopted by AU is respected and the minimum age of recruitment set at 18 years is protected in practice. All peace agreements should include specific measures

to demobilize and reintegrate child soldiers into society. There is an urgent need for the international community to support programmes, including advocacy and social services, for the demobilization and community reintegration of child soldiers.

The treatment of rape as a war crime must be clarified, pursued within military and civilian populations and punished accordingly. Appropriate legal and rehabilitative remedies must be made available to reflect the nature of the crime and its harm to the victim and society. Support programmes should be established for victims of sexual abuse and gender-based violence. These should offer confidential counseling on a wide range of issues, including the rights of victims. Such programmes should also provide educational activities and skills training.

The straight-18 approach is closer to realize than ever to before, this is evidenced by recruiters now partly accountable for their actions, the prohibition on child recruitment having been declared international customary law, restriction imposed on recruitment of child soldiers within their countries, under-15-year-olds prohibited from all participation in hostilities, restriction on under-18-year-olds to participate and voluntarily enlist.

9.2 Recommendations

There is need to expand the definition of 'child soldier' to include children up to 18 years old so as to protect a large number of casualties usually recorded within this age group. The definition should be expanded to encompass the age group of 16-18 years, so as to ensure that those enlisted in the army are mature and can protect themselves. This will also be in line with the age of maturity accepted globally which is generally put at 18 years. Specifically in most countries, voting age is 18 years.

Moreover, support should be given to the United Nations Committee on the Rights of the Child, UNICEF and Red Cross in their efforts to eradicate the use of children under 18 years as soldiers.

While the Security Council has the power to intervene in conflict situation, a greater role in such intervention should be played by relevant regional organisations. The UN Charter accords the primary responsibility of the Security Council in matters involving the use of armed force for the protection of the civilian and children in war including child soldier; this primary responsibility of the Council should be recognised. The implication of such recognition to the international community is that the Council should supervise all humanitarian interventions. The Security Council should authorize all instances of humanitarian intervention to protect child soldiers. Where the Council authorizes a regional or sub-regional organisation to intervene, the intervening organisation should keep the Council updated on all developments relating to the intervention, particularly as it relate to child soldiers.

Logically, it is necessary that countries constituting a regional or sub-regional intergovernmental organisation be mandated and supported financially to intervene on behalf of the UN Security Council. Regional or sub-regional organisations are suitable for a rapid response to a humanitarian emergency due to the geographical proximity to the target state.

The effects may be in the form of trans-border refugee flows or proliferation of illegality held arms. It follows that states in a regional or sub-regional organisation to which the target states belongs are most likely to be interested in addressing the gross human rights violations in the target state. The involvement of regional or sub-regional organisations also enhances burden sharing in the maintenance of international peace and security and consequently makes the work of the Security Council more effectively.

There is need to reform the Security Council by enlarging its membership. In order to provide equitable geographical representation, the membership of the Council should be increased to give each of the UN regional bloc equal representation. At least two permanent seats in the Council should be reserved each for Africa, Asia and Latin America. Reform of the Security Council are likely to increase the legitimacy of the Council among UN member state .Also, the work of a reform Council relating to child soldiers protection will most likely attract a board based consensus and ultimately compliance.

There is need to define criteria for intervention to stop the use of child soldiers. Although it has been argued that intervention is necessary to protect child

soldiers drafted into hostilities, it is important to set criteria that should be taken into account before the UN Security Council mandate the use of force. The criteria should prioritise preventives measures before force is actually used to pre-empt or end gross human rights violation during hostilities. The use of force should be proportionate and should only be sufficient to address the gross human right violations and protection of child soldiers and civilians held hostage in hostilities. As soon as the objectives of intervention are realized, the intervening parties should withdraw.

The Secretary-General of a regional organisation should serve as liaison officer to the UN Secretary-General as to keep the region more informed in the activities of the UN. This would to reduce the veto power of the five permanent members of the Security Council who sometimes take irrational decisions without full consultation with the concerned regional organisations, especially where the interests of the super power are affected.

The spread of light weapons of all kinds has caused untold suffering to millions of children caught up in armed conflict. Many of these weapons have a devastating impact not only during the period of conflict, but for decades thereafter. Landmines and unexploded ordnance probably pose the most insidious and persistent danger. Added to this number are millions of items of unexploded ordnance, bombs, shells and grenades that failed to detonate on impact. Like landmines, unexploded ordnance are weapons deemed to have indiscriminate effects, triggered by innocent and unsuspecting passers-by. Landmines have been employed in most conflicts since the Second World War, and particularly in internal conflicts. Afghanistan, Angola and Cambodia alone have a combined total of at least 28 million landmines.¹⁰⁷⁴ The UN should ban trading in landmine and light arms which is within the capacity of children to carry.

The International community should monitor health situation and all medical facilities so as to ensure that they are not diverted by commanders. Child soldiers especially females are mostly victims of rape and other sexual diseases. Sexual exploitation has a devastating impact on physical and emotional development.

¹⁰⁷⁴ Machel, n. 60 above, p. 26.

Unwanted and unsafe sex is likely to lead to sexually transmitted diseases and HIV/AIDS, which not only affect immediate health but also future sexual and reproductive health and mortality.

Adolescent girls may nonetheless suffer in silence after the trauma of sexual exploitation; they often fear reprisals from those who attacked them or suffer rejection by their families, not to mention the sheer personal humiliation and anguish which causes so many of them to withdraw into a shell of pain and denial. WHO has found that among rape victims the risk of suicide is high.¹⁰⁷⁵ When a pregnancy is forced, the determination about whether it will be carried to term depends on many local circumstances, including access to and the safety of abortion, community support systems and existing religious or cultural mores.

All women and young girls who give birth during conflict must contend with the unexpected economic and psychosocial consequences of raising a child without adequate systems of support. The deterioration of public health infrastructure reduces access to reproductive health services, such as family planning, treatment for sexually transmitted diseases and gynecological complications, and pre- and post-natal care. Complications in pregnancy and delivery are especially likely for children who have children. Owing to their physical immaturity, many pregnant adolescents experience infection as a result of unsafe or incomplete abortion.

Victims of repeated rape and young girls who give birth in the absence of trained birth attendants and in unhygienic conditions are at greater risk of chronic pelvic inflammatory diseases and muscle injury that can result in incontinence. Without sensitive, timely and adequate medical care, many of these victims die. Some commit suicide because of the humiliation and embarrassment they suffer.

The media should be encouraged to expose the use of child soldiers and the need for demobilization. Special efforts should be made for demobilized

¹⁰⁷⁵ Ibid.

adolescent soldiers, including developing projects which offer alternative livelihoods and promote their reintegration into their communities. Human resources development, including youth education, employment and training schemes, should be promoted. Intergovernmental bodies, United Nations programmes and funds agencies and other organizations should support government efforts in strengthening national legislative frameworks. United Nations bodies and NGOs are urged to give urgent attention to the situation of child-headed households and develop policy and programme guidelines to ensure their protection and care.

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