

**CHILDREN AT BOTH ENDS OF THE GUN: TOWARDS A
COMPREHENSIVE LEGAL APPROACH TO THE
PROBLEM OF CHILD SOLDIERS IN AFRICA**

**A DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF
PRETORIA, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE
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DECLARATION

I, **Benyam Dawit Mezmur**, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that secondary information used has been duly acknowledged in this dissertation.

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LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
AFRC	Armed Forces Revolutionary Council
APRM	African Peer Review Mechanism
AU	African Union
CRC	Convention on the Rights of the Child
CROC	Committee on the Rights of the Child
DDR	Disarmament, Demobilisation and Reintegration
DRC	Democratic Republic of Congo
ECOMOG	Economic Community of Western African States Monitoring Group
GA	General Assembly
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTR	International Tribunal for Rwanda
ICTY	International Tribunal for the Former Yugoslavia
ILO	International Labor Organization

LRA	Lord's Resistance Army
NEPAD	New Partnership for Africa's Development
NGOs	Non-governmental organizations
OAU	Organization of African Unity
RUF	Revolutionary United Front
SC	Security Council
SCSL	Special Court for Sierra Leone
TRC	Truth and Reconciliation Commission
UNICEF	United Nations Children's Fund
UN	United Nations

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CHAPTER ONE

INTRODUCTION

1.1 Background to the study

While the participation of children in armed conflict has been evident for some time, internal community mobilization on the issue is fairly recent. In 1993, the General Assembly of the United Nations adopted resolution 48/157 in response to a request by the Committee on the Rights of the Child.¹

At the present the Coalition to Stop the Use of Child Soldiers reports that approximately 300,000 children in over 40 countries worldwide are engaged in armed conflict.² Of the estimated 300,000 child soldiers in the world, 120,000 can be found in Africa alone.³

Apart from making them direct combatants, both governments and armed groups use children as messengers, lookouts, porters, spies able to enter small spaces, and even use them as suicide bombers and human mine detectors.⁴ In the due course of such use and abuse children are forced to kill or are themselves killed, sexually assaulted, raped, forced to become wives of the commanders, exposed to drugs and forced labour, showing the cross cutting nature and magnitude of the problem of child soldiers.

There are a variety of international legal standards which, at first glance, seem to give some direction and guidance in the protection of child soldiers. In spite of these legal instruments for the protection of child soldiers in Africa, however, much remains to be done as the problem is continuing at a larger scale every day and new challenges keep cropping up.⁵ This study will look into ways of addressing these problems in the context of Africa.

¹ The General Assembly requested the Secretary General to appoint an expert to head a study on children in armed conflicts (including combatants). G Machel was appointed in 1994 and her report was submitted in 1996.

² See <<http://www.child-soldiers.org/childsoldiers/some-facts>> (accessed 22 March 2005).

³ The areas most affected by the use of children in armed conflicts include Algeria, Angola, Burundi, Congo-Brazzaville, the Democratic Republic of Congo (DRC), Liberia, Rwanda, Sierra Leone, Sudan, and Uganda. For instance in Northern Uganda, the Lord's Resistance Army (LRA) abducted at least 20,000 children during the 19-year conflict with the government, with 5000 children taken since June 2002. Uganda ratified the CRC in September 1990 and the Optional Protocol in June 2002.

⁴ Human Rights Watch (HRW) *Facts about child soldiers* (2004)

<<http://www.humanrightswatch.org/campaigns/crp/facts.htm>> (accessed 22 March 2005).

⁵ One new challenge that has become very rampant in recent years, for instance, is cross-border recruitment.

Therefore, in order to address the issue to the best possible level, the normative framework in place may need to be strengthened. Moreover, in an attempt to be comprehensive in addressing the problem, ways of dealing with child soldiers who have allegedly committed atrocities during armed conflict should be included. This piece explores how these issues could possibly be addressed to provide for protection to the child soldier in Africa.

1.2 Research questions

The main question this study attempts to ask is “is the existing legal regime governing child soldiers in Africa sufficient and effective?” The sub-categories of questions include

- If not, what are the flaws?
- How have these flaws affected the lives of child soldiers in Africa?
- What is the best way to go about addressing these flaws?
- What possible normative as well as implementation mechanisms can be put in place at the continental level in addressing the issue?

1.3 Significance of the study

This study is particularly significant as it seeks to explore and to outline a big challenge to Africa - the problem of child soldiers. The value added of the study will be its proposal to address the problem in a comprehensive way. It will also have an upper hand in that it will take into account recent developments relevant to the field. The study aims to ask hard questions about the gap between law and reality on the ground and about the utility of stronger laws and new approaches to enforcement. The study will look at child soldiers as victims and “perpetrators” as both aspects of the problem call for a response if the child is to be fully protected. As the subject under consideration is of particular pertinence to the current African situation, at the minimum for the lives of 120,000 child soldiers in the continent,⁶ the study is not of academic interest only.

⁶ HRW *More than 120,000 child soldiers fighting in Africa* (2004)
<<http://hrw.org/english/docs/1999/04/19/africa852.htm>> (accessed 22 March 2005).

1.4 Literature review

Generally speaking on research done on the issue of child soldiers, Danso rightly argues that since the problem of children in armed conflict has only recently been pushed onto the international stage, theoretical discourses on the subject are relatively few.⁷ Most of the work that has been done in this area has been based on fieldwork research and linked to the programme of non-governmental organizations (NGOs).⁸ Thus, there is a growing need for a theoretical framework within which the discussion, design and implementation of programmes for the prevention and rehabilitation of child soldiers can be situated.

Barnitz's work on the subject matter is a useful summary of the employment of 300,000 child soldiers throughout the world.⁹ Goodwin-Gill examines the failure of laws protecting children from military service and abuse by the military.¹⁰ There is also work done from the perspective of international humanitarian law by Sassoli and Bouvier dealing with children affected during armed conflict.¹¹

International human rights organizations like Human Rights Watch (HRW) and Amnesty International have done reports on the subject focusing on the problem in particular countries.¹² HRW has also published a more detailed examination of child soldiers in Burma, where observers believe more youngsters are recruited or forced into the army than in any other country.¹³

One major work worth mentioning is the 1996 report prepared by Machel.¹⁴ Although this report is a detailed one, it is to a certain extent outdated and fails to directly address some of the questions posed by this study.

⁷ A Danso "The co-option of childhood: Africa's young soldiers"
<<http://www.iss.co.za/Pubs/monographs/no82/intro.html>> (2003) (accessed at 31 March 2005).

⁸ As above.

⁹ LA Barnitz *Child Soldiers: Youth Who Participate in Armed Conflict* (1997).

¹⁰ GS Goodwin-Gill *Child Soldiers: A Study on Behalf of the Henry Dunant Institute* (1994)

¹¹ M Sassoli and A Bouvier *How does law protect in war?* (2003).

¹² See, for instance, HRW *Easy Prey: Child Soldiers in Liberia* (1994).

¹³ HRW *My gun was as tall as me: Child soldiers in Burma* (2002).

¹⁴ G Machel *Report to the Secretary General on the impact of armed conflict on children* (1996)
<<http://www.unicef.org/graca>> (accessed 17 July 2005).

Once the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict¹⁵ (Optional Protocol) came into effect in February 2002 there has not been much research undertaken in looking into the legal framework governing child soldiers at the global but more so at the regional level. This seems to emanate from the belief that the Optional Protocol has addressed all of the already existing problems and nothing remains to be addressed. In this regard, Cohn argues that the Optional Protocol has firmly strengthened the legal regime relevant to child soldiers in many ways.¹⁶

1.5 Methodology

The research shall mainly be library based with documented facts on the subject being explored.

1.6 Limitations of the study

The scope of the paper was limited in terms of volume. This means that the paper only highlights the main areas of the problem of child soldiers in Africa.

1.7 Overview of chapters

The study consists of five chapters. Chapter one will set out the content in which the study is set. It highlights the basis and structure of the study. The second chapter will look into the magnitude and nature of the problem and the development of the standards for the protection of child soldiers both at the international and the regional level. The third chapter, which will use the second one as a background, will critically reflect on the gaps and opportunities created by the normative framework protecting child soldiers in Africa.

¹⁵ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, (adopted 25 May 2000 and entered into force February 2002), U.N. GAOR, 54th Sess., UN Doc. A/RES/54/263 (2000).

¹⁶ I Cohn "Progress and hurdles on the road to preventing the use of child soldiers and ensuring their rehabilitation and reintegration" (2004) 37 *Cornell International Law Journal* 531.

A comprehensive approach in addressing the problem of child soldiers calls for setting out possible mechanisms in treating child soldiers both as victims and “perpetrators”. Speaking of child soldiers as perpetrators, the fourth chapter will set out the ways and means to be adopted in calling child soldiers to account for atrocities committed during armed conflict. Under the final chapter, which is chapter five, a conclusion is drawn and the way forward is indicated through recommendations.

CHAPTER TWO

THE LEGAL PROTECTION OF CHILD SOLDIERS IN AFRICA

2.1 Introduction

One of the most alarming trends relating to children and armed conflicts is their participation as soldiers. Children are fighting in nearly every major armed conflict in the world today.¹⁷ While the use of child soldiers is a worldwide problem, it is particularly acute in Africa.¹⁸ In recent years, the use of child soldiers by both government forces and insurgent groups in African countries such as Angola, Burundi, the Democratic Republic of the Congo, Sierra Leone, and Sudan has been witnessed and harshly condemned by the international community.¹⁹

Over the past twenty years, the international child rights movement has undertaken the development of international law, policies, and programs for the protection of children. As part of the move to alleviate the problem, legal devices have been created which address the involvement of children in armed conflict. The areas of law covering this are humanitarian law, human rights law, international criminal law and labour law. Applicable instruments include the four Geneva Conventions of 1949²⁰ and their two Additional Protocols,²¹ the Convention on the Rights of the Child (CRC),²² the African Charter on the Rights and Welfare of the Child (“African Children’s Charter”),²³ the Rome Statute,²⁴ the International Labour Organization's Convention No. 182 on the Elimination of the Worst Forms of Child Labour (“ILO Convention 182”),²⁵ and the Optional Protocol. The

¹⁷ J Becker ‘Child soldiers: Changing a culture of violence’ (2005) 32 *Human Rights Winter* 16.
¹⁸ (n 6 above).

¹⁹ For example, the UN Security Council (UNSC) passed a number of resolutions condemning the use of child soldiers. These include resolution no. 1261 (1999), 1314 (2000) and 1539 (2004).

²⁰ Geneva Conventions (first, second, third and fourth) (adopted 12 August 1949 and entered into force 1950).

²¹ Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 1977 and entered into force 1979); Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, (adopted 1977 and entered into force 1979).

²² UN Convention on the Rights of the Child (adopted 20 November 1989) (entered into force September 1990).

²³ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (adopted 1990), (entered into force 29 November 1999) < [http:// www.africa-union.org](http://www.africa-union.org)>.

²⁴ Rome Statute of the ICC (adopted 17 July 1998) (entered into force in 2002).

²⁵ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, (adopted 17 June 1999).

following section presents the chronological discussion of the creation and development of these devices with a special emphasis on their protection of child soldiers.

2.2 The four Geneva Conventions and the two Additional Protocols

The four Geneva Conventions of 1949 and their two Additional Protocols together make up the body of international humanitarian law. In the Geneva Conventions, children are protected as members of the civilian population and therefore, by definition, as non-participants in the armed conflict.²⁶ Although child participation had taken place in the past, such occurrences were exceptional.

Accordingly, under the fourth Geneva Convention on the Protection of Civilians, specific provisions were drawn up to ensure special treatment for children with regards to material for relief, distribution of food, medical care, as well as family reunification.²⁷ Therefore these provisions fail short of addressing the protection of child soldiers specifically. The application of the Geneva Conventions is also limited to international armed conflicts.

However, in regard to the two Additional Protocols, Additional Protocol I provides for the protection of victims of international armed conflict.²⁸ Moreover, Additional Protocol II provides for similar protections except it is geared toward non-international armed conflicts.²⁹ While article 4(3)(c) of Additional Protocol II specifically prohibits the recruitment of children under fifteen years of age and their participation, whether direct or indirect, in hostilities, article 4(3)(d) provides that children under fifteen who take direct part in the hostilities and whom enemy forces capture do not lose the special protections guaranteed under article 4. There is some evidence to suggest that the states participating in the Diplomatic Conference - the gathering of state representatives that negotiated the instrument - indeed intended to impose a stricter standard on parties

²⁶ The Fourth Geneva Convention of 1949 protects civilians. The other three deal with soldiers and prisoners of war. No specific provisions on children are included.

²⁷ See for example articles 14, 17, 23, 24, 38, 50, 82, 89, 94, and 132 of the fourth Geneva Convention.

²⁸ Additional Protocol I provides for the protection of children and their interests during crisis. These protections include for example article 14, 17, 23, 24, 38, 50, 82, 89, 94, and 132.

²⁹ Articles 4, 6, 78, and 79 of Additional Protocol II.

involved in an internal armed conflict than on those involved in international armed conflict.³⁰

The rules of international humanitarian law thus recognize the vulnerability of children in armed conflicts and establish a series of rules aiming to protect children against the effects of war. The Additional Protocols in particular provide some degree of protection for children during hostilities and regulate, for the first time recorded in international law, their participation in armed conflicts.

2.3 Convention on the Rights of the Child

Children are protected by general human rights instruments. In addition, they are entitled to the protection under child rights instruments directly addressed to them.³¹ Among these instruments is the CRC which the UN General Assembly adopted on 20 November 1989 and which came into force in September 1990. The CRC is the most comprehensive and widely ratified human rights treaty in existence.³² It sets out a comprehensive array of civil and political as well as the economic, social and cultural rights of children, therefore serving as a milestone in the establishment and recognition of children's rights.

The CRC has also created a chance to address explicitly the problem of child soldiers. As Fontana maintains

[w]hen the UN embarked on the drafting of a convention that would solely address the rights of the child, the inclusion of a provision addressing the situation of armed conflicts was considered essential. Some states and non-government agencies hoped it would be the perfect opportunity to improve the provisions of International Humanitarian Law on the question of age, type of recruitment, and type of participation.³³

Accordingly, article 38 of the CRC provides that State Parties undertake to respect and to ensure respect for relevant rules of international humanitarian law; to ensure that children under 15 do not take a direct part in hostilities; to refrain from recruiting those under 15 and give priority to the oldest among those under 18; and, in accordance with

³⁰ Institute for Security Studies 'Child soldiers and international law' (1997)

<<http://www.iss.co.za/Pubs/ASR/6No3/Fontana.html>> (accessed 17 March 2005).

³¹ Before the CRC, children were protected under, for instance, the Declaration of the Rights of the Child, Proclaimed by General Assembly resolution 1386(XIV) of 20 November 1959.

³² The only non-parties in the world are the US and Somalia.

³³ (n 30 above).

international humanitarian law, to ensure protection and care of children affected by armed conflict.³⁴

This provision is derived from article 77 of Additional Protocol I. During the drafting stage of the CRC,³⁵ although there was attempt to provide for a better standard of protection than the one in Additional Protocol I, it did not materialise.³⁶ The representative from the US argued that “because the language used in the Additional Protocol was a result of a lengthy debate in the Diplomatic Conference convened during the last decade to draft the Protocols, a working group on a draft CRC was not an appropriate forum to revise existing international law in this area.”³⁷

The adoption of the CRC no doubt positively contributes to the rights of children. The recognition by the CRC, under article 38, of human rights law and humanitarian law makes it an unusual treaty.³⁸ It is an indication that, at least in relation to children, the two can no longer be seen as distinct bodies of law.³⁹

However, in relation to article 38, what comes as a surprise at first glance is that, even though article 1 defines a child as “any person under the age of 18 unless under the law applicable to the child, majority is attained earlier”, it provides for a minimum age of recruitment at 15 years. The “straight 18” position could not be adopted as it faced a serious challenge from countries like the US. It is actually reported that article 38 remained one of the four most difficult issues to resolve until the final draft was completed.⁴⁰ Ultimately, the failure to adopt the “straight 18” position led to the initiation of the drafting and subsequent adoption of the Optional Protocol.

2.4 African Charter on the Rights and Welfare of the Child

The African Children’s Charter was Africa’s recognition to the ideals of the CRC but with an African emphasis because of the perceived exposure of the African child to a

³⁴ Article 38 of CRC.

³⁵ S Detrick *A commentary on the United Nations Convention on the Rights of the Child* 653

³⁶ As above.

³⁷ Detrick (n 35 above) 654.

³⁸ G Van Bueren *The international law of the rights of the child* 349

³⁹ As above.

⁴⁰ ML Hackenberg ‘Can the Optional Protocol for the Convention on the Rights of the Child protect the Ugandan child soldier?’ (2000) 10 *Indiana International and Comparative Law Review* 428.

particular set of dangerous circumstances. Adopted by the Organization of African Unity (OAU) (now the African Union, AU) in 1990, it incorporates civil and political rights, as well as economic, social and cultural rights of the child. It is also the only regional treaty in the world which addresses the issue of child soldiers.

Among the reasons that required the drafting of the African Children's Charter was the use of children as soldiers and the institution of a compulsory minimum age for military service.⁴¹ Under article 22(2), the African Children's Charter prohibits the recruitment and use of children under 18 in both international and internal armed conflicts and requires states 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." Unlike the CRC and the Optional Protocol, it adopts a "straight 18" position in its definition of a child. It therefore sends a clear message that the participation of children in conflict is unacceptable and will not be tolerated on the continent.

The African Children's Charter also established the African Committee of Experts on the Rights and Welfare of the Child ('African Committee') whose mission is to promote and protect the rights established by the Charter.⁴² The African Committee has the power to consider state party reports as well as individual complaints and inter-state communications which presumably gives additional teeth to its provisions.⁴³ To date the African Children's Charter is ratified by 35 African countries.⁴⁴

⁴¹ L Muthoga 'Introducing the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of the Child' (paper delivered at the International Conference on the Rights of the Child, Community Law Centre, University of the Western Cape, 1992) as cited in F Viljoen 'The African Charter on the Rights and Welfare of the Child' (2000) in CJ Davel (ed) *Introduction to Child Law in South Africa* 219. See also D Chirwa "The merits and demerits of the African Charter on the Rights and Welfare of the Child" (2002) 10(2) *International Journal of Children's Rights* 157; D Olowu "Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child (2002) 10(2) *International Journal of Children's Rights* 127.

⁴² Article 32 of African Children's Charter.

⁴³ Article 44 of African Children's Charter.

⁴⁴ See <<http://www.africa-union.org/home/Welcome.htm>> (accessed 03 July 2005).

2.5 The Rome Statute of the International Criminal Court (ICC)

The Rome Statute establishes a permanent court to try persons charged with committing war crimes, crimes against humanity, and genocide.⁴⁵ In its definition of war crimes, the Statute includes "conscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate actively in hostilities"⁴⁶ and in the case of an internal armed conflict, "conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities".⁴⁷

When drafting the treaty, a footnote was inserted providing guidance for the interpretation of the concepts of "use" and "participation". The footnote provided that

The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints.⁴⁸

The implication of this is that a wider definition is being offered for the notion "child soldier" than one who has a combatant status only. Therefore it affords a wider protection by proscribing as a war crime the situation whereby children are not combatants only but also play an active role linked to combat.

In regard to the notion of "to enlist", it is submitted that it comprises both the act of recruiting and the act of conscripting.⁴⁹ It is argued, therefore, that the term to "enlist" encompasses every act - formal or de facto- of including persons in the armed forces.⁵⁰

The Rome Statute also ensures that the conscription and use of child soldiers is not simply a crime when carried out in international armed conflicts, but also makes the practice a crime under ICC jurisdiction even when carried out nationally, within a

⁴⁵ The crime of aggression has been deferred from the jurisdiction of the ICC for the time being until a definition of the phrase is adopted.

⁴⁶ Article 8(2)(b)(xxvi) of the Statute.

⁴⁷ Article 8(2)(e)(vii) of the Statute.

⁴⁸ See draft Statute for the ICC, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Part One, A/Conf.183/2/Add.1 (14 April 1998) 21 as cited in H Hebel and D Robinson, "Crimes within the jurisdiction of the Court" in R S Lee (ed.), *The International Criminal Court, The making of the Rome Statute, issues, negotiations, results* (1999) 118.

⁴⁹ K Dormann *Elements of War Crimes under the Rome Statute of the International Criminal Court; Sources and Commentary* (2003) 377.

⁵⁰ As above.

country, such as during civil war.⁵¹ Therefore the criminalization as a war crime of the recruitment of children into national armed forces or armed groups and their use in hostilities whether the conflict is international or internal is an important feature of the Rome Statute of the ICC towards the protection of child soldiers.

2.6 ILO Worst Forms of Child Labour Convention 182

In 1999, all 174 Member States of the ILO unanimously adopted ILO Convention 182.⁵² It commits each state which ratifies it to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency".⁵³ The term "child" applies to all persons under the age of 18 years and the worst forms of child labour include among others, all forms of slavery or practices similar to slavery including forced or compulsory recruitment of children for use in armed conflict.⁵⁴

Recommendation 190 accompanying ILO Convention 182 also encourages states to make forced or compulsory recruitment a criminal offence.⁵⁵ Although the recommendation does not have a binding effect, it is an authoritative interpretation of ILO Convention 182, and offers guidance for state parties in complying with their obligations under the Convention.

ILO Convention 182 also offered the opportunity for the first time to set an 18-year minimum age limit in relation to child soldiering in an international treaty. It was also the first specific, legal recognition of child soldiering as a form of child labour, and a worst form of that.

However, conspicuously absent from the list of the worst forms of child labour is a total ban on the use of children as soldiers in armed conflict. As already mentioned above, in lieu of such a broad ban, the CRC prohibits "forced or compulsory recruitment of children

⁵¹ Article 8(2)(e)(vii) of the Statute.

⁵² Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, S. Treaty Doc. No. 106-S (1999), 38 I.L.M. 1207 (entered into force Nov. 19, 2000).

⁵³ Article 1 of ILO Convention 182.

⁵⁴ Article 3(a) of ILO Convention 182.

⁵⁵ See Recommendation Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (17 June 1999) <<http://ilolex.ilo.ch:1567/scripts/convde.pl?R190>> (22 March 2005).

for use in armed conflict."⁵⁶ The legal adviser to the U.S. delegation who negotiated C182 said this was the most controversial aspect of the negotiations.⁵⁷ "Child soldiers are in terrible danger no matter how they are recruited," said Becker, Children's Rights Advocacy Director for Human Rights Watch.⁵⁸ "This narrow provision fails to protect thousands of child soldiers who are lured or coerced into warfare."⁵⁹

The ILO Convention 182 also prohibits "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,"⁶⁰ but leaves it to the national authorities to determine, after consultation with associations of workers and employers, have a say in what should be included under this prohibition. States could include all participation in hostilities and all military recruitment of under-18s in this category. Currently, out of the 132 ratifications, 40 are African states.

2.7 The Optional Protocol on the Involvement of Children in Armed Conflict

During the drafting of the CRC, there was concern that article 38 was inadequate and the proposal for an optional protocol to the CRC arose from the first General Discussion held by the CROC, on "Children in armed conflicts" (5 October 1992).⁶¹ By 2000, international campaigning by NGOs, notably the Coalition to Stop the Use of Child Soldiers, led to the adoption of the Optional Protocol which significantly strengthened legal norms regarding the use of child soldiers.⁶² By 2002, the Optional Protocol had come into force.

The Optional Protocol, under article 1, raises the minimum age of direct participation in hostilities from 15 years to 18 years. As already discussed above, the minimum age for

⁵⁶ HRW *US Blocks Efforts to Ban the Use of Child Soldiers: Clinton Urged to Back Stronger Measures in Geneva* (15 June 1999), <<http://www.hrw.org/press/1999/jun/labor699.htm>> (accessed 23 March 2005)

⁵⁷ M Dennis "The ILO Convention on the Worst Forms of Child Labour" (1999) 93 *American Journal of International Law* 944.

⁵⁸ As above.

⁵⁹ As above. Other critics think that military regimes like the one in Burma will exploit the "voluntary" enlistment loophole in order to gain international legitimacy while continuing to fill up to half their battalions with children under the age of eighteen. See also 'Child Labour Convention Means Little, Critics Say' *Inter Press Service* (12 August 2000) <<http://www.tips.org/ips.human.N./1d3ele76909c9847c22568020035e2bl?OpenDocume>> (accessed on 12 March 2005).

⁶⁰ Article 3(d) of ILO Convention 182.

⁶¹ UNICEF *Implementation handbook for the Convention on the Rights of the Child* (2002) 642. See also CR Revaz "The Optional Protocols to the UN Convention the Rights of the Child on sex trafficking and child soldiers" (2001) 9 No. 1 *Human Rights Brief* 13.

⁶² As above.

direct participation in hostilities was set at 15 by Additional Protocol I and the CRC.⁶³ Additional Protocol II also sets the standard at 15, but does not make a distinction between direct or indirect participation. However, the Optional Protocol retained 15 years as the minimum age for voluntary enlistment.⁶⁴

Article 2 provides that governments "shall ensure that persons who have not attained the age of eighteen years are not compulsorily recruited into their armed forces." Article 4(1) forbids rebel or other non-governmental armed groups from recruiting persons under the age of eighteen years or using them in hostilities under any circumstances. Under article 4(2), governments are required to take all feasible measures to prevent the recruitment and use of children by such groups, including the criminalization of such practices.

Importantly, the Optional Protocol recognizes the vital need for proper rehabilitation and social reintegration for child soldiers.⁶⁵ This is not just an obligation for the State involved in the armed conflict. The Optional Protocol under article 7(1) specifies that State Parties "shall cooperate in [this] ... through technical cooperation and financial assistance".

Currently, out of the 101 ratifications to the Optional Protocol, there are 19 African states including Sudan that became a party in July 2005.⁶⁶ In line with state obligations, the UN Committee on the Rights of the Child (CROC) has already started consideration of initial reports of state parties.⁶⁷ The Optional Protocol, although far from being the end of the road, is the best protection to date and an important step along the way for children involved in armed conflict.

2.8 Conclusion

In the last couple of decades the world has taken strides towards recognizing and attempting to address the problem of child soldiers. This is evident from to this are the instruments discussed above which directly or indirectly cater for the needs of these children. However, at a practical level the problem still continues unabated.

⁶³ Article 77 of Additional Protocol I and article 38 of CRC.

⁶⁴ Article 3(3) of Optional Protocol.

⁶⁵ Article 7 of Optional Protocol.

⁶⁶ See <<http://www.ohchr.org/english/bodies/crc/index.htm>> (accessed 1 August 2005).

⁶⁷ As above.

Admittedly, although not a solution in and of itself, a comprehensive legal framework is the starting point towards alleviating the problem. The majority of existing provisions of the relevant legal framework fail short of addressing the needs of the child soldier in Africa. The following is an investigation of the weaknesses and consequently the ways and means towards addressing the problem of child soldiers specifically in the context of the Africa.

CHAPTER THREE

CHILD SOLDIERS IN AFRICA: IN SEARCH OF ADEQUATE LEGAL PROTECTION

3.1 Introduction

As noted in chapter two, normative frameworks exist ranging from international humanitarian law, international human rights law and international criminal law. Whether or not these normative frameworks afford an adequate protection to child soldiers in Africa and if not, what avenues can be taken to improve them, is going to be the main focus of this chapter.

In this regard, in the area of international human rights, the Optional Protocol is given more emphasis because of its particular importance in addressing the issue of child soldiers. However, where appropriate, reference is also made to the CRC and African Children's Charter. An attempt is made to offer an insight into the specific challenges that may be faced in the context of Africa to alleviate the problem of child soldiers.

At this juncture it must be mentioned that, as is often the case, a large problem involved in solving big problems is political will. This squarely applies to the issue of child soldiers and there is no oversight of this fact here. Notwithstanding the issue of lack of political will, certain minimum standards should be adhered to so as to afford meaningful protection to these children. Therefore, it is with this premise that the suggestions to come up with a comprehensive and up-to-date normative framework are made.

At last, it is not believed that better legal standards even with full implementation are a magic wand. Admittedly, the most effective means of ending this offensive is a multi-faceted approach.⁶⁸ However, the attempt made here is to indicate how the law can at its utmost contribute its share towards fighting this "evil".

⁶⁸ Providing better economic opportunities, providing education to both children and parents, curbing the easy availability of small arms and military aid, avoiding situations which generally cause armed conflict are some of the elements in this multi-faceted approach.

3.2 International humanitarian law

As pointed out in the previous chapter, international humanitarian law has some role to play in protecting children in general and child soldiers in particular.⁶⁹ The first three Geneva Conventions afford little or no protection for children in general.⁷⁰ Although the fourth Geneva Convention provides specific protection to children in general, it falls short of addressing protection for child soldiers.⁷¹ Therefore, this leaves the two Additional Protocols as the only relevant international humanitarian law instruments worthy of further discussion.

One general strong point of international humanitarian law from the perspective of child soldiers is that it applies once a conflict has begun. Beside this it also binds equally all sides of the conflict, including insurgent groups who do not have the legal capacity to sign the Geneva Conventions.⁷² In this regard, even rebel groups who are not signatories of the relevant legal instruments are bound and obliged to abide by the relevant provisions of the law.

However, in general, it is rightly argued by Wells that

...international humanitarian law maintains dated distinctions between persons involved in hostilities and persons needing protection from the effects of hostilities that do not reflect conditions of modern armed conflicts and act to preclude needed legal protection of those among the most vulnerable in wartime, namely child soldiers.⁷³

This argument holds water, for instance, in relation to Additional Protocol I as it is limited to international conflicts.⁷⁴ Presently in Africa, where conflicts have taken the strict

⁶⁹ See sub-section 2.2 above for details.

⁷⁰ The Conventions relate to wounded and sick, the ship wrecked and prisoners of war and do not address the concerns of children specifically.

⁷¹ The provisions do not aim to regulate the participation of children in hostilities. See sub-section 2.2 above for details.

⁷² SL Wells "Crimes against child soldiers in armed conflict situations: Applications and limits of international humanitarian law" (2004) 12 *Tulane Journal of International and Comparative Law* 292.

⁷³ Wells (n 72 above) 288.

⁷⁴ The word "international armed conflict" is somewhat misleading because Additional Protocol I does not apply only to the international armed conflicts covered by common article 2 of the Geneva Conventions, which are defined as conflicts between two or more States Parties to the treaty. Instead, for instance, according to article 1(4) of Additional Protocol I applies to "...armed conflict against racist regimes in the exercise of self-determination...".

dimension of being internal,⁷⁵ Additional Protocol I fails to provide protection for the child soldier in internal armed conflicts.

On the other hand, although Additional Protocol II is commendable for child soldiers in Africa as it applies to non-international armed conflicts, it does not establish any measures of implementation or supervision to ensure compliance with its provisions.⁷⁶ In addition, it requires a higher degree of intensity for its application as it does not apply to riots, isolated and sporadic acts of violence which have not reached the level of internal armed conflicts.⁷⁷ Moreover, both Additional Protocols, just like the Rome Statute, prescribe fifteen as the minimum age for recruitment and participation in hostilities.⁷⁸ This is a major draw back and an inconsistency with other international legal standards for the protection of the child which have adopted 18 as the maximum threshold. It also sends the wrong message that the recruitment and use of children between 15 and 18 is acceptable. Rectifying this drawback in line with current international legal standards could optimise the role international humanitarian law could play.

3.3 International human rights law

3.3.1 General

International human rights law affords the main protection pertaining to child soldiers. For the purpose of child soldiers it is composed of the CRC, the African Children's Charter and the Optional Protocol, the latter addressed particularly to child soldiers. The following is an analysis of the relevant provisions of these instruments with emphasis on the Optional Protocol.

⁷⁵ See, for example, the conflicts in Sudan, Uganda, DRC, Sierra Leone, Liberia and Burundi which have all engaged child soldiers.

⁷⁶ See, generally, S Ramcharan "The role of international bodies in the implementation and enforcement of humanitarian law and human rights law in non-international armed conflicts" (1983) 33 *American University Law Review* 99.

⁷⁷ Most current conflicts involving child soldiers in Africa are internal and below the Additional Protocol II minimum threshold: Article 22(3) of the African Children's Charter provides that it does not only apply to children caught up in international and internal armed conflict, but also to lower levels of violence described as "tension and strife". Thus the African Children's Charter recognizes that it is the best interest of the child which ought to predominate in international law and not the form of the conflict.

⁷⁸ Article 77 of Additional Protocol I and article 4 of Additional Protocol II.

3.3.2 The “straight 18” position: Reasons for resilience

Article 1 of the CRC establishes that 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 function of this article is to define who is to be considered a child for purposes of the CRC.⁷⁹ The only restriction placed on this principle in the CRC itself is to be found in article 38 on recruitment and participation in hostilities which allows the minimum age to be at 15. The Optional Protocol makes reference to article 1 of the CRC for its definition of the “child”.⁸⁰

Under article 2 of the African Children’s Charter every person under the age of 18 is regarded as a child falling within the scope of the Charter. Unlike article 1 of the CRC the provision in the African Children’s Charter does not allow for any exception.

According to Alston, the CRC’s drafters put 18 as the age limit in order to maximize the protection offered by the CRC and to ensure that the rights sets forth therein would uniformly apply to as large a group as possible.⁸¹ Probably a similar reason could be ascribed to the drafters of the African Children’s Charter. Therefore, as child soldiers are one of the most vulnerable groups of children, it becomes imperative to ensure they benefit from the maximum threshold of the age 18.

Furthermore, there is a tendency within the international community to fix the age of majority at 18.⁸² By way of example, the experts meeting in Vienna from 30 October to 4 November 1994 to discuss the question of children and adolescents held in detention, urged States to ensure “that legislation concerning the age of criminal responsibility, civil majority and consent does not have the effect of depriving any child of the full enjoyment of the rights recognised by the CRC.”⁸³ Similarly, in interpreting article 10 of the ICCPR,

⁷⁹ Detrick (n 35 above) 51.

⁸⁰ Para 7 of Preamble of Optional Protocol.

⁸¹ P Alston “The legal framework of the Convention on the Rights of the Child” (1992) 91 *UN Bulletin of Human Rights: The Rights of the Child* 2, 3.

⁸² For example, the regional European Convention on the Exercise of Children’s Rights adopted by the Council of Europe on 26 January 1996 states that the age of majority is 18 years. See 13 European Treaty Series, No. 160, article 1, para 1.

⁸³ UN doc. E/CN.4/1995/100, para. 28(a) of the Recommendations.

the Human Rights Committee mentioned that the age of majority should be 18 as far as criminal matters are concerned.⁸⁴

By adhering to 18, it is not implied that someone by some magic wand on the stroke of a pen turns into a fully competent, mature, wise and autonomous individual upon attaining a certain arbitrarily fixed age.⁸⁵ Rather, it is necessary for international law to do so in order to grant a comprehensive protection for all persons under the age of 18 years who are deemed to be in need of protection. It is the best way of achieving the Convention's and Charter's aim of protecting the youngest and most vulnerable members of society, and in this particular case child soldiers.

One of the main purposes for a legal regime specifically addressed to children, as outlined in paragraph 9 of the Preamble of CRC is that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". Moreover, paragraph 11 of the Preamble of CRC provides that "in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration." With these purposes in mind, it is clearly unsatisfactory that children should be entitled to a lower level of protection in situations of armed conflict which, by definition, place their rights in even greater danger.

Finally, from a practical point of view for recruitment and participation purposes, the "straight 18" position offers an advantage. This is because, for instance, in cases where children do not possess birth certificates, it is easy for their superiors to pass them off as being older than they really are.⁸⁶ However, if the age limit were fixed at 18 years, the recruitment of very young children could certainly be avoided, as their reduced physical appearance would speak for itself.

⁸⁴ Report of the Human Rights Committee of 9 October 1992, UN doc. A/47/40, para. 13.

⁸⁵ M Gose *The African Charter on the Rights and Welfare of the Child: An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child* (2002) 28.

⁸⁶ A good example is Southern Sudan where the physical appearance of the children is relatively larger than their real age.

3.3.3 The nature of state obligation

The Optional Protocol is a compromise.⁸⁷ As a result, the nature of the state obligation suffers from vagueness. The employment of the phrase “all feasible measures”, for instance, as opposed to “ensure” could be considered as a lesser and more imprecise obligation on the part of the state.

In this regard, article 1 of the Optional Protocol stipulates that states “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.” The deliberate vagueness of this provision enables states to determine what constitutes “all feasible measures” and to define “direct part in hostilities.” By setting the standards by which they are judged, states may easily escape the scrutiny of the international community.⁸⁸

For example, a commander might think that it is not feasible to let his soldiers under the age of 18 not to be deployed in direct hostilities because the other party in the conflict has more power than his. In this situation the state is not in violation of its “all feasible measures” obligation as feasibility is limited by whether the actual possibility of undertaking a certain measure exists while “all necessary measures” would not have looked to the possibility of the realisation of a measure, but to whether there is an actual need.⁸⁹

Therefore, although article 1 is the most important provision of the Optional Protocol, the scope of the obligation contained in it is one of conduct rather than of result.⁹⁰ It would have provided children with better protection if states had undertaken to “take all necessary measures” to this end or, even better, if they had a duty to “ensure” that such participation does not take place.⁹¹ It is to be hoped that the Committee on the Rights of the Child will apply a strict interpretation when reviewing whether States have indeed taken all “feasible measures” towards the stated objective.⁹²

⁸⁷ (n 61 above).

⁸⁸ S Abraham “Child soldiers and the capacity of the Optional Protocol to protect children in conflict” (2003) 10 *Human Rights Spring: American Bar Association* 15.

⁸⁹ Gose (n 85 above) 78.

⁹⁰ It contains a wording that is largely in common with the corresponding text of Additional Protocol I.

⁹¹ ICRC “Optional Protocol to the Convention on the Rights of the Child concerning involvement of children in armed conflicts: Position of the International Committee of the Red Cross” (1998) 322 *International Review of the Red Cross* 113.

⁹² As above.

In the meantime, for instance, the obligations under article 2 of the Optional Protocol place a stronger obligation of “to ensure” that persons who have not attained the age of 18 years are not compulsorily recruited into armed forces.⁹³ Also, under the African Children’s Charter, the obligation that a state undertakes is “to take all necessary measures to ensure” that no child takes a direct part in hostilities and refrain in particular, from recruiting any child.⁹⁴ This obviously accords a better standard for the protection of children and is commendable.

3.3.4 Direct and indirect participation in hostilities

The participation of children in armed conflicts brings into focus what should be made of the words “direct” and “indirect” part in hostilities. The CRC under article 38(2), the Optional Protocol under article 1 and the African Children’s Charter under article 22(2) all prohibit children taking a “direct part in hostilities”. “Direct” seems to imply a combatant position and exclude supplementary roles (serving as a scouter, porter and the like) which also involve a great risk for the survival and development of the child.⁹⁵

During the drafting of the CRC, the phrase “direct part in hostilities” had faced a lot of challenge and criticism from a number of delegations.⁹⁶ This is the same phrase that was already in existence in Additional Protocol II under article 77(2), and it has proved inadequate to protect children in armed conflict. In this regard it is argued that it is surely correct to question the usefulness of a new treaty standard that merely reiterates existing standards and approaches.⁹⁷

In order to provide children with the maximum level of protection, as Bueren rightly argues, a combination of “to take part in hostilities” as incorporated in article 4(3) of Additional Protocol II and the “to take all the necessary measures to ensure that children under 18 would not participate” obligation of article 22(2) of the African Children’s Charter is important.⁹⁸ Otherwise, children who are involved in non-combatant status but

⁹³ See also article 4(2) of Optional Protocol.

⁹⁴ Article 22(2) of African Children’s Charter.

⁹⁵ For the position taken during the negotiation of the ICC in regard to what is meant by “direct part in hostilities” see sub-section 2.5 above.

⁹⁶ See Detrick (n 35 above) 652-656.

⁹⁷ Van Bueren (n 38 above) 335.

⁹⁸ As above.

in the meantime are at the risk of real danger towards their survival and development would not be able to benefit from the protection that is called for.

3.3.5 Voluntary recruitment⁹⁹

3.3.5.1 How voluntary is “voluntary”?

Under the Optional Protocol, while other provisions raise the minimum age of compulsory recruitment to eighteen, it allows for voluntary recruitment into a state's armed forces at a younger age.¹⁰⁰ This provision also establishes that upon ratification of or accession to the Optional Protocol, governments must deposit a binding declaration stating their minimum recruiting age.¹⁰¹

However, to ensure that recruitment is voluntary, the Optional Protocol under article 3 mandates for four safeguards. These safeguards require that:(i) the recruitment is genuinely voluntary;(ii) the recruitment is carried out with the informed consent of the potential recruit's parents or legal guardians; (iii) the potential recruit is fully informed of the duties involved in such military service; and (iv) provides reliable proof of age prior to acceptance.¹⁰²

The safeguards built in the provision are commendable as they can play a significant role in screening out those children who do not fulfil the requirements. Actually, voluntary recruitment with such safeguards has been tested and worked in countries like the US,¹⁰³ which is the main driving force behind the inclusion of this provision.¹⁰⁴ However, the reality in the context of Africa might prove otherwise.

⁹⁹ For the purposes of this study, “volunteering” could be defined as not being abducted, not being physically forced, induced or coerced in any manner to join the armed forces or armed groups.

¹⁰⁰ Article 3(1) of Optional Protocol.

¹⁰¹ Article 3(2) of Optional Protocol.

¹⁰² Article 3(3) of Optional Protocol.

¹⁰³ Other countries that allow voluntary recruitment with safeguards include UK, Australia and France.

¹⁰⁴ Throughout the negotiations over the Optional Protocol, the fundamental obstacle to achieving a consensus was US-led opposition to the minimum age requirement for military service. The US currently accepts seventeen year-old volunteers into its armed forces, contingent upon parental permission. The US refused to compromise on its policy of accepting seventeen year-olds into the military and of using them in armed conflict.

In Africa, many child soldiers come from poor families or are in fact orphans.¹⁰⁵ It comes as no surprise that orphans are the prime at-risk group for recruitment into armed conflict. Having kept this in the background, it sounds impractical to expect these vulnerable groups of children to register voluntarily with the consent of parents or legal guardians who do not exist. In spite of this, government forces may continue to abuse the vulnerability of these children through the leeway opened for them by the Optional Protocol by alleging that these children are in fact volunteers even though they fail to satisfy "...the informed consent of the potential recruit's parents or legal guardians" safeguard put in place.

With a similar reasoning, the safeguard requiring children to "...provide reliable proof of age prior to acceptance" is not of much practical effect in Africa. It is reported by UNICEF that in sub-Saharan Africa, 55 percent of children (nearly 15 million) are not registered by their fifth birthday, while in industrialized countries the figure stands at 2 per cent.¹⁰⁶ This clearly shows that it will often be difficult to prove a child's age when he or she volunteers even though governments might just continue their recruitment in the face of lack of the proof of age.

Additionally, according to article 3(5) of the Optional Protocol, the requirement to raise the age limit for voluntary recruitment above 15 does not apply to schools operated by or under the control of the armed forces of the States Parties in accordance with the rights of education¹⁰⁷ of the child. Incidentally this is intended and helps to promote the right of education of these children. In the meantime, however, the possibility that the opposing parties to a conflict would consider these children as part and parcel of the armed forces is high, thereby making them targets rather than mere bystanders.

¹⁰⁵ Orphan usually refers to a child under the age of 18 whose mother (maternal orphan) or father (paternal orphan) or both (double orphan) are dead. In the context of HIV/AIDS, by 2003, 15 million children under 18 had been orphaned worldwide, see UNAIDS/WHO 2004 *Report on the global AIDS epidemic*; About 12 million of these live in sub-Saharan Africa, and it is expected that this number will have risen to more than 18 million by 2010, see UNAIDS, UNICEF, USAID *Children on the Brink (2004) A joint report of new orphan estimates and a framework for action* <www.unicef.org/publications/index_22212.html> (accessed 20 July 2005).

¹⁰⁶ UNICEF *The "rights" start to life: A statistical analysis of birth registration* (2005)

<http://www.unicef.org/publications/files/BirthReg10a_rev.pdf> (accessed 03 August 2005).

¹⁰⁷ Articles 28 and 29 of CRC: See also General Comment No. 3 of the CROC on the Aims of Education.

Another potential challenge for the application of this provision is the distinction it attempts to make between national armed forces and other armed groups. It might prove difficult at times to determine who is a government (national-armed force) and who is not.¹⁰⁸ Some armed groups control territory and population, and resemble *de facto* governments.¹⁰⁹ This practical difficulty in making a distinction might act to the detriment of child soldiers.

In the UN study on the Impact of Armed Conflict on Children, Machel, among other commentators, dismisses the idea of “volunteerism”, arguing that when the only options are survival or poverty, the choices of the children can hardly be called free and fair.¹¹⁰ It is clear that the degree of real choice varies from situation to situation. For instance, with the words of one self-defined volunteer describing the circumstances in which he joined “one of my friends... was shot in his head because he refused to join them. He was killed straight in front of me”.¹¹¹ Therefore, most “voluntary” recruitment should not be regarded as a genuine expression of the child’s free will. In this regard Vandergrift argues correctly that

One of the problems is that young people can easily be forced to say they joined voluntarily; we witness this in many places. Is it truly voluntary when there are immense pressures to join armed forces and there are few options for those who do not join?¹¹²

Finally, in discussing “volunteerism”, it would not be complete without mentioning the tension created with the right of the child to freedom of association and freedom of expression on the one hand and those that dismiss the concept of volunteering

¹⁰⁸ An example could be Sierra Leone during the civil war when the junta by the name AFRC took power from the legitimate government and ran the country for over a year until it was ousted by ECOMOG forces, which put the legitimate government back in power. During the period AFRC was in power, it was difficult to determine whether it was a national armed group or not.

¹⁰⁹ The RUF of Sierra Leone is a good example.

¹¹⁰ Machel (n 14 above).

¹¹¹ R Brett “Adolescents volunteering for armed forces or armed groups” (2003) *International Review of the Red Cross* No 852
<[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5WNJFX/\\$File/IRRC_852_Brett.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5WNJFX/$File/IRRC_852_Brett.pdf)> (accessed 22 July 2005); Although this scenario relates to action by armed groups, there are a number of scenarios whereby a similar act has been committed by the *Kamajors* who formed part of the national armed forces, see generally <<http://www.childsoldiers.org/home/intro.asp>>. African Studies Centre “Sierra Leone: background report on child soldiers”

<http://www.africa.upenn.edu/Newsletters/irinw_71599.html> (July 1999) (accessed 13 July 2005).
¹¹² K Vandergrift “International law barring child soldiers in combat: Problems in enforcement and accountability: Challenges in implementing and enforcing children’s rights” (2004) 37 *Cornell International Law Journal* 550.

outright.¹¹³ The former two rights are a reflection of one of the four cardinal principles of the CRC, namely the right to participation as incorporated in article 12 of the CRC. One argument favours the view that safeguards in article 38(2) and (3) of the CRC, and by comparative analysis article 22(2) of the African's Children Charter, restrict the manifestation of a child's right to freedom of expression and freedom of association.¹¹⁴ This is because it is important to note that children are not always forcibly recruited into the armed forces¹¹⁵ and only voluntary enlistment is focused upon here.

However, the counter argument rightly has it that the protection accorded is an appropriate humanitarian gesture although its underlying philosophy may conflict with regard to, for instance, the expression of political views.¹¹⁶ It is further submitted that the participation of children in armed conflicts could be equated to a specific forms of exploitation as armed conflicts are inherently brutalising and their very nature makes it impossible for those under 18 to give free and informed consent.¹¹⁷

To conclude, it would be difficult to admit that the whole concept of "voluntary recruitment" of children in national armed forces is a step taken in accordance with the guiding principle of the best interest of the child. In particular, in Africa, its potential to do harm to the rights of the child is very high.

3.3.5.2 Double standard as "no standard"

Article 3(3) of the Optional Protocol, in stating that "[s]tate Parties that permit voluntary recruitment..." does recognize the possibility of voluntary recruitment of children below the age 18 only by government forces. Article 4(1) further explicitly 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 18 years.¹¹⁸

¹¹³ This is also referred to as the protection versus participation debate.

¹¹⁴ Van Bueren is of the view that the argument for protection is more convincing than the one forwarded by the position for the right to freedom of association. See Van Bueren (n 38 above) 816.

¹¹⁵ A good example would be wars of national liberation.

¹¹⁶ F Olsen "Children's rights: Some feminist approaches to the United Nations Convention on the Rights of the Child" (1992) 6 *International Journal of Law and the Family* 214 as cited in C Jesseman "The protection and participation rights of the child soldier: An African and global perspective" (2001) 1 *African Human Rights Law Journal* 151.

¹¹⁷ Van Bueren (n 38 above) 335.

¹¹⁸ Article 4(1) of Optional Protocol.

At face value, this is a commendable step. This is because, although not always, the recruitment and use of child soldiers is more rampant among armed groups than within government forces.¹¹⁹ But, in the meantime, this double standard sets a wrong precedent for a number of reasons.

To belabour the obvious, international law is important to efforts to ensure armed groups respect human rights. Firstly, it provides criteria and it has distinct advantages over national law as armed groups will not readily accept the legitimacy of national law.¹²⁰ International law, even though it is developed by states, has the advantage of being distinct from any particular state.¹²¹ More importantly to the discussion at hand, international law provides a common standard and does not have partiality.¹²²

The application of the Optional Protocol to armed groups as non-state actors is already challenged as being out of line with the classical conception of a human rights instrument which only binds governments and citizens.¹²³ Additionally, including a double standard, with one set of norms which applies for government forces and another for armed groups is similar to adopting no standard.¹²⁴ This derogates from the advantages mentioned above that international law has over national law. The likelihood that armed groups will treat it as a legal obligation is minimal, which in effect might put in question the impartiality of the whole instrument from their perspective.

¹¹⁹ For instance, the RUF of Sierra Leone and LRA of Uganda, which are both armed groups, have recruited more child soldiers than their respective government forces. In the LRA it is reported that minors make up 80% of its forces. See for instance the Washington Times "Africa's forgotten war" by S Brownback and RE Stearns <<http://washingtontimes.com/op-ed/20050308-094129-9853r.htm>> (March 2005) (accessed 22 August 2005).

¹²⁰ For instance, if they are secessionist movements, they are likely to disagree that the state has authority to pass laws that are valid in contested territories. Similarly, revolutionary or insurrectionist groups that seek to overturn the government of a country are likely to challenge the legitimacy of that government's laws. National law is tainted by its association with the state or government in power.

¹²¹ In other words, since it is supra-national in character, it provides a degree of legitimacy for armed groups that national law does not.

¹²² International Council on Human Rights Policy "Ends & means: human rights approaches to armed groups" <<http://www.reliefweb.int/library/documents/2001/EndsandMeans.pdf>> (2001) (accessed 26 July 2005).

¹²³ As above.

¹²⁴ It may be observed in this regard that humanitarian law has always been based on the premise of equal obligations on all sides, and that this argument is often put forward when seeking to induce parties to conflict to implement the law.

3.3.6 Disarmament, demobilisation and reintegration (DDR)¹²⁵

Although at face value the issue of DDR might seem to be strictly a social issue, there is a significant role that the law should play. Therefore, the Optional Protocol also addresses post-conflict issues, including demobilization of child soldiers. Article 6 of the Optional Protocol provides that persons "recruited or used in hostilities" are to be demobilized and accorded "all appropriate assistance for their physical and psychological recovery and their social reintegration."¹²⁶ Notably, the language makes it clear that children voluntarily or forcibly recruited into armed groups, as well as non-state forces, are to be included in demobilization and reintegration efforts.

Another area that needs to be emphasised by the law is that DDR must be undertaken swiftly. This helps to minimise the possibility of re-recruitment and continuing exploitation of children within a region.¹²⁷ Moreover, the phrasing under article 6 of the Optional Protocol should be taken to include health care, psychosocial counselling, educational programs, vocational training, family reunification, and the basic needs of food and shelter.

At times, because children are not thought to be a "threat" and of not much "importance", the DDR programmes might overlook their involvement in the DDR process.¹²⁸ For instance, the majority of former fighters interviewed who had participated in the 2000-2003 United Nations-sponsored Sierra Leonean DDR program received only partial benefits, were kept out of the skills training component of the program or failed to receive any benefits at all.¹²⁹ Of the 21,000 children recruited by both rebel and government forces during the Liberian civil war – some as young as six years old – only 4,300 were demobilized.¹³⁰ Among the child soldiers themselves, the lack of a gender

¹²⁵ Disarmament is the process of handing in arms, demobilisation is the formal process of being released from duty and reintegration is a range of processes which helps the person get back to normalcy.

¹²⁶ Article 6(3) of Optional Protocol.

¹²⁷ See, for further details, section 3.7 below on cross-border recruitment.

¹²⁸ Governments tend to consider adult soldiers more of a threat than child soldiers and prefer to see the DDR of adult soldiers first.

¹²⁹ Amnesty International "Côte D'Ivoire: Cross-border child soldiers" (10 August 2005). <http://www.amnesty.ca/take_action/actions/cote_divoire_child_soldiers.php> (accessed 22 August 2005).

¹³⁰ As above.

sensitive approach to girl child soldiers is another shortcoming.¹³¹ To conclude, in accordance with article 7 of the Optional Protocol which obliges “[s]tate Parties to co-operate in the implementation of the protocol...”, the issue of DDR for child soldiers is an area whereby a great deal of international cooperation can be sought.¹³²

3.3.7 Girl soldiers

There was a time when the prevailing opinion was that all child soldiers were boys. This is because war has traditionally been considered as a male preserve, and this remains predominantly true. But we now know that child soldiers include boys as well as girls. Women and girls participate in warfare to a far greater degree than is generally recognised.¹³³ In addition to armed combat, girl soldiers are often forced to serve as sexual slaves of armed groups.¹³⁴ Girl soldiers have also been used to augment the number of rebel fighters in supplementary roles, such as cooks, domestics, and porters, and are sometimes given positions of power as spies or commanders.¹³⁵ The experience of girl soldiers defeats the assumption that child soldiers constitute a monolithic category of children who possess the same characteristics and needs.

International laws which prohibit the use of child soldiers do not cater for the specific experiences of girl soldiers. Although Cohen identifies the CRC as all encompassing given that it protects and promotes the rights of the girl child,¹³⁶ the CRC is criticized for failing to adequately protect the girl child.¹³⁷ The absence of targeted provisions

¹³¹ For a discussion on girl child soldiers, see section 3.3.7 below.

¹³² Because DDR programmes often fail due to financial constraints, states could co-operate to meet the resources required to optimise the effect DDR can have on child soldiers. A severe funding shortage of US \$39 million in the Liberian disarmament program not only left some 40,000 combatants at risk of missing out on job training and education, but appeared to make them more vulnerable for re-recruitment to fight in future armed conflicts.

¹³³ All numbers and proportions are mythical, but estimates indicate that where girls do join armed forces or armed groups, whether they are forced or not, up to a third of the child soldiers will be girls. See R Brett “Girl soldiers: Challenging the assumptions” (2002) <http://www.geneva.quino.info/pdf/Girl_Soldiers.doc.pdf> (accessed 23 July 2005).

¹³⁴ The Prosecutor of the Special Court for Sierra Leone (SCSL) has filed the crime of “bush wives” as a war crime against 6 defendants.

¹³⁵ S McKay, M Burman, M Gonsalves and M Worthen “Known but invisible: Girl mothers returning from fighting forces” (2004) *Child Soldiers Newsletter* 11.

¹³⁶ CP Cohen and PM Olssen, “Status Report: United Nations Convention on the Rights of the Child” (1991) 8 *New York Law School Journal of Human Rights* 367; C P Cohen “The United Nations Convention on the Rights of the Child: A feminist landmark” (1997) 3 *St. Mary Journal of Women and Law* 29.

¹³⁷ See, generally, for instance on child marriage, L Askari “The Convention on the Rights of the Child: The necessity of adding a provision to ban child marriages” (1998) 5 *ILSA Journal of International and Comparative Law* 123.

addressing the gender specific problems of girl soldiers correctly forms part of this criticism.

The same goes for the Optional Protocol, because in focusing on those child soldiers who take part in "direct hostilities", it further reinforces the male-based definition of a child soldier. The only primary reference to gender in the Optional Protocol is made when it recognizes the "special needs of those children who are particularly vulnerable to recruitment or use in hostilities contrary to the present Protocol owing to their economic or social status or gender".¹³⁸

By the same token, although the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography¹³⁹ addresses specific issues faced by girls, child soldiers do not generally fit within its mandate. With the words of Leibig

Child soldiers do not fit into the categories laid out here: in most cases they are not sold, but abducted; they are not prostitutes because they don't receive any material goods in exchange for their sexual servitude; child pornography and sex tourism are not applicable to child soldiers either. This is yet another example of the failure of the international community to create a body of law to protect female child soldiers.¹⁴⁰

At the continental level, although the African Children's Charter emphasises the girl child in general, article 22 which deals with child soldiers does not provide for a way in which the specific concerns of girl soldiers are to be dealt with.¹⁴¹ Moreover, as is commonly true with the above mentioned instruments, whether or not girls who work as sex slaves form part and parcel of the protection accorded to child soldiers is not clear. Therefore, notwithstanding the acknowledgement of and support for the rehabilitation and reintegration of girls, so far girls seem to be lost in the rehabilitation process, and are continually marginalized by DDR programs at all levels.¹⁴²

¹³⁸ Para. 15 of Preamble of Optional Protocol.

¹³⁹ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, (25 May 2000) UN GAOR, 54th Session, UN Document A/RES/54/263.

¹⁴⁰ A Leibig "Girl child soldiers in northern Uganda: Do current legal frameworks offer sufficient protection?" (2005) 3 *Northwestern University Journal of International Human Rights* 6.

¹⁴¹ For instance, female circumcision and early child marriage are not issues directly addressed by the CRC.

¹⁴² In Angola, 8,500 boys were demobilized; No girls were demobilized despite the fact that the Angolan armed forces forcibly recruited girls and the rebel forces extensively used child soldiers, 30-40 percent of whom were girls. See Coalition to Stop the Use of Child Soldiers *Child Soldiers Global Report* (2001).

To sum up, it is now uncontested that there are a substantial number of girls serving as soldiers at present. It is once again not debatable that these girl soldiers face a range of gender specific problems. The lack of specific legal provisions catering for their needs has adversely affected the best interests of this group of children. If any child rights instrument is to be complete and gender neutral, it should protect the rights of boys and girls in a manner that promotes substantive equality.¹⁴³

3.3.8 Cross-border recruitment

The concept of cross-border recruitment has become peculiar to Africa.¹⁴⁴ It is a situation whereby whenever there is a conflict occurring in different countries of a region, children are recruited from one territory to fight conflicts in other territories.

For instance, Human Rights Watch reports that Liberian commanders interviewed have admitted that they were actively involved in recruiting other Liberians, including children, most of whom had fought in the recently ended Liberian civil war (1999-2003), for the conflict in Côte d'Ivoire.¹⁴⁵ They said numerous Liberian children who had not previously fought in any war had also been recruited and recently crossed into Côte d'Ivoire to fight.¹⁴⁶ Gliding back and forth across the borders of Guinea, Burkina Faso and Sierra Leone as well is a migrant population of young fighters – regional warriors – who view war mainly as an economic opportunity.¹⁴⁷ Moreover, in the case of the rebel-held territories in the Eastern portion of the Congo, cross-border forced child soldier recruitment is all too common.¹⁴⁸ In a situation whereby the economic activity in parts of the Great Lakes region of Africa virtually ceases, more and more youngsters are becoming prey to the only viable employer in the region: war.¹⁴⁹

¹⁴³ For a detailed discussion on substantive equality, see JD Waal, I Currie and G Erasmus *The Bill of Rights handbook* (4th ed) (2001) 200.

¹⁴⁴ It is becoming a rampant activity in particular in West Africa among Liberia, Sierra Leone, Guinea and Cote d' Ivoire.

¹⁴⁵ HRW *Recruitment of ex-child soldiers in Cote d' Ivoire* (2005)
<<http://hrw.org/english/docs/2005/03/30/cotedi10402.htm>> (accessed 18 August 2005)

¹⁴⁶ As above.

¹⁴⁷ HRW "Youth, poverty and blood: The lethal legacy of West Africa's regional warriors" (2005)
<<http://hrw.org/reports/2005/westafrica0405/westafrica0405text.pdf>> (accessed 22 July 2005).

¹⁴⁸ Refugee International "Child soldiers: Promising commitments in the Congo" (2004)
<<http://www.refugeesinternational.org/content/article/detail/1322/>> (accessed 12 July 2005).

¹⁴⁹ As above.

The Optional Protocol is of limited use to cross-border recruitment, if any at all. In paragraph 11 of its Preamble, it is provided that “[c]ondemning with the gravest concern the recruitment, training and use within and *across national borders* of children in hostilities by armed groups distinct from the armed forces of a State...” (emphasis added). However, the Optional Protocol fails to explicitly follow on this lead in its substantive provisions. Cross-border recruitment also frustrates DDR programmes, and makes the applicability of the present provisions of the Optional Protocol difficult. Therefore, the concept of cross-border recruitment of child soldiers has not been clearly addressed by the Optional Protocol.

3.3.9 Enforcement

After setting out the substantive normative framework, a central challenge is to ensure its application. In the words of Otunnu, the Special Representative of the Secretary General of the UN for Children and Armed Conflict, “words on paper cannot save children in peril.”¹⁵⁰ Political willingness to adhere to already existing obligations, as well as readiness to think along new lines, are both necessary prerequisites for improved enforcement.

The words of Cohn capture the bigger enforcement failure of the CRC:

The main problem in enforcement, however, is that the enforcement mechanisms of the Convention on the Rights of the Child are incredibly weak. Consider that the main mechanism for accountability is reporting to the Committee on the Rights of the Child once every five years. In reality, it is more than five years because of procedural delays. Five years is a long time in the life of a child caught up in war. And a report may or may not be taken seriously as an enforcement vehicle by the receiving government.¹⁵¹

Unfortunately, the Optional Protocol, as an “amendment” to the mother document, the CRC, is vulnerable to the same problems concerning the procedure of reporting.¹⁵²

Partly motivated by the need to address the enforcement gap, there are five SC resolutions to date devoted to the protection and rehabilitation of children affected by armed conflict. Resolution 1261 (1999) affirms that the protection and well being of war-affected children constitutes a fundamental peace and security concern that belongs on

¹⁵⁰ Office of the Special Representative for the Secretary General for Children and Armed Conflict <<http://www.un.org/special-rep/children-armed-conflict/>> (accessed 4 March 2005).

¹⁵¹ Cohn (n 16 above).

¹⁵² Article 8 of Optional Protocol.

the agenda of the SC. Resolution 1314 (2000) sets out specific action-oriented measures such as tackling the illicit trade in conflict diamonds and ending impunity for war crimes against children, and the release of abducted children. Resolution 1379 (2001) strengthens the measures provided for in resolution 1314 (2000) and makes them more targeted. Resolution 1460 (2003) broadens the scope for monitoring and reporting, stipulating that all country-specific reports should include sections on children, and endorses the call for an era of application.¹⁵³ In these four resolutions, each one has been stronger than the last one and each of them has enforced an important principle: violations of the security and rights of children are in themselves a threat to international peace and security.

Resolution 1612 (2005), which is the most recent resolution, was voted on unanimously by all 15 members of the SC.¹⁵⁴ It calls for a series of measures to be taken, including the establishment of a mechanism for monitoring and reporting violations,¹⁵⁵ a SC Working Group to monitor progress and oversee implementation of these measures,¹⁵⁶ and a demand to offending parties to prepare and implement concrete action plans for ending violations against children.¹⁵⁷ The proposed new mechanism plans to monitor violations by all parties, both governments and insurgents, including: killing and maiming of children, recruiting or using child soldiers, rape or other sexual violence against children, abduction of children, denial of humanitarian access for children and attacks against schools or hospitals.¹⁵⁸ Under the new mechanism, UN-led task forces will be established in phases, to monitor the conduct of all parties and transmit regular reports to a central task force in New York.¹⁵⁹

As noted in chapter two, the ILO provided further protection to child soldiers with Convention 182 by affirmatively stating that no one under eighteen years of age should take direct part in hostilities. Despite the bold efforts of the ILO, it has no authority to force compliance or punish violations. It can only refuse or remove assistance it offers.¹⁶⁰

¹⁵³ (n 150 above).

¹⁵⁴ UN SC Resolutions S/Res/1612/2005 <http://www.un.org/Docs/sc/unsc_resolutions05.htm> (accessed 4 September 2005).

¹⁵⁵ Articles 2 and 3 of Resolution 1612.

¹⁵⁶ Article 8 of Resolution 1612.

¹⁵⁷ Article 7 of Resolution 1612.

¹⁵⁸ As above.

¹⁵⁹ As above.

¹⁶⁰ MG Davidson "The International Labour Organization's latest campaign to end child labour: Will it succeed where others have failed?" (2001) 11 *Transnational and Contemporary Problems* 209.

There are some indications that the issue of child soldiers could be better enforced at the regional level. The African Children's Charter entrusts the functions of promotion and protection of its provisions to the African Committee.¹⁶¹ This Committee has wider powers than that of the CROC. The Committee is not only tasked with examining state reports but is also able to make recommendations arising from individual or interstate communications,¹⁶² and to conduct investigations.¹⁶³ In fact, acceptance of this complaints mechanism is part and parcel of ratifying the African Children's Charter.¹⁶⁴ Secondly, the Charter is very wide in relation to persons who can bring communications before it. Any person, group or non-governmental organization recognized by OAU (AU) or member states or the UN may bring communications before the Committee.¹⁶⁵ Although the African Committee is still at its early stages,¹⁶⁶ with the necessary financial and technical support, it can prove itself to be a major tool for alleviating the problem of child soldiers in Africa.

Still within the continent, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) entered into force on 25 January 2004.¹⁶⁷ The Protocol under article 5(1)(e) explicitly provides that the African Committee has a standing and can bring a case before the Court. Bringing a case before the Court would be advantageous as the decisions of the African Court are binding and final.¹⁶⁸

In the absence of robust UN action, stronger efforts by regional organizations like the AU and individual governments are critical. In this regard the AU could be able to curb some

¹⁶¹ Article 32 of African Children's Charter.

¹⁶² Article 44 of African Children's Charter.

¹⁶³ Article 45 of African Children's Charter.

¹⁶⁴ Article 44(1) of African Children's Charter.

¹⁶⁵ Article 44 (1) of African Children's Charter.

¹⁶⁶ For the work of the African Committee, see A Lloyd "How to guarantee credence? Recommendations and proposals for the African Committee of Experts on the Rights and Welfare of the Child" (2004) 12 *The International Journal of Children's Rights* 21.

¹⁶⁷ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998 (entered into force 25 January 2004) <<http://0-www.africaunion.org.innopac.up.ac.za:80/home/welcome.htm>> (accessed 3 July 2005)

¹⁶⁸ Article 28 (2) of African Court Protocol. As per article 28 (3), the only exception to finality is that the Court may review its own decision in the light of new evidence.

of the problems the UNSC has failed to address.¹⁶⁹ This includes developing resolutions which have tangible repercussions for those who keep on violating the rights of these children.

Apart from the AU, an opportunity that could be explored is through the New Partnership for Africa's Development (NEPAD). Although the main concerns of NEPAD are economic issues,¹⁷⁰ the African Peer Review Mechanism (APRM) could possibly address issues of human rights¹⁷¹ under its "democracy and political stability" focus.¹⁷² This is because, democratic governance should necessarily incorporate human rights and hence the issue of child soldiers.

Children's issues have been incorporated into peace negotiations and peace accords, such as the 1999 Lomé Peace Accord on Sierra Leone; the 2000 Arusha Accords on Burundi; and the Accra Peace Agreement on Liberia. The Accra Peace Agreement of 18 August 2003 provides for the protection and rehabilitation of war-affected children and calls upon the Special Representative and UNICEF to assist in mobilizing resources for the DDR of child soldiers.

As depicted above, quite a good number of institutional frameworks have been put in place which may be used directly or indirectly to address the issues of child soldiers in Africa. If utilized properly and innovatively, they can be a weapon for enforcement of human rights standards. To conclude, further progress towards the era of application will depend on strong and consistent international condemnation, on political will, and on ensuring that violators pay a price should they continue to recruit and deploy child soldiers.

¹⁶⁹ The SC resolutions are a repetition of an already existing resolution under which enforcement was tried and failed. "Naming" and "shaming" of the "shameless" has proved a failure for enforcement purposes.

¹⁷⁰ African Peer Review Mechanism Base Document, AHG/235(XXXVII) Annex II.

¹⁷¹ The APRM is an instrument voluntarily acceded to by Member States of the African Union as an African self-monitoring mechanism. It is a mutually agreed instrument for self-monitoring by participating Member States.

¹⁷² The other three are Economic Governance and Management [EGM]; Corporate Governance [CG] and Socio-Economic Development [SED].

3.4 International criminal law

Undoubtedly, ending the culture of impunity can contribute a great deal towards alleviating the problem of child soldiers. Under international law, the culture of impunity is a debilitating factor in the struggle for the rights of the child. Towards this end, as already pointed out in the previous chapter, one of the major successes of the Rome Statute has been the inclusion, as a crime, of the recruitment of children under the age of 15 as soldiers.¹⁷³ Accordingly, article 8(3)(b) provides that “conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities” is a war crime. Therefore, individual accountability is set in place for the crime of using child soldiers.¹⁷⁴

A recent contribution in the area of international criminal law pertains to the decision of the SCSL in the Norman Case.¹⁷⁵ In this case, the SCSL held that the recruitment of child soldiers below the age of 15 had become a crime under customary international law by 1996.¹⁷⁶

Currently, the referrals under investigation by the Prosecutor of the ICC relate to Sudan, DRC and Uganda, conflicts that have engaged the use of child soldiers.¹⁷⁷ For instance, in the Ituri region of the DRC, some estimate that more than half of the estimated 15,000 fighters who make up the rebel forces are under 18 years, some as young as eight.¹⁷⁸

The other relevance of the Rome Statute pertains to the role it creates for national courts to play. Because of the principle of complementarity,¹⁷⁹ the ICC will come into picture only when national courts are “unable” or “unwilling” to prosecute the crimes listed in the Statute.¹⁸⁰ To use the words of Schabas, the ICC “requires that the State’s own courts

¹⁷³ Article 8 (3)(b) of Rome Statute.

¹⁷⁴ Although international criminal prosecution is one way of accountability, impunity could also be challenged through national courts, ad hoc tribunals, and other justice mechanisms.

¹⁷⁵ See SCSL <www.sc-sl.org>. It is important to note that all the 13 indictments of the SCSL include the use of child soldiers by defendants accused of abuses during the civil war.

¹⁷⁶ SCSL <<http://www.sc-sl.org/summary-childsoldiers.html>> (accessed 24 April 2005).

¹⁷⁷ The focus of the Prosecutor on the DRC gives one great hope that an important precedent will be set with respect to the criminality of the use of children as soldiers. Just as issues relating to war crimes against women have received increasing attention through the efforts of the ICTY and ICTR, it is key that the ICC brings attention to war crimes that affect children.

¹⁷⁸ BBC News, “DR Congo ‘awash’ with child soldiers”, <www.news.bbc.co.uk/2/hi/africa/2772575.stm> 17 February 2003 (accessed 13 July 2005).

¹⁷⁹ Preamble para. 10 and article 1 of the Rome Statute.

¹⁸⁰ Article 17 of the Rome Statute.

get the first bite at the apple.”¹⁸¹ It is this concept that the ICC partly refers to as “admissibility”.¹⁸² Therefore, as a way of implementing the provisions of the Statute, it would be advisable for a State Party to incorporate the crimes listed in the Statute in its national law for its criminalisation in the national courts. This in effect creates an immediate avenue to criminally prosecute those who commit the crime. Moreover, the jurisprudence that will develop from the ICC will help guide national courts in adjudicating cases pertaining to the crime of recruiting or using child soldiers.

On another note, the Rome Statute allows the ICC to address the issue of reparations to victims, establishing general rules for “restitution, compensation and rehabilitation”.¹⁸³ As much as the ICC is entitled to “make an order directly against a convicted person specifying reparations” such reparations could be used for reintegrating child soldiers back to normal life.

However, the major flaw created by the Rome Statute is the age threshold which it set out in its definition of the crime, which is the recruitment or use of children below the age of 15. This is a key drawback because the development of international law pertaining to the child in general, and child soldiers in particular, is adopting the “straight 18” position.¹⁸⁴ It also sends the wrong message that the recruitment and use of children between 15 and 18 is acceptable and not a crime. Rectifying this drawback in line with current international legal standards could optimise the role the ICC could play. Be that as it may, however, the protection of child soldiers in Africa can be promoted through international criminal law and it would not be a misplaced optimism to look towards the ICC for such delivery.

3.5 Conclusion

The adequate legal protection of child soldiers is one of the multi-faceted approaches to addressing the problem. This chapter has critically analysed and indicated that although there are standards that already exist, a full response to the problem calls for bolstering

¹⁸¹ WA Schabas *An introduction to the International Criminal Court* (2nd ed) (2003) 68.

¹⁸² See generally RB Philips “The International Criminal Court Statute: Jurisdiction and admissibility” (1999) 10 *Criminal Law Forum* 61.

¹⁸³ M Christopher *Reparation to victims* in Lattanzi and Schabas, *Essays on the Rome Statute* (2003) 303-310.

¹⁸⁴ International legal documents that followed in 1999 (ILO Convention 182) and 2000 (Optional Protocol) have risen the minimum age from 15 to 18.

these standards. This is more so for the peculiar situation the African child soldier finds himself or herself in such as the more vulnerable situation of girl soldiers and the concept of cross-border recruitment. With some innovation and political will, it is possible and necessary to rectify the gaps. As a holistic approach to the problem is called for, the next chapter looks at child soldiers as perpetrators and provides for the way they should be treated.

CHAPTER FOUR

CALLING CHILD SOLDIERS TO ACCOUNT

4.1 Introduction

The previous chapters have looked at child soldiers as victims and how they are and should be protected. Therefore, the major focus of international standards outlined previously is on those who recruit and use children. However, some argue that child soldiers are not always victims.¹⁸⁵ This is because child soldiers do also commit some of the worst atrocities during armed conflict.¹⁸⁶ Therefore, the accountability of child soldiers and how they should be dealt with as perpetrators is brought to the spotlight.

But the question of the accountability of child soldiers is not without complexities. On the one hand, if children are victims, then those who victimized them must face prosecution. But on the other hand, if children are also criminals themselves, then there should be a mechanism through which they account for their acts.

This chapter focuses on how the accountability of child soldiers should be established. On the premise that accountability mechanisms meeting certain child specific needs for child soldiers are appropriate, the chapter briefly enquires into how both criminal prosecution and other non-prosecution alternatives could be used in calling child soldiers to account for their acts.

4.2 Child soldiers: Is there a need for their accountability?

As noted above, the accountability of child soldiers for acts committed during armed conflict is one of the most controversial issues surrounding their use in armed conflict. The issue poses complex questions of culpability, justice and impunity, as well as individual and social healing. There remain many unanswered questions about what should happen to children who participate in the commission of atrocities in armed conflict. This is because the issue poses both legal and moral¹⁸⁷ questions with no clear answers.

¹⁸⁵ N Arzoumanian and F Pizzutelli "Victims and perpetrators: Issues of responsibility relating to the problem of child soldiers in Africa" (2003) 852 *International Review of the Red Cross* 843 - 855.

¹⁸⁶ As above.

¹⁸⁷ See T Cole "The Special Court for Sierra Leone: Conceptual concerns and alternatives" (2001) 1 *African Human Rights Law Journal* 117 and 126.

On the one hand are those who argue that child soldiers are victims, and consequently only those who forcibly recruited the children must face prosecution.¹⁸⁸ They also argue that because children are children, they should not and cannot be held responsible for their acts.¹⁸⁹ They further contend on the basis that participation is involuntary, they should not be held accountable.¹⁹⁰

On the other hand, some argue that if child soldiers are criminals themselves, then there should be consequences for their acts.¹⁹¹ They substantiate their argument on the ground of ending the culture of impunity towards perpetrators as well as on the right to a remedy for victims.¹⁹² It is suggested that prosecution "makes possible the sort of retribution seen by most societies as an appropriate communal response to criminal conduct."¹⁹³ Some argue that, prosecution in general can help to educate and deter, provide an opportunity for compensating victims, enhance the rule of law, and help to heal a society's wounds.¹⁹⁴ Similarly, Crocker concludes that "[e]thically defensible treatment of past wrongs requires that those individuals and groups responsible for past crimes be held accountable and receive appropriate sanctions or punishment."¹⁹⁵

There is also an extreme position that, irrespective of age, all perpetrators should be held liable for atrocities they commit. In relation to the Rwandan genocide of 1994, it was lamented that:

Rwandans say that if a child was able to kill, if a child was able to discriminate between two ethnic groups, to decide who was a Hutu moderate and who was not, and was able to carry out murder in that way, why should that child be considered differently from an adult? And therefore the punishment should be the same.¹⁹⁶

¹⁸⁸ A Davison "Child soldiers: No longer a minor incident" (2004) 12 *Willamette Journal of International Law and Dispute Resolution* 147.

¹⁸⁹ As above.

¹⁹⁰ As above.

¹⁹¹ See Amnesty International Report "Child soldiers: Criminals or victims" (2000) <<http://web.amnesty.org/library/Index/ENGIOR500022000?open&of=ENG-364>> (accessed 22 July 2005).

¹⁹² As above.

¹⁹³ S Landsman "Alternative responses to serious human rights abuses: Of prosecution and Truth Commissions" (1996) 59 *Law and Contemporary Problems* 84.

¹⁹⁴ As above.

¹⁹⁵ DA Crocker "Reckoning with past wrongs: A normative framework" (1999) 13 *Ethics and International Affairs* 53.

¹⁹⁶ C Reis "Trying the future: Avenging the past: The implications of prosecuting children for participation in internal armed conflict" (1997) 28 *Columbia Human Rights Law Review* 634 – 635.

This writer believes that child soldiers should be held accountable for their participation in the commission of atrocities.¹⁹⁷ Rather, it is argued, the question should be how the accountability of these children needs to be established while continuing to regard them as beneficiaries of special protections attributable to their vulnerable status. On the basis of this reasoning, the following sections are devoted to reflect on this question.

4.3 Prosecution of child soldiers¹⁹⁸

4.3.1 General

Under international law, the prosecution of children is not prohibited. Although not necessarily directly addressed to the prosecution of child soldiers, the CRC envisages the trials of children under 18 in article 40. It requires that, when children are tried, the procedure of the trial should be fair and take into account the particular needs and vulnerabilities of young people.

In the history of international criminal law, children in general have not been held accountable. Neither the ICTY nor the ICTR Statutes have explicitly given jurisdiction to the tribunals to try juveniles.¹⁹⁹ The Rome Statute explicitly prohibits the prosecution of individuals less than 18 years of age at the time of the commission of the offence.²⁰⁰

¹⁹⁷ Actually, often, the accountability of these children would also be an impetus to facilitate their rehabilitation into society, which is in the best interest of the child.

¹⁹⁸ In this section the term "prosecution" is used to refer to both domestic and international efforts to bring perpetrators to trial. Some statesmen and scholars have argued that international prosecutions are necessary because domestic trials often do not meet due process standards. Although there may be differences in the extent to which domestic versus international prosecutions can meet the traditional goals of criminal justice while simultaneously respecting defendants' rights, such a comparison is beyond the scope of this paper. See NJ Kritz, "Coming to terms with atrocities: A review of accountability mechanisms for mass violations of human rights" (1996) 59 *Law and Contemporary Problems* 129-133 (discussing the advantages and disadvantages of international and domestic prosecutions).

¹⁹⁹ The same is true with the International Military Tribunals for the Far East and at Nuremberg.

²⁰⁰ Article 26 of Rome Statute. The drafters of the Rome Statute considered bringing minors under its jurisdiction but refrained. The decision to exclude juveniles from ICC jurisdiction did not rest on a belief that young persons were incapable of committing war crimes. Rather, the inability to set an age range for which jurisdiction would apply combined with member countries evaluating maturity differently, led delegates to exclude children under eighteen from the ICC's jurisdiction. Exclusion also stemmed from logistical and financial limitations on the ICC, and the delegates decided national courts would be best suited to handle the prosecution of juveniles.

However, the Statute of the SCSL is the first international standard that expressly provides for the prosecution of children for international crimes.²⁰¹ This has set a precedent that child soldiers could be held accountable under international criminal law. Obviously by implication, it also indicates the possibility of child soldiers being tried under national jurisdictions.

Therefore, the prosecution of child soldiers is not prohibited under international law. But when they are tried, certain minimum standards should be met to cater for their vulnerable positions. Among these minimum standards, those of great importance are the issue relating to the age of criminal responsibility, fair trials, sentencing and detention.

4.3.2 Age of criminal responsibility

One of the most difficult areas of criminal justice policy lies in providing appropriate legal mechanisms to reflect the transition from the age of childhood innocence through to maturity and full responsibility under the criminal law.²⁰² In calling child soldiers to account under the criminal justice system, an age of criminal responsibility that adheres to international law is a very important aspect of the whole process. This is because the less the age of a child is, the more that child should be presumed to have no capacity to be responsible for criminal acts.²⁰³ Therefore, it helps to strike a balance between attributing responsibility appropriately and protecting children from a process they are too young to understand.²⁰⁴

In relation to the age of criminal responsibility, the CRC requires states parties to establish “a minimum age below which children shall be presumed not to have the

²⁰¹ Article 7 of the SCSL Statute. See AD Marie “Calling children to account: The proposal for a juvenile chamber in the Special Court for Sierra Leone” (2001) 29 *Pepperdine University Law Review* 178, noting that the inclusion of juveniles within the jurisdiction of a tribunal adjudicating international humanitarian law, under the auspices of an international organization is, to be sure, novel.

²⁰² G Urbas “The age of criminal responsibility” (2000)
<<http://www.aic.gov.au/publications/tandi/ti181.pdf>> (accessed 15 September 2005).

²⁰³ There should be a conclusive presumption that those below the age of criminal responsibility are *doli incapax* i.e. unable to entertain criminal intent. For a discussion of the *doli incapax* concept in England, for instance, see SJ Millet “The age of criminal responsibility in an era of violence: Has Great Britain set a new international standard” (1995) 28 *Vanderbilt Journal of Transnational Law* 307.

²⁰⁴ (n 191 above).

capacity to infringe the penal law.²⁰⁵ In the area of juvenile justice, the Beijing Rules rule 4 provides that the age of criminal responsibility should not be fixed at too low.²⁰⁶ Apparently, both the CRC and the Beijing Rules do not specify what the appropriate age of criminal responsibility is.

Although establishing the minimum age of criminal responsibility is not an easy task, in Africa, some child soldiers who have allegedly committed atrocities are as young as 6 and 7 years of age²⁰⁷ and these children should not be presumed to have criminal capacity at all.²⁰⁸ From the work of the CROC, concern has been expressed that seven,²⁰⁹ eight²¹⁰ and even fourteen²¹¹ have been fixed at too low for criminal responsibility.²¹²

In most European countries the age of criminal responsibility lies between the ages of 13 and 16.²¹³ Doek, the Chairperson of the CROC, concludes that the minimum age of criminal responsibility at least for Europe should be 12.²¹⁴ For Africa, there is no reason that warrants that the age of criminal responsibility should be below than the one established in Europe.

To conclude, if the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility for child soldiers would become meaningless. Efforts should therefore be made to promulgate a minimum age of criminal responsibility in accordance with international law that takes into account the facts of emotional, mental and intellectual maturity of the child.

²⁰⁵ Article 40(3)(a) of CRC.

²⁰⁶ United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by the UN General Assembly on 29 November 1985, Resolution 40/33. Also known as the "Beijing Rules".

²⁰⁷ Amnesty International (n 7 above).

²⁰⁸ It is the position of this writer that these children should only be dealt with by social care services or mental health service.

²⁰⁹ CROC report on Hong Kong CRC/C/sr.329, para 79.

²¹⁰ CROC Concluding Observation on Sri Lanka, CRC/C/15/Add.40, paras 22 and 40.

²¹¹ CROC report on Hong Kong (n 26 above).

²¹² See J Sloth-Nielsen "The role of international human rights law in the development of South Africa's legislation on juvenile justice" 5 *Law, Democracy and Development* 68 arguing, after analysing concluding observations of the CROC, that the CROC has consistently criticized States Parties whose minimum age is less than 10.

²¹³ Your Rights, Age of criminal responsibility, (2002)

<http://64.233.161.104/search?q=cache:EyLxt66lQisJ:www.yourrights.org.uk/your-rights/chapters/the-rights-of-children-and-young-people/young-offenders/age_of_criminal_responsibility.shtml+Age+of+criminal+responsibility&hl=en> (accessed 23 September 2005).

²¹⁴ See, generally, J Doek "Modern juvenile justice in Europe" in M Rosenheim et al (eds) (2002) *A century of juvenile justice*.

4.3.3 Trial of child soldiers

Although there is no evidence of child soldiers being tried by international tribunals for international crimes, they have faced prosecutions in national jurisdictions. For instance, in 2000, six child soldiers were arrested in the DRC and while five received a conviction for conspiracy to overthrow the Government, the other received a conviction for murder.²¹⁵ The Court sentenced all six to death.²¹⁶ Child soldiers have also faced closed and unfair trials before military courts with no legal representation, and some have been sentenced to death and executed.²¹⁷

This shows that, even though the recognition that children in conflict with the law should be treated differently to adults is over a century old,²¹⁸ child offenders, in this particular case child soldiers, still continue to suffer under procedures that do not take into account their vulnerable conditions.²¹⁹ Therefore, from this perspective providing for guidance as to how child soldiers should be held accountable could be looked at being in the best interest of the child.

Initially, before making the decision to prosecute child soldiers, as is the case in any criminal case, the prosecutor must exercise his or her discretion whether to proceed or not.²²⁰ In arriving at this decision, the prosecutor should be guided by the best interest of the child principle including the inherent maturity of the child, the child's moral development, the extent to which the child rehabilitation is not placed at risk and, to the extent of their availability, the possibility of alternative accountability and reconciliation mechanisms. In particular, for the purpose of international prosecution, the "authority

²¹⁵ Coalition to Stop the Use of Child Soldiers, <[http://www.childsoldiers.org/cs/childsoldiers.nsf/fffd058ae1d99d80256adc005c2bb8/bb1c00f3effdae4d80256c6a00611d4e? OpenDocument&Highlight=0](http://www.childsoldiers.org/cs/childsoldiers.nsf/fffd058ae1d99d80256adc005c2bb8/bb1c00f3effdae4d80256c6a00611d4e?OpenDocument&Highlight=0)> (accessed 16 Sept 2005).

²¹⁶ As above.

²¹⁷ Amnesty International Report "Democratic Republic of Congo: Children at war" (2003) <<http://web.amnesty.org/library/index/engaf620342003>> (accessed 13 September 2005). The execution of individuals for crimes committed below age eighteen violates the ICCPR and the CRC. See also HRW "Congo: Don't execute child soldiers: Four children to be put to death" <<http://www.hrw.org/press/2001/05/congo0502.htm>> (2001) (accessed 13 September 2005).

²¹⁸ Sloth-Nielsen (n 212 above) 59, providing that the 1899 Illinois Juvenile Court Act is credited for providing the first example of legislation establishing a separate juvenile justice system.

²¹⁹ Actually, some child soldiers are not offered any procedures and have been victims of extra judicial executions. For instance, Bahati from Masisi in North-Kivu in DRC was arrested in Uvira by the RCD-Goma on 25 May 2003 after allegedly killing a soldier the night before while trying to steal his radio. He was given no trial and was executed in public on the same day.

²²⁰ For a detailed discussion of prosecutorial discretion, see HB Jallow "Prosecutorial discretion and international criminal law" (2005) 3 *Journal of International Criminal Justice* 145.

position of the accused" and the "gravity or massive scale of the crime" should be taken as indicators.²²¹

In the event that child soldiers are prosecuted, the need for special protection mechanisms is high. Their treatment should be in accordance with international human rights standards specific to the rights of the child. They should, as rightly incorporated in the Statute of the SCSL "[b]e 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."²²²

In accordance with international human rights law, the fundamental rights and legal safeguards accorded to children under the CRC should be provided to child soldiers in their trial.²²³ These include the right to be heard,²²⁴ presumption of innocence, the right to be notified of charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses, and the right to appeal to a higher authority at all stages of proceedings.²²⁵

The surrounding circumstance in which child soldiers became involved and continue as being soldiers should also be taken into account as a defense or mitigating factor.²²⁶ Sometimes, during abductions and forced recruitment, armed groups compel children to follow orders by threatening death, or by forcing the children to commit atrocities against family members and friends so that they become hardened to violence.²²⁷

Because of this, in court, the child soldier has the defense of duress to a specific crime because of threat of death or serious bodily injury to the child or to another.²²⁸ However,

²²¹ I Zarifis "Sierra Leone's search for justice and accountability of child soldiers" (2002) 9 No. 3 *Human Rights Brief* 20.

²²² Article 7 of SCSL Statute.

²²³ See article 40(2)(b) of CRC.

²²⁴ Article 12 of CRC.

²²⁵ Beijing Rules rule 7.1.

²²⁶ A defense in criminal law is capable of acquitting the accused while a mitigating factor is for sentencing purposes.

²²⁷ In the Firing Line - War and Children's Rights 63 (1999) (explaining that minors often are recruited when the number of adult soldiers is insufficient for the force needed because the conflicts have been so prolonged and so many have already died).

²²⁸ M Happold "Excluding children from refugee status: Child soldiers and article 1F of the Refugee Convention" (2002) 17 *American University International Law Review* 1169; See also Rome Statute article 31(1)(a) on lack of capacity defense and article 31(1)(d) on the defense of duress.

it is argued that it is not a defense to a specific war crime if the child was coerced into recruitment generally.²²⁹

Moreover, child soldiers are drugged to commit atrocities. In Liberia, it was reported that children are doped up — on amphetamines, marijuana and palm wine.²³⁰ In Sierra Leone, the RUF exploited natural teenage recklessness by drugging teenage boys and sending them into battle.²³¹ This intensifies the diminished capacity of children to distinguish between right and wrong and should serve as a defense or mitigating factor.

The defense of superior orders is also another defense that could be availed of by child soldiers.²³² The Statutes of ICTY and ICTR state that although a subordinate will not be relieved of his responsibility in the war crime, superior orders may be considered in mitigation of punishment.²³³ This shows that international law recognizes that war criminals are less culpable when superiors bear partial responsibility.

Therefore, from the point of view of the defense of superior order, a child soldier may claim that he was "just following orders".²³⁴ A child soldier using this defense has a more valid claim than an adult because a child has a different sense of individual responsibility.²³⁵ Society generally demands different responsibilities of children than adults.²³⁶

If found guilty, in recognition of normative international standards, child soldiers should not face the death penalty.²³⁷ They should not also be sentenced to life imprisonment without parole.²³⁸ According to article 37(b) of the CRC "[t]he ...detention or imprisonment of a child ...shall be used only as a measure of last resort and for the

²²⁹ Happold (n 228 above) 1155.

²³⁰ MSNBC *Child soldiers add to Liberian tragedy* (1999) <<http://www.msnbc.com/news/945577.asp>> (accessed 13 August 2005).

²³¹ SH Bald "Searching for a lost childhood: Will the Special Court for Sierra Leone find justice for its children?" (2002) 18 *American University International Law Review* 553.

²³² For a detailed explanation of the defense of superior orders see JB Insko "Defense of superior orders before military commissions" (2003) 13 *Duke Journal of Comparative and International Law* 389.

²³³ Happold (n 228 above).

²³⁴ W Perlmutter "An application of refugee law to child soldiers" (2001) 6 *Georgetown Public Policy Review* 143.

²³⁵ As above.

²³⁶ M Musalo et al *Refugee and Policy: Cases and Materials* (1998) 100.

²³⁷ See, for instance, ICCPR article 6 (prohibiting the use of the death penalty).

²³⁸ Article 37(a) of the CRC

shortest appropriate period of time.” The juvenile justice system embodies the beliefs that juveniles are less culpable than adults, are more able to grow, and should be given assistance and the opportunity for rehabilitation.²³⁹ The Beijing Rules describe the aims of juvenile justice in the following terms:

The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and the offence.²⁴⁰

Therefore, the same stance should be adopted in the treatment of child soldiers.

Finally, the SCSL Statute offers some guidance in the sentencing of child soldiers. Accordingly, instead of ordering imprisonment as a penalty, the SCSL is limited to ordering any of the following rehabilitative measures: care, guidance, and supervision orders; community service orders; counselling; foster care; correctional, educational, and vocational training programs; approved schools; and, as appropriate, any disarmament, demobilization, and reintegration programs of child protection agencies.²⁴¹

4.4 Non-prosecution alternatives to accountability

Accountability mechanisms can take many forms and there are alternatives to prosecution. Therefore, the assumption that prosecutions are always the best way to pursue justice in societies can be challenged.²⁴² It can be argued that the choice between prosecution and non-prosecutorial alternatives should depend on what one is seeking to achieve.

²³⁹ See DA Hager “Does the Texas juvenile waiver Statute comport with the requirements of due process?” (1995) 26 *Texas Technical Law Review* 814.

²⁴⁰ Beijing Rules rule 5.1.

²⁴¹ Article 7(2) of SCSL Statute.

²⁴² It is also argued that exclusive recourse to criminal trials, adjudication and imprisonment as mechanisms of individual accountability have failed to promote justice and societal reconciliation. In particular, in the case of trials undertaken in transitional contexts, it is common for prosecutions to result in procedural abnormalities of exceptional measures, including illegal internments, the presumption of guilt, biased selection of judges and jurors, lack of appeals mechanisms, collective guilt, and retroactive legislation. See J Elster “Coming to terms with the past: A framework for the study of justice in the transition to democracy” (1998) 39 *European Journal of Social Sciences* 24 - 26 (arguing that procedures used in dealing with the past tend to be exceptional).

In the child soldier context, as mentioned above, the purpose of holding them accountable should primarily be for their rehabilitation and reintegration into society by keeping the best interest of the child at the heart of the whole process. In this regard, depending on their availability, alternatives to prosecution could play a major role in calling child soldiers to account.

Although the best-known alternative to prosecution is the truth and reconciliation commission (TRC), which is also highlighted under this section, it is not the only alternative; other options include reports by international delegations, civil liability, reparations and historical inquiry.²⁴³ Additionally, each of these alternatives may take many different forms.²⁴⁴

In regard to TRC, proponents rightly argue that it is the most effective accountability mechanism for juveniles because "it allows the victim and perpetrator to heal emotionally and psychologically."²⁴⁵ As Zarifis argues, in relation to child soldiers and the TRC in Sierra Leone:

The unique position of the child combatant, first victim then perpetrator, would best be served by truth telling before the TRC to facilitate effective social rehabilitation and reintegration. At the same time, the TRC promotes national reconciliation, which is essential for the population to heal after armed conflict.²⁴⁶

Traditional dispute resolution procedures, such as the Gacaca court system in Rwanda could also be best suited for establishing the accountability of child soldiers.²⁴⁷ As long as the procedures of these dispute resolution mechanisms are conducted in a way that respects the rights of these children and takes into consideration their age and maturity,

²⁴³ See, for instance, MC Bassiouni "Searching for peace and achieving justice: The need for accountability" (1996) 59 *Law and Contemporary Problems* 20-22 (listing a variety of accountability mechanisms); R Boed "An Evaluation of the legality and efficacy of lustration as a tool of transitional justice" (1999) 37 *Columbia Journal of Transitional Law* 357 (questioning the ability of lustration to achieve the goals of transitional justice); GF Mejjide et al "The role of historical inquiry in creating accountability for human rights abuses" (1992) 12 B.C. *Third World Law Journal* 269.

²⁴⁴ See, for instance, PB Hayner "Fifteen truth commissions--1974 to 1994: A comparative study" (1994) 16 *Human Rights Quarterly* 597 (describing a wide variety of truth commissions).

²⁴⁵ Zarifis (n 221 above) 21; See also FB Kargbo "International peacekeeping and child soldiers: Problems of security and rebuilding" (2004) 37 *Cornell International Law Journal* 495; MA Corriero "The involvement and protection of children in truth and justice-seeking processes: The Special Court for Sierra Leone" (2002) 18 *New York Law School Journal of Human Rights* 337.

²⁴⁶ As above. See also Zarifis (n 221 above) 21.

²⁴⁷ UNICEF *The State of the World Children* (2005) 55; See E Daly "Between punitive and reconstructive justice: The Gacaca courts in Rwanda" (2002) 34 *New York University Journal of International Law and Politics* 355; ME Laflin "Gacaca courts: The hope for reconciliation in the aftermath of the Rwandan genocide" (2003) 46-MAY *Advocate (Idaho)* 19.

their emphasis on restorative justice should make them a better alternative than prosecution.

In conclusion, prosecution should not be the first port of call in holding child soldiers accountable. In situations where alternatives to prosecution like TRC and traditional dispute resolution procedures exist, the possibility of using these alternatives should first be inquired. As long as these alternatives put safeguards to ensure the best interest of the child and their purpose is restorative justice, they could offer an appealing form of accountability for child soldiers.

4.5 Conclusion

It is today's sad truth that children scarcely able to dribble a soccer ball may take up arms and commit unthinkable atrocities. In order to provide some sort of respite from grief for the victims and the local community, and to aid in the assimilation of these children back into society, there may need to be accountability for these acts.

In establishing their accountability, depending on their availability and the safeguard they offer for the child, priority should be accorded to non-prosecution alternatives to accountability. This helps avoid the stigmatizing effect of prosecution and promotes restorative justice. In exceptional situations where prosecution is called for, it should always place the best interest of the child at the heart of the whole process and be in accordance with the CRC and other normative frameworks.

According to the CRC, the key principle concerning child perpetrators is to promote their reintegration and return to a constructive role in society and restore the child's respect for the human rights of others.²⁴⁸ The right of child victims to recovery and reintegration extends to children involved with juvenile justice systems.²⁴⁹ Any form of accountability should not lose sight of these important obligations.

²⁴⁸ Article 40(1) of CRC.

²⁴⁹ Article 39 of CRC. Article 6(5) of ICCPR.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This study analysed the issue of child soldiers in Africa and the normative framework as it is and as it ought to be. Central to the study was the firm assertion that the existing normative framework for the protection of child soldiers is inadequate in particular from the viewpoint of the African child soldier. Apart from considering child soldiers as victims in need of protection, the study has also shown how and why these children should be called to account (when necessary) for crimes they have allegedly committed. What follows is a detailed conclusion and recommendations based on the findings of the study.

5.2 Conclusion

Over the past twenty years, the international child rights movement has undertaken the development of international law, policies, and programs for the protection of children. Since 1979, the UN, ICRC, and NGOs have successfully documented and raised the level of international concern about the recruitment and use of children in armed conflict. The entry into force of the Optional Protocol and of other international and regional standards, such as the ILO Convention 182, the African Children's Charter and the Rome Statute raised hopes that substantial changes on the ground will follow.

However, against these efforts, children still play an increasingly important role within armed forces and groups in today's conflicts. In modern armed conflicts, in particular in Africa, the recruitment and use of child soldiers is often a rule rather than an exception.²⁵⁰ At present, an estimated 300,000 children, almost half of which are in Africa, serve as child soldiers in conflicts around the world.²⁵¹

International humanitarian law, from the perspective of many children caught in the midst of hostilities around the world, and in particular in Africa, is ill-equipped to fully and

²⁵⁰ C Maher "The protection of children in armed conflict: A human rights analysis of the protection afforded to children in wartime" (1989) 9 B.C. *Third World Law Journal* 297, 305-306

²⁵¹ (n 4 above).

accurately address the experiences of those among the most vulnerable participants in today's hostilities and fails to adequately reflect the conditions of modern armed conflicts. Therefore, as children join the ranks of combatants and other roles in armed conflicts, there may be cause to extend certain humanitarian protections guaranteed under international humanitarian law beyond traditionally defined categories of protected persons.²⁵²

International human rights law, in particular the Optional Protocol, although important, is inadequate for protecting child soldiers in Africa. Among other things, the Optional Protocol does not adopt a "straight 18" position by allowing voluntary recruitment, neglects the girl soldier and cross-border recruitment. The nature of states obligation and its enforcement mechanism are also weak.

The African Children's Charter offers a better standard of protection in important respects than the CRC and the Optional Protocol. The African Committee also has an appropriate mandate for enforcement which should be utilised to its maximum potential. With the necessary financial back up and some degree of commitment by African States, the African child soldier can look upon the African Committee for his or her rescue.

From the point of criminal law, through the ICC (and also national courts), perpetrators must be aggressively pursued and effectively punished. Ending the culture of impunity contributes to deterrence. The decision of the SCSL that the prohibition of the recruitment and use of child soldiers constitutes customary international law is commendable as it bolsters the role international criminal law can play in alleviating the problem.

Finally, many child soldiers are victims themselves, abducted or induced by rebels or government forces from their families and forced to serve as soldiers.²⁵³ However, as is evident from the first section of the title of this study - children at both ends of the gun - children scarcely able to dribble a soccer ball may also commit unthinkable atrocities making their accountability necessary. Admittedly, the accountability of these children

²⁵² See, generally, J Gardam and M Jarvis, "Women and armed conflict: The international response to the Beijing Platform for Action" (2000) 32 *Columbia Human Rights Law Review* 53.

²⁵³ M Iacono "The child soldiers of Sierra Leone: Are they accountable for their actions in war?" (2003) 26 *Suffolk Transnational Law Review* 448.

poses a moral and legal dilemma. In any case, when calling child soldiers to account, balancing society's desire for accountability with the social utility benefit of rehabilitating children is found to be a formidable task.

Finally, the study does not lose sight of the problem of lack of political will which makes the application of the normative framework in existence difficult. It also rightly accepts that the problem of child soldiers is a challenge that calls for multi-faceted responses. Rather, what is outlined above by the study is how the law can and should be used to contribute its utmost share towards protecting the most vulnerable group of the vulnerable - child soldiers. With the words of Bernard Shaw "some people see things the way they are and ask why, I dream of things that are not and ask why not?". To deliver these children who are denied of their childhood, we all need to dream together.

5.3 Recommendations

For international humanitarian law to be meaningful for the protection of child soldiers, it should be able to reflect the conditions of modern armed conflicts. Dated distinctions between persons involved in hostilities and persons needing protection from the effects of hostilities should not be used for the detriment of the most vulnerable in wartime, namely child soldiers. The minimum age for recruitment should also be raised to 18.

Under the Optional Protocol, the nature of the state obligation should be strengthened. A "straight 18" position should be adopted and the concept of "voluntary" recruitment should be done away with. The protection should be afforded to all who take part in hostilities, both directly and indirectly. DDR obligations and efforts of states should be comprehensive and the practice of including DDR provisions for child soldiers in peace agreements should be promoted. Moreover, provisions that take into account the gender specific needs of girl soldiers and proscribe cross-border recruitments should also be made.

For the purpose of enforcement, the UN should continue pressurising governments and armed groups that continue to recruit and use child soldiers. Because the "naming and shaming" approach has been tried and failed, the UN should be able to move one step ahead and come up with resolutions that have serious consequences on violators.

The African Children's Charter is a relatively powerful instrument for the protection of child soldiers in the continent. Adopting an additional protocol which elaborates on the African Children's Charter and takes into account the specific challenges the African child soldier faces could be ideal. The appropriate mandate the African Committee is tasked with, if coupled with financial back up and political will to ratify and implement the African Children's Charter, could give meaning to the lives of these children.

Moreover, recent developments in the continent could help substantiate an argument that boiling the issue down to the continental level could mean a better chance of enforcement. The establishment of the African Court sheds some hope for change on the ground. The APRM process could also be used for assessing compliance with the human rights obligations of states towards their children.

To increase the role international criminal law has for alleviating the problem of the child soldiers, the age threshold which it sets out in its definition of the crime of the recruitment and use of child soldiers should be raised to 18. Perhaps through its jurisprudence, the ICC should also confirm that "active participation" does not only mean combatant position but also other supporting roles in armed conflict.

In establishing the accountability of child soldiers, depending on their availability and the safeguard they offer for the child, priority should be accorded to non-prosecution alternatives to accountability. In exceptional situations where prosecution is called for, it should always place the best interest of the child at the heart of the whole process and be in line with the CRC and other normative frameworks. Restorative justice should be at the heart of the whole process. Because the key principle concerning child perpetrators in the CRC is to promote their reintegration and return to a constructive role in society and restore the child's respect for the human rights of others, any form of accountability should not lose sight of these important obligations. In order to create uniformity in accordance with the best interest of the child, it is advisable for the international community (regional community) to come up with standards or guidelines that should be taken into consideration in calling child soldiers to account.

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