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# International Legal Standards Governing the Use of Child Soldiers

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# INTERNATIONAL LEGAL STANDARDS GOVERNING THE USE OF CHILD SOLDIERS

by

DORCAS B. MULIRA

(Under the Direction of Gabriel Wilner)

## ABSTRACT

This paper seeks to analyze the international laws governing the use of children in armed conflict. Despite the prohibition of the use of child soldiers in armed conflict in international law, States and non-State actors continue to actively recruit, abduct, and directly use children, some as young as eight, in hostilities. International humanitarian law's limited scope prevents it from protecting the world's most vulnerable children, child soldiers, while human rights instruments adopted to make up for these limitations lack enforcement mechanisms, therefore rendering the much-needed protection for child soldiers inadequate. As development of international law concerning child soldiers progresses on paper, progress on the ground lags behind, thus creating a gap between progress in the law and the enforcement of this law on the ground. The international community needs to take steps to bridge this gap so that the practice on the ground is at par with the law. The term "use of child soldiers" means recruitment, utilization, and participation of children in armed conflict.

INDEX WORDS: Child soldiers, armed conflict, recruitment, hostilities, international law, international humanitarian law, international human rights law, legal standards.

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DEDICATION

To God for his steadfast love and faithfulness

To my husband, Norman Kisukye, for his love and friendship

To my parents for their financial and emotional support in helping me achieve a great  
academic career

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## CHAPTER ONE

### INTRODUCTION

“I think with sorrow of those living and growing up against a background of war, of those who have known nothing but conflict and violence. . . . What a terrible legacy for their future! Children need peace; they have a right to it.”<sup>1</sup>

Approximately 300,000 children below the age of eighteen are used in both international and national conflicts around the world.<sup>2</sup> Twenty million children have died as a result of participation in armed conflict.<sup>3</sup> Over the past two decades, the international child rights movement has prompted the development of international law, policies, and programs concerning the use of child soldiers.<sup>4</sup> Yet in spite of the stronger laws and advocacy that have resulted in United Nation’s Security Council resolutions, international agreements, domestic legislation, and establishment of country-specific ad hoc tribunals, both national armies and rebel groups continue to recruit and use children in armed conflict.<sup>5</sup> This blatant disregard of international law is proof that the practice on the ground has not caught up with the written law. Focus needs to shift from developing international legal standards protecting children in armed conflict to ensuring that these standards are enforced on the ground.<sup>6</sup> Those using child soldiers are willing to ignore the longstanding ethical norms and will likely be un-deterred by new ones

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<sup>1</sup> His Holiness Pope John Paul II, Address at the celebration of the World Day of Peace (Jan 1, 1999).

<sup>2</sup> Marsha L. Hackenberg, *Can the Optional Protocol For the Convention on the Rights of the Child Protect the Ugandan Child Soldier?* 10 Ind. Int’l & Comp. L. Rev. 417, 418 (2000).

<sup>3</sup> Id.

<sup>4</sup> Symposium, *International Law Barring Child Soldiers in Combat: Problems in Enforcement and Accountability*, 37 Cornell Int’l L.J. 531 (2004).

<sup>5</sup> Id. at 534; Mike Crawley, *Everyone’s Outraged, but Children Still Fight Wars: Promises by Militias, Government Not to Use them Often Broken*, Chicago Sun-Times, November 21, 2004, at 45.

<sup>6</sup> Leyla Linton, *U.N. Report Urges Sanctions on Users of Child Soldiers*, Contra Costa Times (Walnut Creek, CA), February 10, 2005.

or persuaded by moral appeal.<sup>7</sup> The international community needs to realize that the practice of using children as soldiers is not accidental.<sup>8</sup> This practice reflects the use of a well-planned doctrine, resulting from conscious and deliberate decisions.<sup>9</sup> Unless and until the international community understands the doctrine that drives the use of child soldiers, the prohibitions against child soldiering will be empty and will continue to be violated.<sup>10</sup> Making laws is not the same as finding ways to enforce them.<sup>11</sup> Stronger legal standards are essential but they, by themselves, are not enough to stop the practice of child soldiering.<sup>12</sup> Passing resolutions in the United Nations Security Council one after another and adopting treaty after treaty in the international community is not enough without ensuring that they are followed with specific action.<sup>13</sup> In order to be effective at preventing the practice of child soldiering, the root causes of child soldiering need to be analyzed.<sup>14</sup> In short, knowledge is needed about why adults find the recruitment of children desirable and, similarly, why children volunteer for armed conflict. In understanding the causes, as well as the resulting dynamics, guided strategies that attack the very heart of the practice can be developed.<sup>15</sup>

This thesis examines the use of children as soldiers in armed conflict and the various international legal standards governing their use. In so doing, it examines the applicability and

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<sup>7</sup> P.W. Singer, *Talk is Cheap: Getting Serious about Preventing Child Soldiers*, 37 Cornell Int'l L.J. 561, 573 (2004).

<sup>8</sup> *Id.* at 574.

<sup>9</sup> *Id.* at 573. "Groups deciding to adopt the child soldier doctrine have never been ignorant about whether it was the ethical thing to do or confused as to what exactly was allowed under international law or norms of proper behavior. The codes against using children as soldiers have existed for thousands of years. . . . [For example], the LTTE (Liberation Tiger of Tamil Eelam) in Sri Lanka has one of the most systemized approaches in its execution of the child soldier doctrine—ranging from sophisticated recruiting strategies using computer databases to a complicated structure of training camps and deployment strategies. . . . This group pointedly omits the dates of birth on the headstones of its child soldiers, knowing that history will harshly judge their exploitation of these children."

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Jo Becker, *Child Soldiers: Changing a Culture of Violence*, 32 WTR Hum. Rts. 16, 17 (2005).

<sup>13</sup> Crawley, *supra* note 5.

<sup>14</sup> Singer, *supra* note 7, at 562.

<sup>15</sup> *Id.*

enforcements of these legal standards in theory and on the ground. Chapter two discusses the causes and methods of child recruitment in armed conflict as well as the consequences of child recruitment and participation. The chapter suggests ways of eliminating and preventing child recruitment and also suggests ways of addressing the consequences of child participation in armed conflict. Chapter three examines current legal standards governing the use of child soldiers. The first part of chapter three, part A, examines the scope of international humanitarian law relative to the use of child soldiers and discusses the inapplicability of current international humanitarian law in armed conflicts, especially in internal armed conflicts where most child soldiers are found; therefore, showing the limited protection international humanitarian law affords child soldiers. The second part chapter three, part B, examines efforts that have been made by the international community to improve the protection afforded child soldiers by developing international law relative to child soldiers through the adoption of both international and regional human rights instruments and declarations. This part analyzes the human rights instruments relative to child soldiers at length by looking at their strengths and weaknesses in relation to the protection they afford child soldiers. The third and last part of chapter three, part C, discusses the growing gap between this developing law concerning child soldiers and practice on the ground. That is to say, while there has been progress in developing and adopting laws protecting child soldiers, the practice of child soldiering has continued to thrive on the ground. Part C of chapter three discusses and suggests different ways to narrow this gap. Chapter four concludes that until the root causes of child recruitment and participation are dealt with, children will continue to volunteer in armed conflicts and government and non-government armed forces will continue to recruit them. Chapter five concludes that focus needs to shift from developing the law relative to child soldiers to actually enforcing it.

## CHAPTER TWO

### RECRUITMENT AND PARTICIPATION OF CHILDREN IN ARMED CONFLICT.

Traditionally, children were protected by cultural presumptions that they were noncombatants.<sup>16</sup> The first widespread use of child soldiers was in the Second World War.<sup>17</sup> Since then, the lack of child involvement in combat has disappeared.<sup>18</sup> In recent years, the use of child soldiers in armed conflict has significantly increased.<sup>19</sup> The underlying causes for the increased use of child soldiers is poverty, lack of economic and educational opportunity for many youths, and the spread of war and disease.<sup>20</sup> Increase in the use of children as soldiers is also attributed to a number of other factors. Since the end of the Cold War, protecting children from human rights abuses has become difficult because of the nature of conflicts today, which are more internalized, localized, and grounded in nationalistic, ethnic, and religious conflict.<sup>21</sup> Also, wars today do not occur on well-defined battlefields but in cities and towns, making the abduction of children from schools, buses, churches, and villages easier for recruiters.<sup>22</sup> Moreover, because of the post-Cold War surplus, there are as many as 500 million small arms around the globe.<sup>23</sup> Consequently, the increased reliance on small arms and light weapons has made using children as soldiers practical since these weapons are easily obtainable, relatively

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<sup>16</sup> Colleen C. Maher, *The Protection of Children in Armed Conflict: A Human Rights Analysis of the Protection Afforded to Children in Warfare*, B.C. Third World L.J. 297, 301 (1989).

<sup>17</sup> Id. (discussing the use of children as spies and porters by the Nazis during the Second World War).

<sup>18</sup> Id.

<sup>19</sup> Amy Beth Abbott, *Child soldiers-The use of Children as Instruments of War*, 23 Suffolk Transnat'l L. Rev 499, 508 (2000).

<sup>20</sup> Singer, supra note 7, at 563.

<sup>21</sup> Abott, supra note 19, at 508.

<sup>22</sup> Id; Jimmy Carter, *Kid Soldiers a War's Most Tragic Victim*, USA Today, June 30, 1998, at 11A (discussing factors leading to increase in child soldiers).

<sup>23</sup> Singer, supra note 7, at 565.

cheap, and easy to use and transport.<sup>24</sup> Unlike earlier weapons, which required precision aiming and physical strength, these weapons are ultra-light automatic weapons that can be carried and fired by children as young as ten.<sup>25</sup> With the firepower of such weapons, children can become deadly combatants.<sup>26</sup> Unfortunately, trade in these arms is largely unregulated and embargoes are rarely respected.<sup>27</sup> To make matters worse, government control over the trade in small arms and light weapons has decreased because private companies produce most of the small arms and light weapons.<sup>28</sup> A recent survey showed that 600 manufacturing firms in approximately ninety-five countries produce small arms, light weapons, or other types of ammunition and parts.<sup>29</sup>

The protracted length of conflicts combined with the proliferation of small arms and light weapons has made the use of children as child soldiers pragmatic.<sup>30</sup> The longer the conflict is, the more likely that children will be recruited.<sup>31</sup> For example, at the end of 1995, civil wars had been running in Angola for thirty years, in Afghanistan for seventeen years, and in Sudan for twelve years.<sup>32</sup> The persistence of protracted conflicts makes finding volunteers difficult; therefore, prompting rebels and government forces to recruit the nation's youth to alleviate the shortage of manpower.<sup>33</sup> Moreover, when conflicts are protracted, the root causes of the conflict such as poverty or repression are exacerbated, thus motivating the civilian population to join armed groups.<sup>34</sup>

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<sup>24</sup> Nancy Morisseau, *Seen but not Heard: Child Soldiers Suing Gun Manufacturers Under Alien Tort Claims Act*, 89 Cornell L.Rev. 1263, 1285 (2004).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1267.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1284.

<sup>31</sup> Abbott, *supra* note 19, at 511.

<sup>32</sup> Radda Bamen, *Stop Using Child Soldiers!*, Coalition to Stop the Use of Child Soldiers, International Save the Children Alliance, London, U.K., 1985, at 5 (pointing out that shortages of manpower will increase recruitment of child soldiers).

<sup>33</sup> *Id.*

<sup>34</sup> Ilene Cohn & Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict*, 23 (1993).

## A. Forced Recruitment

Both armed opposition groups and national armed forces use actual physical force and threats to recruit under-age children.<sup>35</sup> Several rebel groups and national armed forces around the world practice forced recruitment of under-age children by abducting children from schoolyards, buses, market places, streets, churches, or refugee camps.<sup>36</sup> The Lord's Resistance Army, a rebel group in northern Uganda, has abducted more than 20,000 children as fighters, porters, and sex slaves during the eighteen-year-old civil war against the government of President Yoweri Museveni.<sup>37</sup> Many of the children abducted are between fourteen and sixteen years old; however, some are as young as eight and nine.<sup>38</sup> Burma, the largest user of child soldiers in the world, forces children as young as eleven-years-old into their national armed forces.<sup>39</sup> As many as 70,000 children under the age of eighteen serve in Burma's national armed forces while another 6,000 to 7,000 serve in Burma's ethnic opposition groups.<sup>40</sup> The state has forcibly abducted boys and girls at train and bus stations, threatening to jail them if they refuse to comply.<sup>41</sup> The young recruits are taken to camps for weapons training where they usually receive regular beatings and are not given a chance to contact their families.<sup>42</sup> Unlike other countries that recruit child soldiers, Burma does not have reintegration and demobilization

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<sup>35</sup> Id at 514.

<sup>36</sup> Hackenberg, supra note 2, at 42; *Burundi: Children Abducted for Military*, available at <http://hrw.org/english/docs/2001/11/14/burund3355.htm> "All parties-whether rebel or government- have used children to fight this horrible war. But dragging large numbers of students from school to make them soldiers represents a new and alarming practice." Alison Des Forges, Senior Adviser to the African Division of Human Rights Watch.

<sup>37</sup> Ann Davison, *Child Soldiers: No Longer a Minor Issue*, 12 Willamette J. Int'l L. Disp. Resol. 124, 141 (2004).

<sup>38</sup> Hackenberg, supra note 2, at 424.

<sup>39</sup> Davison, supra note 37, at 141.

<sup>40</sup> Jo Becker, 'A Gun as Tall as me', Asian Wall Street Journal, January 20, 2004, at A11.

<sup>41</sup> Davison, supra note 37, at 141.

<sup>42</sup> Id.

programs.<sup>43</sup> The Burmese government continues to deny the recruitment of children into their armed forces.<sup>44</sup>

Many of the under-age peasants recruited lack identity records documenting their date of birth because their birth was not formally registered or because the registry was destroyed in fighting.<sup>45</sup> Those swept up in recruitment drives often have difficulty proving that they are under-age or that they fall under exempted categories like students or an only son.<sup>46</sup>

Once recruited, children are used as spies, porters, and cooks.<sup>47</sup> Although boys are more likely to be recruited than girls, opposition forces recruit girls, whom they often rape and force to become wives of combatants.<sup>48</sup> The children are used as human mine detectors and frontline troops by opposition forces because they are easy to manipulate and are considered expendable.<sup>49</sup> These children are turned into fierce fighters through brutal indoctrination and inducement through the use of hard drugs and alcohol. The children are sent out to commit atrocities against civilians, including their own families.<sup>50</sup> Children like this end up depending on their captors and even identifying with their cause, since they have no where else to go.

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<sup>43</sup> Becker, *supra* note 40.

<sup>44</sup> *Id.*

<sup>45</sup> Cohn & Goodwin-Gill, *supra* note 34, at 24.

<sup>46</sup> *Id.*

<sup>47</sup> Gracia Machel, *Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children*, at para 27, 51<sup>st</sup> Sess., Agenda Item 108, U.N. Doc. A/51/306 (1996) [*hereinafter* Machel study].

<sup>48</sup> *Id.* at para 35 ; *More than 120,000 Child Soldiers Fighting in Africa*, *ca.*, at <http://www.hrw.org/press/1999/apr/cs0419.htm> Concy, a fourteen-year-old girl, abducted from Uganda and taken to Sudan by the opposition group, the Lord's Resistance Army (LRA), recounted to one interviewer. "In Sudan we were distributed to men and I was given a man who had just killed his woman.... Girls who refused to become LRA wives were killed in front of us to serve as a warning to the rest of us."

<sup>49</sup> Davison, *supra* note 37, at 138.

<sup>50</sup> Machel Study, *supra* note 47, at para. 47; Cohn & Goodwin-Gill, *supra* note 34, at 27. In the 1980's, RENAMO, the Mozambican resistance group, had a recruitment practice that involved taking a boy soldier back to the village and having him kill someone known to him. "The killing took place in such a way that the community knew that he had killed, thus effectively closing the door to the child ever returning to his village."

After killing civilians and fighting alongside the rebels, human rights workers have a difficult time trying to reunify and reintegrate these children into their community.<sup>51</sup> Reunification for girl soldiers that have been raped or sexually abused is particularly difficult because cultural beliefs make staying with their families hard and any prospects of marriage are lost.<sup>52</sup> The girls are left with few or no alternatives and eventually end up as prostitutes.<sup>53</sup> Even when the children are rescued by peacekeepers, they are often considered deserters and are subject to on-the-spot execution if found.<sup>54</sup> Successful reintegration of child soldiers depends upon education, vocational opportunity, economic security, and support from family and the community.<sup>55</sup>

### **Eliminating Forced Recruitment by Government Armed Forces and Armed Groups**

Eliminating forced recruitment is an endeavor that needs tenacity. A number of approaches have been taken to stem the recruitment of child soldiers. The United Nations Security Council has shown promising initiative by passing resolutions that demand concrete action plans to end child soldiering by parties in violation of international law and has threatened measures that include travel bans on leaders, arm embargoes, and the restriction of the flow of financial resources to parties that refuse to comply.<sup>56</sup> Negative public media, especially directed toward unrecognized opposition groups, could serve as an effective solution for eliminating forced recruitment of under-age children by pressuring opposition groups to adhere to

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<sup>51</sup> Abbott, *supra* note 19, at 515; Machel Study, *supra* note 47, at para. 55. In some African cultures, it is spiritually believed that the evil spirits of the victims haunt anyone who has killed; to accept a former child soldier is to accept evil spirits.

<sup>52</sup> See Machel Study at para. 51.

<sup>53</sup> *Id.*

<sup>54</sup> Abbott, *supra* note 19, at 515.

<sup>55</sup> *Id.* at 516.

<sup>56</sup> Becker, *supra* note 12, at 17.

international norms.<sup>57</sup> In some cases, for example, armed groups adhered to even greater standards in the hope of gaining positive publicity and legitimacy.<sup>58</sup> Foreign aid donors supporting armed groups could be influential in pressuring their clients not to recruit under-age children.<sup>59</sup>

Without a doubt, however, stronger efforts are needed to end impunity. Recruiters are rarely held accountable for recruiting children under the age prescribed by law or policy.<sup>60</sup> They know recruiting under-age children is a war crime but seem to believe that they will never be brought to justice.<sup>61</sup> There is no need for additional law in this area, given the number of treaties, declarations, and resolutions this practice violates.<sup>62</sup> Instead, the full measure of international law needs to be applied to eliminate the sense of impunity enjoyed by those who use child soldiers.<sup>63</sup> This impunity can be challenged through national courts, ad hoc tribunals, and the International Criminal Court (ICC).<sup>64</sup> For instance, in May of 2004, the Special Court for Sierra Leone issued a landmark decision finding that an individual may be held criminally responsible for the offense of recruiting child soldiers into armed conflict.<sup>65</sup> The Special Court was the first international criminal body to indict a person for the crime of recruiting and using children in war and also the first to deliver an international conviction associated with the practice.<sup>66</sup> As case law, this landmark decision now joins a host of international treaties that prohibit the practice of

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<sup>57</sup> Cohn & Goodwin-Gill, *supra* note 34, at 76.

<sup>58</sup> *Id.* “With respect to Iran, publicity had no effect at all, whereas in El Salvador the opposite was more often true. Sometimes an armed group will recognize that using children is not militarily or strategically beneficial, while at other times, as in Mozambique, the opposite applied.”

<sup>59</sup> *Id.* at 77.

<sup>60</sup> Becker, *supra* note 12, at 18.

<sup>61</sup> Singer, *supra* note 7, at 575.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Becker, *supra* note 12, at 18.

<sup>65</sup> Noah B. Novogrodsky, *Litigating Child Recruitment before the Special Court for Sierra Leone*, 7 San Diego Int’l L.J. 421(2006).

<sup>66</sup> *Id.* at 421, 423.

recruiting child soldiers.<sup>67</sup> More recently, the ICC issued its first indictment in July of 2005 against Joseph Kony, the rebel leader of the Lords Resistance Army (LRA) in Uganda, and five of his commanders.<sup>68</sup> On March 17, 2006, the ICC made its first arrest.<sup>69</sup> Mr. Thomas Lubanga Dyilo, founder and leader of the Union of Congolese Patriots (UPC) was arrested and transferred to the ICC.<sup>70</sup> Thomas Lubanga is alleged to have committed war crimes, as set out in Article 8 of the Statute, in the territory of the Democratic Republic of the Congo since July of 2002.<sup>71</sup> In short, legal action can act as a deterrent, but whether such prosecution would take place ultimately depends on political will, which in turn is influenced by public opinion.<sup>72</sup>

In an effort to eliminate forced recruitment, proper recruitment procedures should be established by governments.<sup>73</sup> Implementing Article 7 of the Convention on the Rights of the Child (CRC), which provides for registration after birth, would help ensure that under-age children were not recruited.<sup>74</sup> Governments should have effective systems of birth registration and documentation of children's age in order to stop the use of children as soldiers. In addition, the proliferation of weapons, especially light weight weapons that are easy to handle by children, should be curbed.<sup>75</sup> Moreover, evacuating children from war zones and creating safe havens

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<sup>67</sup> Id. at 424.

<sup>68</sup> Press release, First Arrest for the International Criminal Court, March 17, 2006, at <http://www.icc-cpi.int/pressreleases/114.html>

<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> Id.

<sup>72</sup> Stuart Malsen, *Relevance of the Convention on the Rights of the Child to Children in armed Conflict*, 6 *Transnat'l L. & Contemp. Probs.* 329, 344 (1996).

<sup>73</sup> Alison Dundes Renteln, *The Child Soldier: The Challenge of Enforcing International Standards*, 21 *Whittier L. Rev.* 191, 203-204 (1999).

<sup>74</sup> Convention on the Rights of the Child, Nov. 20, 1989, at art. 7, 1577 U.N.T.S.3. "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to be cared for by his or her parents."

<sup>75</sup> Malsen, *supra* note 72, at 344.

would minimize the impact of war on them and would also protect them from being forcibly recruited.<sup>76</sup>

In order to gain universal respect for human rights and consequently eliminate forced recruitment, dissemination of information in relation to the protection and treatment of children during armed conflict should be made available to all sections of the community.<sup>77</sup> Educating parents and local communities about national and international laws pertaining to the use of child soldiers would also strengthen the capacity for advocacy.<sup>78</sup> Increased awareness and support for banning children in combat would create an atmosphere where it is harder for any group to use children in combat.<sup>79</sup> National and international non-governmental organizations play an important role in monitoring and reporting responsibilities.<sup>80</sup> Information relating to child soldiers such as reports on the practices of governments and non-government entities could be shared on a network basis, thereby encouraging the development of cross-regional and cross-international strategies.<sup>81</sup>

## **B. Voluntary Participation**

While children may be forcibly recruited by both government armies and opposition groups, they are sometimes the first to voluntarily join these groups.<sup>82</sup> Their motivation lies in the social, economic, and political issues defining their lives.<sup>83</sup> Experts have estimated that voluntarily participation exceeds forced recruitment.<sup>84</sup> The term “voluntary” in reference to the

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<sup>76</sup> Renteln, *supra* note 73, at 204.

<sup>77</sup> *Id.* at 342.

<sup>78</sup> *Id.*

<sup>79</sup> Hackenberg, *supra* note 2, at 447.

<sup>80</sup> Cohn & Goodwin-Gill, *supra* note 34, at 180-181.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Barbara Fontana, *Child Soldiers and International Law*, *African Security Review*, Vol.6, No. 3, (1997).

use of child soldiers is questionable, given the brutal conditions that motivate children to join armed forces.<sup>85</sup> Children volunteer for the armed forces because of what they have experienced personally: poverty, death, loss, displacement, religious motivations, need for revenge, and collapse of social structure.<sup>86</sup> In response to these experiences, children find themselves volunteering with armed groups.<sup>87</sup> In addition, children's surroundings influence their decision to volunteer in armed conflict.<sup>88</sup> A child's social environment influences the way they see things.<sup>89</sup> Families, peer groups, and religious or other community-based groups may exert pressure that leads or encourages children to join armed hostilities.<sup>90</sup> A child's surrounding has an impact on a child's decision to participate in hostilities.<sup>91</sup> For example, if a community's perception of war is based on ethnic cleansing or religious fanaticism, this perception is passed on to the child, who in turn feels motivated and justified to participate in effecting a change in ethnicity by volunteering their services in armed conflict.<sup>92</sup> Also, peer pressure, hopelessness, family loss, desires for revenge, and the loss of a support structure makes joining an armed group seem like a better alternative.<sup>93</sup> Lastly, conflicts leave children orphaned, displaced, or responsible as heads of household when one or both parents are killed or are away fighting.<sup>94</sup> Schools, which would otherwise occupy their time, are closed or destroyed, and the fields they would otherwise cultivate are off-limits because of mines.<sup>95</sup> Children who find themselves in

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<sup>85</sup> Morisseau, *supra* note 24, at 1280.

<sup>86</sup> Cohn & Goodwin-Gill, *supra* note 34, at 32, 168.

<sup>87</sup> *Id.* at 173.

<sup>88</sup> *Id.* at 37-43, 168-169.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*; Abbott, *supra* note 19, at 517: In some cultures, giving a child as a volunteer is viewed as noble. For example, in Sri Lanka, the community viewed child soldiers as heroes and received special favors, which included tax exemptions and preferential treatment at job interviews.

<sup>91</sup> See Cohn & Goodwin-Gill, *supra* note 34, at 37-43, 168-169.

<sup>92</sup> *Id.* at 23.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

this vulnerable situation face the risk of being recruited or being receptive to ideological propaganda which encourages them to join armed groups.<sup>96</sup>

### **Preventing Voluntary Participation**

As mentioned earlier, what motivates children to participate in armed conflict lies deep in the roots of the conflict, and in the social, economic, and political issues defining their lives.<sup>97</sup> Only by determining and addressing the root causes of voluntary participation can constructive solutions be found to help prevent children from volunteering in armed conflict.<sup>98</sup> Preventative strategies aimed at reducing child volunteerism include interventions aimed at structural reform, interventions aimed at changing perceptions of the value of participation held by children and those around them, interventions that counter children's feelings of helplessness, vulnerability, and frustration, and demobilization.<sup>99</sup>

Structural reform interventions may include elimination or improvement of the structural causes of negative personal experience which may be targeted by providing alternative social institutions.<sup>100</sup> Interventions aimed at targeting children's appraisal of participation in hostilities should be directed both to the children and to those around them by convincing them of the negative consequences of participation.<sup>101</sup> This should in turn convince adults to prevent their children from volunteering.<sup>102</sup> Advocacy taking this approach should include moral arguments based on religion, local culture, history, and morals.<sup>103</sup> Adult's perceptions and values of war should be taken into account so as to effect a change in children's perceptions and values of

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<sup>96</sup> Id.

<sup>97</sup> Id.

<sup>98</sup> Id.

<sup>99</sup> Id.

<sup>100</sup> Id.

<sup>101</sup> Id. at 79-80.

<sup>102</sup> Id.

war.<sup>104</sup> Alternative activities like educational opportunities, socio-economic improvement, and physical and psychosocial rehabilitation would go a long way in the process.<sup>105</sup>

Feelings of helplessness and vulnerability are often not problems of perception; therefore, the solution is not only a matter of making children feel empowered and secure but also of reducing their oppression and improving their capacity to effect change without joining armed forces.<sup>106</sup> Interventions aimed at instilling feelings of competence, security, and strength involve providing alternatives for children in war zones.<sup>107</sup> For example, leaving schools open during conflicts would make children less bored, frustrated, and desperate.<sup>108</sup> Children would be less attracted to joining armed forces if schools were kept open during hostilities.<sup>109</sup> However, this is not always the case because keeping children in school during hostilities can also help facilitate recruitment by opposition armed forces.<sup>110</sup>

Encouraging demobilization of child soldiers would more likely than not reduce or prevent children from volunteering in the future. After children volunteer their services, they usually regret their decision but find that they cannot leave the armed group safely.<sup>111</sup> Deserters are shot on the spot or beaten in front of other troops.<sup>112</sup> Even those who escape live in fear of being detained by the police, while their families are subject to harassment and threats.<sup>113</sup> Improved socio-economic conditions are often a factor that encourages young soldiers to

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<sup>103</sup> Id. at 80-81.

<sup>104</sup> Id. at 172.

<sup>105</sup> Id. at 173.

<sup>106</sup> Id. at 81.

<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> Id.

<sup>111</sup> Id.

<sup>112</sup> Id.

<sup>113</sup> Id.

demobilize.<sup>114</sup> Also, since some of the child soldiers fear retribution for the acts carried out by them during conflicts, amnesty offers may persuade them to surrender their arms and leave the armed group.<sup>115</sup> However, this may not always be the case as was seen in Liberia where amnesty offers did not automatically lead to demobilization.<sup>116</sup> Provision of care for the homeless and orphaned and physical and psychological rehabilitation might also facilitate demobilization.<sup>117</sup> Demobilization has to be linked with development initiatives so as to successfully prevent child soldiers from volunteering again in the future.<sup>118</sup> In summary, only by examining the different situations and taking account of the experience of others can the factors producing voluntary involvement be dealt with.<sup>119</sup>

### **C. Consequences of Participation in Armed Conflict**

The growth and development of children are continuing processes that require essential nutrients, psychological stimuli, and social interactions.<sup>120</sup> Obstacles that interrupt or block this normal progression can have serious implications on the physical and mental well-being of a child.<sup>121</sup> The recruitment and abduction of children into armed forces is one of the most disruptive obstacles to the healthy development of children.<sup>122</sup> Children that are recruited are robbed of a normal life and are denied a normal education, which is essential for their development and promotion of self-esteem.<sup>123</sup>

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<sup>114</sup> Id. at 82.

<sup>115</sup> Id.

<sup>116</sup> Id.

<sup>117</sup> Id.

<sup>118</sup> Id.

<sup>119</sup> Id.

<sup>120</sup> Malsen, *supra* note 72, at 331.

<sup>121</sup> Id. at 332.

<sup>122</sup> Id.

<sup>123</sup> Id.

Customary international law is violated whether children become soldiers voluntarily or as a result of forced recruitment.<sup>124</sup> Exposure to armed conflict through direct participation or via the resulting breakdown of community support systems traumatizes childhood development.<sup>125</sup> Malnutrition, disease, sexual exploitation, mental abuse, and physical injury are some of the many hardships faced by child soldiers.<sup>126</sup>

Child soldiers are subjected to dangerous risks, some of which are beyond the normal perils of war.<sup>127</sup> They are made to walk across fields ahead of their abductors and to plant landmines or clear fields of landmines, and therefore are the first to die if they miss a mine.<sup>128</sup> Child soldiers are forced to suffer the rigors of military life.<sup>129</sup> The younger children collapse under the heavy loads. Malnutrition, respiratory and skin infections, and other ailments are frequent.<sup>130</sup> Child soldiers face the additional risk of drug and alcohol abuse, which is often used to desensitize them from violence.<sup>131</sup>

Girl soldiers are particularly at risk of sexual exploitation.<sup>132</sup> They are raped, abducted for sexual exploitation, and forced into marriages or prostitution.<sup>133</sup> Sexual exploitation has a devastating impact on the physical and emotional development of the victim.<sup>134</sup> Unwanted and unsafe sex is most likely to result in unwanted pregnancies and sexually transmitted diseases like HIV/AIDS, which affect the immediate and future sexual reproductive health of the girl and the

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<sup>124</sup> Abbott, supra note 19, at 518.

<sup>125</sup> Id.

<sup>126</sup> Id.

<sup>127</sup> *Child Soldiering is the Worst Form of Child labor*, available at <http://www.cdi.org/issue/document.cfm?DocumentID=582&IssueID=108&Start...>

<sup>128</sup> Id.

<sup>129</sup> *Key Points of Global report on Child Soldiers*, available at <http://www.worldrevolution.org/Projects/Webguide/GuideArticle.asp?ID=12>.

<sup>130</sup> Id.

<sup>131</sup> Id.

<sup>132</sup> Id.

<sup>133</sup> *Sexual and Gender-Based Violence Against Children*, available at <http://www.un.org/special-rep/children-armed-conflict/English/SexualViolence.html>.

<sup>134</sup> Machel Study, supra note 47, at Para. 99.

mortality of the girl child soldier.<sup>135</sup> Girls that have been repeatedly raped face the risk of chronic pelvic inflammatory disease and death.<sup>136</sup> Some commit suicide because of the humiliation they suffer, while others flee from their homes leading to ostracism and further displacement.<sup>137</sup>

Besides the risks of death or physical injury in combat, child soldiers also suffer psychosocial consequences of participation. Under the CRC, every child is entitled to receive such “protection and care as is necessary for his or her well-being,” and State Parties are obliged to “ensure to the maximum extent possible the survival and development of the child.”<sup>138</sup> Child soldiers that have suffered traumatic experiences like executions and violent acts experience nightmares and flashbacks.<sup>139</sup> They live in fear of rejection and in fear of legal or physical retribution for the acts they committed during conflict.<sup>140</sup> Sometimes families or communities reject former child soldiers because of the abuses they carried out during conflicts or because the family or community fears violent retribution for the acts committed by the child soldier.<sup>141</sup>

Children who have perpetrated or fallen victim to extreme violence need to receive psychological treatment.<sup>142</sup> Successful recovery programs allow children to resume their normal childhood while learning to live in an environment of peace.<sup>143</sup>

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<sup>135</sup> Id.

<sup>136</sup> Id. at para. 102.

<sup>137</sup> Id; Abbott, *supra* note 19, at 506.

<sup>138</sup> Convention on the Rights of the Child, *supra* note 74, at arts. 3(2), 6(2).

<sup>139</sup> Cohn & Goodwin-Gill, *supra* note 34, at 105-107.

<sup>140</sup> Id. at 109.

<sup>141</sup> Id.

<sup>142</sup> Abbott, *supra* note 19 at 519.

<sup>143</sup> Id.

## Addressing the Consequences of Child Recruitment and Participation

The preamble to the CRC provides that, “the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.”<sup>144</sup> The 1977 Additional Protocols further confirm the special protection afforded children by providing that, “Children shall be the object of special respect and shall be protected against any form of indecent assault.”<sup>145</sup>

In seeking to ensure that the consequences suffered by child soldiers are addressed, the sources of obligation must be clarified and those responsible for addressing the consequences should be identified.<sup>146</sup> Unfortunately, international humanitarian law is not always clear in this area.<sup>147</sup> In addition, questions that cannot be answered once and for all are questions like who should intervene, when and how.<sup>148</sup> The responsibility to protect or respond to the needs of child soldiers falls on States and non governmental entities, who may be parties or adherents to international instruments, parties to the conflict, subjects of national law, and others who are bound by customary international law.<sup>149</sup> However, fulfillment of the formal requirements is complicated by the lack of political will and the availability of only limited resources because of conflicts.<sup>150</sup> Certain obligations like physical integrity, humane treatment, and freedom from torture are never dependent on the availability of resources but must be fulfilled by all parties

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<sup>144</sup> Convention on the Rights of the Child, *supra* note 74.

<sup>145</sup> Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International armed Conflicts, June 8, 1997, art. 77, 1125 U.N.T.S. 17512 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non - International Armed Conflicts, art 4, 1125 U.N.T.S. 609 [hereinafter Protocol II].

<sup>146</sup> Cohn & Goodwin-Gill, *supra* note 34, at 123.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 175.

<sup>149</sup> *Id.* at 123-125.

<sup>150</sup> *Id.*

concerned.<sup>151</sup> In short, addressing the consequences of child participation in armed conflict takes place both at national and international levels.<sup>152</sup> For instance, dealing with psychosocial and physical consequences of children's participation in conflict usually takes place at the national and community level.<sup>153</sup> Nonetheless, international legal obligations do offer general principles and a framework for action.<sup>154</sup> The two 1997 Additional Protocols require parties to the conflict to provide children "with the care and aid they require, whether because of their age or any other reason."<sup>155</sup> The reference to 'age or any other reason' may be interpreted to include trauma due to recruitment; thus, this may imply that there is an obligation on parties to provide rehabilitative services.<sup>156</sup> The CRC further confirms States' obligations by providing that, "State Parties shall take all appropriate measures to promote the physical and psychological recovery and social re-integration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts."<sup>157</sup> "Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."<sup>158</sup> In practice, however, providing rehabilitation services to ex-child combatants is not that easily achieved since conflict often coincides with the breakdown of community programs and support systems.<sup>159</sup>

In addition, responsive programs dealing with the psychosocial and physical consequences of child participation in conflict should be developed and executed.<sup>160</sup> In developing these programs, incorporation of traditional practices, values, and beliefs should be

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 131.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Protocol I and II, *supra* note 145, at art. 77 and art. 4, respectively.

<sup>156</sup> Cohn & Goodwin-Gill, *supra* note 34, at 131.

<sup>157</sup> Convention on the Rights of the Child, *supra* note 77, at art. 39.

<sup>158</sup> *Id.*

<sup>159</sup> Cohn & Goodwin-Gill, *supra* note 34, at 131.

considered.<sup>161</sup> Programs or policies that offer incentives for child soldiers to demobilize and reintegrate are important and help reduce delinquency and dissatisfaction of former child soldiers.<sup>162</sup>

Education, as part of the demobilization and reintegration package, would help former child soldiers reenter society and would give them purpose.<sup>163</sup> Unfortunately, most child soldiers that have spent their school-age years as combatants are likely to be more interested in earning money once they hand over their guns.<sup>164</sup> In such cases, programs that provide vocational training, industrial skills training, or agricultural skills training should be designed and executed.<sup>165</sup> Such skills training combined with a loan enable them to establish their own businesses and financial independence, thus bringing about successful reintegration in society.<sup>166</sup> Article 28 of the CRC recognizes a child's right to education, and obliges State Parties to take various steps to ensure that the right is achieved, "progressively and on the basis of equal opportunity."<sup>167</sup>

Forgiveness and reconciliation are also a step that should be considered when dealing with reintegration and rehabilitation of former child soldiers.<sup>168</sup> Most child soldiers commit heinous crimes against civilians, including family members and neighbors during conflicts.<sup>169</sup> Former child soldiers' reintegration into society and transition to civilian life is obviously difficult for both the victims and the child soldiers.<sup>170</sup> Former child soldiers need to be forgiven

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<sup>160</sup> Id. at 133.

<sup>161</sup> Id. at 134.

<sup>162</sup> Id. at 138-139.

<sup>163</sup> Id.

<sup>164</sup> Id.

<sup>165</sup> Id. at 139-140.

<sup>166</sup> Id.

<sup>167</sup> Convention on the Rights of the Child, *supra* note 74, at art. 28.

<sup>168</sup> Cohn & Goodwin-Gill, *supra* note 34, at 136-137.

<sup>169</sup> Id.

<sup>170</sup> Id.

by society, and this can be done through efforts to help community members understand that child soldiers are also victims.<sup>171</sup> National level policy initiatives to ensure amnesty, family reunification, and follow-up social support should be initiated in the name of reconciliation and psychological healing.<sup>172</sup> Public acknowledgment of human rights violations is an important step toward national reconciliation.<sup>173</sup>

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<sup>171</sup> Id.

<sup>172</sup> Id.

## CHAPTER THREE

### THE LEGAL REGIME GOVERNING THE USE OF CHILD SOLDIERS

International law governing children may be found in the broad realm of human rights law encompassed in treaties, international humanitarian law, customary international law, and in the laws and practices of individual States.<sup>174</sup> Until recently, the prevailing legal standard in international law, established in the 1977 Additional Protocols of the Geneva Convention and the 1989 Convention on the Rights of the Child, was that children as young as fifteen could be legally recruited and used in combat.<sup>175</sup> This standard is weak considering that in other aspects of the Convention on the Rights of a Child a child is defined as anyone under the age of eighteen and is entitled to special protections.<sup>176</sup> The weak legal standard and continued wide spread of the use of child soldiers in the 1990's prompted an international group of geographically diverse NGO's, the Coalition to stop the Use of Child Soldiers, to campaign for stronger laws relative to the use of child soldiers<sup>177</sup> The campaigns ultimately led to three new treaties that significantly strengthened the legal norms regarding the use of child soldiers.<sup>178</sup> The 1998 Rome Statute of the International Criminal Court, adopted by 120 governments, made the practice of conscripting, enlisting, or using children under the age of fifteen in hostilities a war crime.<sup>179</sup> In

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<sup>173</sup> Id.

<sup>174</sup> Cohn & Goodwin, *supra* note 34, at 55.

<sup>175</sup> Protocol I and II, *supra* 145, art. 77(2) and art. 4(3) (C), respectively; Convention on the Rights of the Child, *supra* note 74, at art. 38.

<sup>176</sup> Convention on the Rights of the Child, *supra* note 74, at art. 1.

<sup>177</sup> Singer, *supra* note 7, at 569.

<sup>178</sup> Id.

<sup>179</sup> Rome Statute of the International Criminal Court, July 17, 1998, art. 8 (xxvi), U.N. Doc. A/CONF.183/9, at 8, 9, 17, 37 I.L.M. 999 [hereinafter Rome Statute.] The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as a part of a large-scale commission of such crimes. 2. For the purposes of this Statute, "war crimes" means: (a) Grave breaches of the Geneva Conventions of 12 August

June of 1999, the International Labor Organization adopted the Worst Forms of Child Labor Convention (Convention 182), which prohibited the forced recruitment of children under the age of eighteen for use in armed conflict.<sup>180</sup> In May of 2000, the United Nations adopted the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, establishing eighteen as the minimum age for participation in armed conflict, for compulsory or forced recruitment, and for any recruitment by non-governmental armed groups.<sup>181</sup> The African Charter on the Rights and Welfare of the Child, although only a regional treaty, also established eighteen as a minimum age for recruitment and participation in hostilities.<sup>182</sup>

#### **A. The Limited Scope of International Humanitarian Law Relative to the use of Child Soldiers.**

International humanitarian law is the body of law that establishes rules that seek to limit the effects of armed conflict by protecting non-combatants and by restricting the means and methods of warfare.<sup>183</sup> International humanitarian law is codified in the four 1949 Geneva

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1949; (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: . . . (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities. . . . (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: . . . (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities. . . .

<sup>180</sup> International Labor Organization Worst Forms of Child Labor Convention 182, S. Treaty Doc. No. 106-S (1999), 38 I.L.M. 1207, available at <http://www.ilo.org/public/english/50normes/whatare/index.htm> [hereinafter Convention 182].

<sup>181</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, GA Res. 54/263, Annex I (May 25, 2000), S. TREATY DOC. NO. 106-37 (2000) [hereinafter Protocol on the Involvement of Children in Armed Conflict].

<sup>182</sup> African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) [hereinafter African Charter].

<sup>183</sup> L. Wells, *Crimes Against Child Soldiers in Armed Conflict Situations: Application and Limits of International Humanitarian Law*, 12 Tul. J. Int'l & Comp. L. 287, 292 (2004). The rules and norms of international humanitarian law can be found in agreements between States, in customary rules based on state practice and opinio juris, and in general principles.

Conventions and the two 1977 Additional Protocols.<sup>184</sup> As shall be discussed below, the scope of international humanitarian law relative to the use of children in armed conflict is rather limited, especially in conflicts of a non-international nature. The 1949 Geneva Conventions anticipate two types of conflicts: “all cases of declared war or of any armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them,”<sup>185</sup> and “the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>186</sup> In short, the 1949 Geneva Conventions anticipate both international and non-international conflicts.

Common Article 3 of the Geneva Conventions applies to internal armed conflicts and sets out basic protections which apply to “persons taking no active part in the conflict.”<sup>187</sup> Because Common Article 3 affords protections to persons taking no active part in conflicts, persons who take a direct part in hostilities fall outside the ambit of this protection, thus losing all protection guaranteed under Common Article 3 of the Geneva Conventions.<sup>188</sup> Therefore, since Common Article 3 does not explicitly address the issue of child combatants, children who directly participate in armed conflicts are not protected by the Geneva Conventions, thus falling between

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<sup>184</sup> The four Geneva Conventions: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded Sick and Shipwrecked Members of Armed Forces at Sea, Aug 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (Geneva Convention II); Geneva Convention Relative to the treatment of Prisoners of War, Aug 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Geneva Convention III); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Geneva Convention IV); Protocol I and II, *supra* note 145; Hackenberg, *supra* note 2 at 453.

<sup>185</sup> See Geneva Conventions at art. 2.

<sup>186</sup> *Id.* at art. 3.

<sup>187</sup> *Id.* Persons protected under common article 3 to the Geneva Convention are those: “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause. . . .” These persons are protected from “violence to life and person” and “outrages upon personal dignity, in particular humiliating and degrading treatment.” Likewise, persons guaranteed protection under Additional Protocol II are defined as: “All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted. . . .” These protections include protection against “violence to life, health and physical or mental well-being”; “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”; “slavery and slave trade in all their forms”; and threats to commit any of the foregoing acts.”

<sup>188</sup> Wells, *supra* note 183, at 294.

the gaps of international humanitarian law.<sup>189</sup> However, where there are gaps or contradictions in international humanitarian law, the long-standing Martens Clause recalls and confirms the most basic standard.<sup>190</sup> “ In cases not covered by specific international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”<sup>191</sup> This position is supported by the International Law Commission and is restated, verbatim, in Article 1(2) of Additional Protocol I.<sup>192</sup> The Martens Clause is important because through its reference to customary law, it stresses the importance of customary norms in the regulation of armed conflict.<sup>193</sup>

Another problem with the application of Common Article 3 relates to the refusal of States to admit its applicability.<sup>194</sup> According to some, the lack of a clear definition of armed conflict in Common Article 3 “gave rise to a great number of interpretations and its applicability was often denied.”<sup>195</sup> However, because the obligations contained in Common Article 3 are

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<sup>189</sup> Id; see supra text accompanying note 187.

<sup>190</sup> Cohn & Goodwin-Gill, *supra* note 34, at 56. As it first appeared in the Preamble to the 1899 Hague Convention (II), the Martens Clause reads: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience." The Clause was based upon and took its name from a declaration read by Professor von Martens, the Russian delegate at the Hague Peace Conferences 1899. The life and works of Martens are detailed by V. Pustogarov, "Fyodor Fyodorovich Martens (1845-1909) — A Humanist of Modern Times", *International Review of the Red Cross (IRRC)*, No. 312, May-June 1996, pp. 300-314.

<sup>191</sup> UN Report of the International Law Commission on the Work of its Forty-sixth Session, 2 May -22 July 1994, GAOR A/49/10, p. 317; see also <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList133/32AEA038821EA35EC1256B66005A747C>

<sup>192</sup> UN Report of the International Law Commission on the Work of its Forty-sixth Session, 2 May -22 July 1994; Protocol I, *supra* note 145, at art. 1 (2).

<sup>193</sup> Cohn & Goodwin-Gill, *supra* note 34, at 56.

<sup>194</sup> Chen Reis, *Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict*, 28 Colum. Hum. Rts. L. Rev., 629, 637 (1997).

<sup>195</sup> Id; Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), at 4448 [hereinafter Protocol II Commentary.] “Common Article 3 does not contain a definition of armed conflict. In the absence of clarity of this concept, it gave rise to a great variety of interpretations and in practice its applicability was often denied. To improve the protection of the victims on non-international armed conflicts it proved necessary not only to develop

considered customary international law, “rebels and governments against which they fight are always bound by the duties and obligations of Common Article 3,” regardless of whether they deny its applicability.<sup>196</sup> Nevertheless, the four Geneva Conventions, despite their good intentions, fail to adequately protect child soldiers, especially those in internal armed conflict.

The 1977 Additional Protocols to the Geneva Conventions were the first international instruments to regulate the role of children in armed conflict.<sup>197</sup> Additional Protocol I, which applies to conflicts of an international nature, obligates parties to the conflict to “take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.”<sup>198</sup> Also, “in recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the parties to the conflict shall endeavor to give priority to those who are oldest.”<sup>199</sup>

The use of the term “feasible measures” makes claiming that keeping children out of the conflict was unfeasible easy for State Parties.<sup>200</sup> This formulation is less mandatory than that proposed in the Diplomatic Conference by the International Committee of the Red Cross (ICRC), which would have obliged parties to take “all necessary measures” to prevent participation.<sup>201</sup> In addition, the flexible restriction on the acceptance of voluntary service is to the extent that

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the rules, but also to find more objective criteria to determine whether they are applicable and to reduce the measure of discretion left to each government.”

<sup>196</sup> Id.

<sup>197</sup> Protocol I and II, *supra* note 145.

<sup>198</sup> Protocol I, *supra* note 145, at art. 77(2).

<sup>199</sup> Id.

<sup>200</sup> Renteln, *supra* note 73, at 194.

<sup>201</sup> Cohn & Goodwin-Gill, *supra* note 34, at 61.

indirect voluntary participation of children under fifteen in hostilities would not involve any breach of Article 77 of Additional Protocol I.<sup>202</sup>

The text's reference to taking a 'direct' part in hostilities could lead to the conclusion that indirect acts of participation are not covered.<sup>203</sup> The ICRC's draft article, which did not include this word, would have prohibited even indirect participation, such as the transmission of military information, transport of arms and supplies, and provisions of supplies.<sup>204</sup> Lastly, the terms of the treaty only apply to one or both of the parties that has ratified it or expressed the intent to be bound by it.<sup>205</sup>

Additional Protocol II develops and supplements Common Article 3 to the Geneva Conventions without modifying the existing conditions of application.<sup>206</sup> Like Common Article 3, Additional Protocol II applies to non-international armed conflicts.<sup>207</sup> However, "Protocol II only applies to conflicts of a certain degree of intensity and does not have exactly the same field of application as Common Article 3, which applies in all situations of non-international armed conflict."<sup>208</sup> The application of Additional Protocol II is often obstructed by threshold issues. As stated above, Additional Protocol II only applies to internal conflicts that reach a certain level of

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<sup>202</sup> Id; Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), at 3184. [hereinafter Protocol I Commentary.] Voluntary enrolment was not explicitly mentioned in Additional Protocol I because States noted that "sometimes, especially in occupied territories and wars of national liberation, it would not be realistic to totally prohibit voluntary participation of children under fifteen.

<sup>203</sup> See Protocol I Commentary at 3187.

<sup>204</sup> Id; Cohn & Goodwin-Gill, *supra* note 34, at 61-62.

<sup>205</sup> See Cohn & Goodwin-Gill at 58-62. In order for Protocol I to bind parties, the parties must declare intent to accept its terms.

<sup>206</sup> Protocol II, *supra* note 145, at art. 1(1). This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

<sup>207</sup> Id.

<sup>208</sup> Id; Protocol II Commentary, *supra* note 195, at 4447.

intensity, and where the opposition armed forces meet the criteria of responsible command and control over the territory, and where there is capacity to implement the Protocol.<sup>209</sup> Furthermore, “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”<sup>210</sup> Because of Additional Protocol II’s high threshold application, States are able to deny that their internal conflicts are covered by claiming that their conflicts are merely internal disturbances, riots, or sporadic acts.<sup>211</sup> At present, there is no international body that determines which non-international conflicts meet the conditions necessary for the application of Protocol II and which do not.<sup>212</sup> Therefore, the minimal conditions of Common Article 3 of the four Geneva Conventions, human rights law provisions that are not subject to derogation, and local law govern the conflict when the conflict does not meet the applicability requirements of Additional Protocol II.<sup>213</sup>

Additional Protocol II extends its protections to children involved in non-international armed conflicts by providing that “children who have not attained the age of fifteen years shall *neither* be recruited in the armed forces or groups *nor* allowed to take part in hostilities.”<sup>214</sup> This total prohibition is stronger than that in Protocol I, since it prohibits voluntary enlistment and indirect participation.<sup>215</sup> That is to say, “not only can a child not be recruited or enlist himself, but furthermore, he will not be "allowed to take part in hostilities", i.e., to participate in military operations such as gathering information, transmitting orders, transporting ammunition and

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<sup>209</sup> See *supra* text accompanying note 206; Cohn & Goodwin-Gill, *supra* note 34, at 58.

<sup>210</sup> Protocol II, *supra* note 147, at art.1 (2).

<sup>211</sup> Cohn & Goodwin-Gill, *supra* note 34, at 58.

<sup>212</sup> Renteln, *supra* note 73, at 194.

<sup>213</sup> Cohn & Goodwin-Gill, *supra* note 34, at 58-59.

<sup>214</sup> Protocol II, *supra* note 145, at art. 4(3) (c).

<sup>215</sup> Wells, *supra* note 183, at 297.

foodstuffs, or acts of sabotage.”<sup>216</sup> Moreover, Additional Protocol II extends special protections to children in conflict by providing that children who have not attained the age of fifteen, who end up participating in hostilities despite the provisions of sub-paragraph c, shall continue to enjoy the special protections afforded them by Article 4.<sup>217</sup>

Unfortunately for the child soldier, Protocol I and II do not establish minimum humanitarian standards of treatment that ought to apply to those children that participate in armed conflict, but instead focuses on the unrealistic ban on their participation in war.<sup>218</sup> Although the Protocols prohibit the recruitment and participation of children less than fifteen-years-old in armed conflict, those who do decide to participate are recognized as combatants and lose the protections afforded civilians under international humanitarian law.<sup>219</sup> However, as mentioned above, these children continue to enjoy the special protections provided by Article 4(d) if they participate in hostilities.<sup>220</sup> Nevertheless, States will only be bound by Additional Protocol II if they have ratified the treaty or have made a valid unilateral declaration of intent to respect the rules of international humanitarian law.<sup>221</sup> Other armed groups, however, will be bound by the rules of customary international law relating to the conduct of hostilities and treatment of vulnerable groups, such as children.<sup>222</sup>

In summary, international humanitarian law, as it stands today, is incapable of reaching children involved in armed conflicts, especially conflicts of a non- international nature. There

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<sup>216</sup> Id.

<sup>217</sup> Protocol II, supra note 145, at art. 4(3)(d). The special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured. Sub-paragraph (c): children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.

<sup>218</sup> Wells, supra note 183, at 297.

<sup>219</sup> Geneva Conventions, supra note 184, at art. 3; Protocol II, supra note 145, at Art. 4. Common Article 3 of the Four Geneva Conventions and Protocol II only protect non-combatants/civilians. Persons directly participating in armed conflict are not protected.

<sup>220</sup> Protocol II, supra note 145, at art. 4(3)(d); see supra text accompanying note 218.

<sup>221</sup> Cohn & Goodwin-Gill, supra note 34, at 65.

are no international conflicts today in which children are fighting to which Additional Protocol I would apply.<sup>223</sup> Most of the conflicts children are involved in today are internal in nature and because of the high threshold issues in Additional Protocol II, children participating in internal conflicts cannot benefit from it.<sup>224</sup> Also, Additional Protocol II is rarely ratified by the State in conflict, and Common Article 3 of the four Geneva Conventions places no restrictions on the recruitment or participation of children in armed conflict.<sup>225</sup> The failure of international humanitarian law to reach children involved in armed conflict prompted the development of other international and regional standards in other arenas.<sup>226</sup>

### **B. Attempts to Improve International Legal Standards Relative to Child Soldiers through the Adoption of Human Rights Instruments**

International human rights law is a body of rules primarily regulating the rights and obligations individuals owe to one another as members of a collective society.<sup>227</sup> Generally, international human rights law seeks to prevent as well as punish breaches of its provisions and accordingly creates specific rights and responsibilities for States as well as individuals. However, most human rights treaties that protect children are not self-executing, and therefore require domestic legislation to create a private cause of action.<sup>228</sup> Nevertheless, signatories of these treaties have a responsibility to observe them with good faith and scrupulous care.<sup>229</sup>

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<sup>222</sup> Id.

<sup>223</sup> Id. at 66.

<sup>224</sup> Id.

<sup>225</sup> Id.

<sup>226</sup> Reteln, *supra* note 73, at 195.

<sup>227</sup> Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/3 (1948) [hereinafter UDHR.] The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all people. . . . All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in the spirit of brotherhood.

<sup>228</sup> Morisseau, *supra* note 24, at 1286.

<sup>229</sup> Id.

## The Convention on the Rights of the Child (CRC)

The 1989 Convention on the Rights of the Child (CRC) provides children with protection during times of war and peace.<sup>230</sup> The CRC became the most ratified human rights treaty in history with 191 of the 193 participating nations ratifying it at record-breaking rates.<sup>231</sup> The CRC addresses the use of child soldiers by providing that “State Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.”<sup>232</sup> The “law applicable to them” must include not only treaties to which States are parties but also relevant rules of customary international law.<sup>233</sup> Although these rules of customary international law are unclear, both international and domestic laws prohibit certain acts.<sup>234</sup>

Despite the widespread global acceptance of the CRC, several imperfections render it incapable of protecting children in armed conflict.<sup>235</sup> Article 38 has been subject to considerable criticism.<sup>236</sup> First, it is the only provision in the Convention that deviates from the general age limit of eighteen.<sup>237</sup> Specifically, while Article 1 of the Convention defines a child as everyone under the age of eighteen, Article 38 redefines a child as everyone under the age of fifteen for

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<sup>230</sup> Convention on the Rights of the Child, *supra* note 74, at art. 38 (4): “In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.”

<sup>231</sup> Davison, *supra* note 37, at 131; see also Hackenberg, *supra* note 2, at 429. Only the U.S. and Somalia have not ratified the CRC.

<sup>232</sup> Convention on the Rights of the Child, *supra* note 74, at art. 38(1). This is an example of a convergence between international humanitarian law and international human rights law. “This convergence is due to the distressing proliferation of violent internal armed conflicts in many parts of the world. . . .”

<sup>233</sup> Malsen, *supra* note 72, at 338, 339.

<sup>234</sup> *Id.* It is prohibited to target individual civilians or the civilian population in either international or internal conflicts; therefore the deliberate shooting of an unarmed child is a war crime. Also, international law prohibits mutilation, torture, rape and abduction.

<sup>235</sup> Hackenberg, *supra* note 2, at 429.

<sup>236</sup> Daniel Helle, *Optional protocol on the Involvement of Children in Armed Conflict to the Convention on the Rights of the Child*, International Review of the Red Cross, No. 839, p.797-809 (2000).

<sup>237</sup> *Id.*

purposes of recruitment and participation in armed conflict.<sup>238</sup> Second, with respect to the prohibition against recruitment and participation, Article 38 is mostly confined to repeating Article 77 of Additional Protocol I of the Geneva Conventions.<sup>239</sup> In so doing, it not only brought nothing new, but could also detract attention from the stronger standard contained in Additional Protocol II of the Geneva Conventions, which provides a more absolute prohibition for the use of child soldiers in non-international armed conflicts.<sup>240</sup>

Furthermore, the CRC has a large number of reservations.<sup>241</sup> Reservations like these weaken the requirements of the CRC.<sup>242</sup> International human rights law, especially that concerning the world's children, becomes meaningless if States bound by it are permitted to pick and chose those provisions they will abide by and those they will not.<sup>243</sup>

In addition, the CRC has no enforcement mechanisms, therefore making its enforceability dependent upon the domestic laws of each nation.<sup>244</sup> However, the CRC has an implementation mechanism that uses a periodic reporting system by the State Parties to the Committee on the

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<sup>238</sup> Id; Convention on the Rights of the Child, *supra* note 74, art. 1, 38(2), (3). Article 1 of the CRC provides that “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” Article 38(2) provides that “State Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.” Article 38(3) provides that “State Parties shall refrain from recruiting persons who have not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, State Parties shall endeavor to give priority to those who are oldest.”

<sup>239</sup> See Convention on the Rights of the Child, at art. 38(3): “State Parties shall refrain from recruiting persons who have not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, State Parties shall endeavor to give priority to those who are oldest.” Likewise, Protocol I, *supra* note 145, at art. 77(2): “The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the parties to the conflict shall endeavor to give priority to those who are oldest.”

<sup>240</sup> Protocol II, *supra* note 145, at art. 4(3)(c): “Children who have not attained the age of fifteen years shall *neither* be recruited in the armed forces or groups *nor* allowed to take part in hostilities.”

<sup>241</sup> Hackenberg, *supra* note 2, at 429.

<sup>242</sup> Id.

<sup>243</sup> Id.

<sup>244</sup> Abbott, *supra* note 19, at 524.

Rights of the Child, which monitors implementation of the provisions recognized in the CRC.<sup>245</sup> The Committee can make suggestions and other forms of constructive criticism to the State Party but it cannot punish non-compliance or force compliance even though compliance is requested by the Committee.<sup>246</sup>

### **Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict**

In light of the growing awareness and concern within the international community of the plight of children affected by armed conflict, an initiative was taken to campaign for the adoption of an Optional Protocol to the CRC that would raise the minimum age of recruitment and participation in hostilities to eighteen years.<sup>247</sup> The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, adopted on May 25, 2000, generally strengthens protection for children in armed conflict: it establishes an international standard for the employment of children in armed conflict; it codifies a legal norm by which States can be held accountable; it sets a minimum age requirement that makes it more difficult for governments and non-state actors to fabricate the ages of children employed in armed conflict; it encourages States to implement existing national laws and policies or enact domestic standards that will reflect the standards enunciated in the statute; and it raises public

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<sup>245</sup> Id; Convention on the Rights of the Child, *supra* note 75, at art. 44(1). “State Parties undertake to submit to the Committee, through the Secretary General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights: a) Within two years of the entry into force of the Convention for the State Party concerned; b) Thereafter every five years. . . .”

<sup>246</sup> Hackenberg, *supra* note 2, at 429; see Convention on the Rights of the Child, *supra* note 74, at art. 45(d). “The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from State Parties.”

<sup>247</sup> Protocol on the Involvement of Children in Armed Conflict, *supra* note 181.

awareness regarding the use of child soldiers.<sup>248</sup> However, the Optional Protocol is not flawless. Most of its pitfalls, which will be discussed below, are on account of its vagueness, which affects its effectiveness.

### **Examining the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict**

*Article 1: State Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 do not take a direct part in hostilities.*<sup>249</sup>

This is probably considered the most important article in the Optional Protocol since it raises the minimum age for participation in hostilities from fifteen to eighteen and therefore represents an improvement of the present protection provided by international law.<sup>250</sup> Raising the age of participation in hostilities from fifteen to eighteen has a number of advantages for child soldiers.

First, in the context of international armed conflict, children between fifteen and eighteen years of age who are recruited into the armed forces are no longer entitled to protection against the effects of hostilities as members of the civilian population but are instead considered combatants within the meaning of Article 43 of Additional Protocol I and the Geneva Convention Relative to the protection of Civilians Persons in Time of War.<sup>251</sup> Raising the

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<sup>248</sup> Id. at arts. 1-6; Sarah Abraham, *Child Soldiers and the Capacity of the Optional Protocol to Protect Children in Armed Conflict*, American Bar Association, 2003.

<sup>249</sup> See Protocol on the Involvement of Children in Armed Conflict at art.1.

<sup>250</sup> Helle, *supra* note 236, at 797.

<sup>251</sup> *Optional Protocol to the Convention on the Rights of the Child Concerning Involvement of Children in Armed Conflicts: Position of the International Review of the Red Cross*, International Review of the Red Cross, no. 322, 107-125 (1998) [hereinafter International Review of the Red Cross].

minimum age to eighteen guarantees such children the protection the civilian population is entitled to in international armed conflicts.<sup>252</sup>

Second, in the context of non-international armed conflicts, a step like this constitutes progress.<sup>253</sup> Article 4, paragraph 3(d), guarantees protection for children under the age of fifteen who have taken part in hostilities despite the prohibition stipulated in Article 4, paragraph 3(c), of Additional Protocol II.<sup>254</sup> However, this special protection is not expressly stipulated for children between fifteen and eighteen years of age.<sup>255</sup> Also, neither Article 3 common to the Geneva Conventions nor its Additional Protocol II contains a provision similar to that of Article 77(2) of Additional Protocol I: “. . . In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavor to give priority to those who are oldest.”<sup>256</sup> Thus, raising the age limit to eighteen for purposes of participation in hostilities guarantees children in non-international armed conflicts protection. Moreover, in practice, especially in cases where children do not have birth certificates, raising the age limit to eighteen makes it hard for superiors to pass children off as being older than they really are, since their physical appearance speaks for itself.<sup>257</sup> This is especially important since many reports have shown that persons under the age of eighteen have not attained the physical and intellectual maturity which would enable them to cope with the harsh realities of armed conflict.<sup>258</sup> Other instruments that represent a raised age limit of eighteen for participation in hostilities are the 1990 African Charter on the Rights and Welfare of

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<sup>252</sup> Id.

<sup>253</sup> Id.

<sup>254</sup> Protocol II, *supra* note 145, at art. 4(3) (d); see *supra* text accompanying note 217.

<sup>255</sup> International Review of the Red Cross, *supra* 251; Protocol I Commentary, *supra* note 202, at P. 1378; Protocol II Commentary, *supra* note 195, at P. 1378.

<sup>256</sup> Protocol I, *supra* note 145, at art. 77(2).

<sup>257</sup> International Review of the Red Cross, *supra* 251.

<sup>258</sup> Id.

the Child and the 1999 International Labor Organization Convention (182) on the Prohibition of and Immediate Action for the Elimination of the Worst Forms of Child Labor.<sup>259</sup>

The positive changes Article I of the Optional Protocol brings to children in armed conflict do not render this particular Article flawless. As regards the age limit, Article 1 of the CRC, whose wording is repeated in the preamble of the Optional Protocol, stipulates: “For the purposes of that Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”<sup>260</sup> However, there is a restriction placed on this general principle by Article 38 of the CRC, the underlying Convention, which stipulates fifteen as the minimum age for participation in hostilities.<sup>261</sup> This restriction provides children in situations of armed conflict a lower level of protection and places their rights in even greater danger.

As regards the scope of the obligation in Article 1, two weaknesses must be mentioned.<sup>262</sup> The first weakness relates to the obligation imposed on States: States have a duty to “take all feasible measures to ensure” that persons who have not attained the age eighteen do not take part in hostilities.<sup>263</sup> This standard recognizes that, in exceptional circumstances, withholding or withdrawing soldiers eighteen years of age or younger will not be “feasible.”<sup>264</sup> As interpreted in law of war treaties, including Geneva Protocol I, the term “feasible” has been understood to mean that which is practicable or practically possible taking into account all circumstances ruling

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<sup>259</sup> African Charter, *supra* note 182, at art. 2; Convention 180, *supra* note 182, at art. 2. Both the Charter and the Convention define a child as anyone less than 18 years even for purposes of armed conflict.

<sup>260</sup> Convention on the Rights of the Child, *supra* note 74, at art. I; Protocol on the Involvement of Children in Armed Conflict, *supra* note 181.

<sup>261</sup> See Convention on the Rights of the Child at art. 38.

<sup>262</sup> Helle, *supra* note 237, at 797.

<sup>263</sup> Protocol on the Involvement of Children in Armed Conflict, *supra* note 183, at art. 1.

<sup>264</sup> Michael J. Denise, *Newly Adopted Protocols to the Convention on the Rights of the Child*, 94 Am. J. Int'l L. 789, 791 (2000).

at the time, including humanitarian and military considerations.<sup>265</sup> This Article would have provided children better protection if States had undertaken to “take all necessary measures.” The second weakness relates to the extent of the protection provided children against being involved in hostilities.<sup>266</sup> Specifically, children who have not attained the age of eighteen are protected from taking a “direct part in hostilities.”<sup>267</sup> This text, as mentioned above, is weaker than the corresponding clause in Additional Protocol II, which precludes all participation by stipulating that children shall not be allowed to “take part in hostilities.”<sup>268</sup>

The reference to “direct participation” weakens the protection conferred on children because only a certain type of participation is covered, not participation in hostilities in general.<sup>269</sup> In the context of treaties relating to law of armed conflict, the term “direct participation in hostilities” has been understood to mean a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place.<sup>270</sup> In other words, ‘direct participation’ means, “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”<sup>271</sup> An important note is that direct participation does not include acts such as the gathering and transmission of military information, the transportation of arms and munitions, the provision of supplies, or other similar activities.<sup>272</sup> Therefore, the involvement of children in

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<sup>265</sup> Id. This definition is used in Article 3(10) of the Protocol to the 1980 Conventional Weapons Convention Concerning the Use of Mines, Booby-Traps and Other Devices, October 10, 1980, amended May 3, 1996, 35 ILM 1206 (1996). A number of States (e.g. Canada, Germany, Ireland, Italy, the Netherlands, Spain, and the United Kingdom) also included such a definition of “feasible” in understandings that accompanied their instruments of ratification to Geneva Protocol I.

<sup>266</sup> Helle, *supra* note 237, at 797.

<sup>267</sup> Protocol on the Involvement of Children in Armed Conflict, *supra* note 183, at art. 1.

<sup>268</sup> Protocol II, *supra* note 147, at art. 4(3)(c); Helle, *supra* note 237, at 797.

<sup>269</sup> International Review of the Red Cross, *supra* 251.

<sup>270</sup> Commentary on the Additional Protocols, pp.516 and 619.

<sup>271</sup> Id.

<sup>272</sup> Commentary on the Additional Protocols, p. 901.

these activities puts them at serious risk of physical injury and psychological trauma without protection.

*Article 2: State Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.*

Raising the minimum age from fifteen to eighteen for compulsory recruitment also represents an improvement from the previous standards. The protection provided by Article 38, paragraph 3, of the CRC and Article 77, paragraph 2, of Additional Protocol I against the forced recruitment of children between fifteen and eighteen years of age is weak, since State Parties “shall endeavor” only to give priority to those who are oldest.<sup>273</sup>

*Article 3(1): States Parties shall raise in years the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.*

*(2) Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.*

*(3) States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:*

*(a) Such recruitment is genuinely voluntary;*

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<sup>273</sup> Helle, supra note 236.

*(b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;*

*(c) Such persons are fully informed of the duties involved in such military service;*

*(d) Such persons provide reliable proof of age prior to acceptance into national military service.*

*(4) Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.*

*(5) The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.*

Article 3, which was seen as a big achievement, raises the minimum age for voluntary recruitment from fifteen to sixteen years of age, in accordance with the declaration to be submitted by States upon ratification or accession to the Optional Protocol.<sup>274</sup> As noted, these declarations may be strengthened at anytime but not weakened.<sup>275</sup> Therefore, a declaration can only be withdrawn in favor of a declaration specifying a higher minimum voluntary recruitment age into the government armed forces and not a lower one. Although raising the age limit from fifteen to sixteen years is a welcome development, Article 3 weakens the protection provided by the entire Optional Protocol, especially Article 2, because, in practice, determining whether child soldiers have been voluntarily recruited may be difficult.<sup>276</sup> This is especially true since experience shows that voluntary recruitment is rarely based solely on the will of the child but is

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<sup>274</sup> Protocol on the Involvement of Children in Armed Conflict, supra note 181, at art. 3 (1), (2).

<sup>275</sup> Id. at art. 3(4).

<sup>276</sup> Helle, supra note 236.

conditioned by factors beyond his or her control.<sup>277</sup> The safeguards included to ensure that recruitment is indeed voluntary and that no child under the minimum age is recruited are positive features of the provision.<sup>278</sup> However, these safeguards may be difficult to implement in practice since in developing countries affected by armed conflict, proving the age of the child is difficult given that birth registration systems often do not exist.<sup>279</sup> In addition, the requirement to raise the age for voluntary recruitment in paragraph 1 does not apply to schools operated by or under control of the armed forces.<sup>280</sup> The wording of the provision allows for the possibility of circumventing the age limit by considering such students as members of the armed forces and thus as military targets.<sup>281</sup>

*Article 4(1). 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.*

*(2). States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.*

*(3). The application of the present article shall not affect the legal status of any party to an armed conflict.*

According to this provision, non-State entities are prohibited from recruiting children either forcibly or voluntarily. Furthermore, they are not allowed to let children participate in hostilities, whether in a direct or indirect manner.<sup>282</sup> This is a positive provision, since it demonstrates the willingness of States to regulate the behavior of non-State entities, and thus

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<sup>277</sup> International Review of the Red Cross, *supra* 251. Children enlist in armed forces or armed groups for economic reasons, physical safety, religious or social beliefs and convictions, etc.

<sup>278</sup> Helle, *supra* note 236.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

also address the situations of non-international armed conflict.<sup>283</sup> However, the potential effectiveness of Article 4 in preventing the recruitment and participation of children in situations of internal armed conflict is questionable, mainly because the wording “should not” rather than “shall not,” seems to impose a moral, as opposed to a legal, obligation under international law.<sup>284</sup> The reason for the wording was mainly because many States, during negotiations, opposed departing from the traditional approach of human rights law under which human rights law is only binding on States, whereas the behavior of non-State entities is regulated by domestic law.<sup>285</sup> However, the criminal repression under domestic law which Article 4 provides for is likely to have little or no deterrent effect because those who take up arms against a legitimate government have already exposed themselves to the most severe penalties of the law; thus, the threat of additional penal sanctions for recruiting children is likely to be inconsequential.<sup>286</sup> Also, in many contemporary situations of non-international armed conflict, governments’ capacity to enforce their domestic law may be limited.<sup>287</sup> Some have argued that providing a direct legal obligation on non-State entities would have been feasible under the Optional Protocol by defining recruitment and use in hostilities of persons under the age of eighteen years as a crime under international law.<sup>288</sup> Alternatively, providing this obligation on non-State entities could have been achieved by incorporating part of international humanitarian law in the Optional Protocol, so that the legal responsibility of non-State entities was limited to situations

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<sup>283</sup> Id. The ICRC supported including the issue of non-State entities in the Optional Protocol, given that the involvement of children in non-international armed conflicts is equally as deadly and traumatizing for children in international conflicts.

<sup>284</sup> Id.

<sup>285</sup> Id; Dennis, *supra* note 264, at 792.

<sup>286</sup> Id.

<sup>287</sup> Id.

<sup>288</sup> Id. The Rome Statute makes the recruitment and participation of children under 15 (not 18) a crime under international law. See *supra* text accompanying note 179.

of armed conflict.<sup>289</sup> However, many of the States were opposed to including an obligation for non-state groups in an international human rights instrument like the Optional Protocol because they did not want to equate rebel groups with State Parties or confer recognition on them.<sup>290</sup>

The obligation imposed on non-State entities in Article 4 is different from and is wider than that imposed on States and therefore casts doubt on the effectiveness of Article 4.<sup>291</sup> This provision may be considered by non-State entities as a “double standard” and consequently that the moral force of the norm imposed upon them is weak.<sup>292</sup> Accordingly, non-State entities may feel that they are not bound by the provision and thus not respect it.<sup>293</sup> An important note in this regard that one rule of international humanitarian law is that the parties to a conflict must be treated on an equal footing, and likewise, there must be equal obligations on all sides.<sup>294</sup> This argument has often been put forward when seeking to induce parties to a conflict to implement the law.<sup>295</sup> The Optional Protocol’s failure to encourage adherence from non-State entities and the exclusion of non-State entities in crafting the content of the Statute makes persuading their adherence difficult.<sup>296</sup>

More generally speaking, the Optional Protocol breaks from standard international norms.<sup>297</sup> Usually, a state must ratify the underlying instrument, in this case the CRC, in order to ratify its optional additions.<sup>298</sup> The Optional Protocol allows for States that have not ratified the

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<sup>289</sup> Id.

<sup>290</sup> Dennis, *supra* 264, at 792,793; Working Group on the Involvement of Children in Armed Conflict, Report on Its second Session, UN Doc. E/CN.4/1996/102, paras. 31-32, 118-24.

<sup>291</sup> See Dennis at 792, 793. Article 4 prohibits non-State entities from recruiting children whether voluntarily or forcibly and also prohibits both their direct and indirect participation for non-State entities, and yet Article 1, 2, and 3 allows indirect participation (over 18 years of age), compulsory recruitment (over 18 years of age), and voluntary recruitment (not under 16 years of age) by State Parties.

<sup>292</sup> Id.

<sup>293</sup> Id.

<sup>294</sup> Id.

<sup>295</sup> Id.

<sup>296</sup> Abraham, *supra* note 248, at 4.

<sup>297</sup> Id.

<sup>298</sup> Id.

CRC, for example, the United States, to ratify it, which undermines the spirit of the CRC.<sup>299</sup> Although there are advantages to allowing States to commit to the Optional Protocol even where such States are unwilling to accept all the terms of the underlying Convention, some argue that this loophole downgrades the significance of the Convention.<sup>300</sup>

Despite the weaknesses mentioned above, the Optional Protocol represents progress and serves to consolidate existing international law concerning the protection of children from recruitment and participation in hostilities.

### **African Charter on the Rights and Welfare of the Child**

In 1990, the Organization of African Unity adopted the African Charter on the Rights and Welfare of the Child.<sup>301</sup> The Charter, in no uncertain terms, offers protection to children involved in armed conflict by providing that “State Parties to this Charter shall undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflicts which affect the child.”<sup>302</sup> State Parties are also instructed to “take all necessary measures to ensure that no child shall take a direct part in hostilities and shall refrain, in particular, from recruiting any child.”<sup>303</sup> Although the Charter is only a regional instrument, it is far more reaching than the CRC. Unlike the CRC, the Charter recognizes that a child is anyone below eighteen, including those involved in armed conflict.<sup>304</sup> Also, unlike Additional Protocol II, the Charter applies to internal skirmishes, tension, and strife and therefore recognizes that the rights and welfare of a

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<sup>299</sup> Id.

<sup>300</sup> Id; Dennis, *supra* note 264, at 795. During negotiations, developing countries supported the U.S. proposal of permitting States that had not ratified the CRC to ratify the Optional Protocol to achieve the widest possible adherence to the Protocol and make it clear that they spoke to the entire world community.

<sup>301</sup> African Charter, *supra* note 182.

<sup>302</sup> Id. at art. 22(1).

<sup>303</sup> Id. at art. 22(2).

child are of more value than the type of conflict they are involved in.<sup>305</sup> Moreover, the Charter uses stronger language (necessary measures) than the CRC (feasible measures) in ensuring State Parties' protection of children involved in armed conflict.<sup>306</sup> The Charter's implementation mechanism, which is very similar to that of the CRC in that it has a similar reporting system,<sup>307</sup> accepts complaints from non-party States, individuals, organizations, and non-governmental organizations.<sup>308</sup>

Despite its good intentions, the Charter has shortcomings. First, the Charter is only binding on States that have ratified it.<sup>309</sup> Second, "Any custom, tradition, cultural, or religious practice that is inconsistent with the rights and obligations contained in the present Charter shall to the extent of such inconsistency be null and void."<sup>310</sup> This provision leaves it open for State Parties to use cultural or religious inconsistencies with the African Charter as a pretext for non-

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<sup>304</sup> Id. at art. 2. "For purposes of this Charter, a child means every human being below the age of 18 years." The Children's Convention generally defines a child as anyone below the age of eighteen, but redefines a child as anyone below fifteen years for purposes of armed conflict; See *supra* text accompanying note 238.

<sup>305</sup> See African Charter at art. 22(3). State parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife." Protocol II, *supra* note 107, at Art. 1. "This Protocol . . . shall apply to all armed conflicts . . . which take place between its armed forces and dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. This Protocol **shall not apply** to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature, as not being armed conflict."

<sup>306</sup> Id. at art. 22(2); Convention on the Rights of the Child, *supra* note 74, at art. 38(2); Renteln, *supra* note 763, at 198.

<sup>307</sup> See African Charter at art. 43(1). "Every State Party to the present Charter shall undertake to submit to the Committee through the Secretary-General of the Organization of the African Unity, reports on the measures they have adopted which give effect to the provisions of this Charter and on the progress made in the enjoyment of these rights: (a) within two years of entry into force of the Charter for the State Party concerned, (b) and thereafter, every three years." ; Convention on the Rights of the Child, *supra* note 74, at art. 45(d)." "The Committee may make suggestions and general recommendations based on information received pursuant to Articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from State Parties."

<sup>308</sup> See African Charter at art. 44(1). "The Committee may receive communication, from any person, group or non-governmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter."

<sup>309</sup> Hackenberg, *supra* note 2, at 431, 439.

<sup>310</sup> Id; African Charter, *supra* note 182, at art.1(3).

compliance with the Charter.<sup>311</sup> Regardless of these shortcomings, the Charter compliments the CRC and international humanitarian law concerning child soldiers, in particular those involved in internal conflicts.

### **Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (Convention 182)**

In June of 1999, the International Labor Organization adopted a Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (Convention 182).<sup>312</sup> The Convention commits each state that ratifies it to “take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency.”<sup>313</sup> Article 2 of Convention 182 defines a child as anyone under eighteen-years-old.<sup>314</sup> Convention 182 further provides that the term “worst forms of child labor” includes: “All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict.”<sup>315</sup> In addition, “worst forms of child labor” also includes, “work which, by its nature or circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”<sup>316</sup> In implementing the provisions of the Convention, the Convention leaves to State authorities to determine, after consultation with associations of workers and employees, what should be considered as work harmful, unsafe, or

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<sup>311</sup> See Hackenberg at 431, 439.

<sup>312</sup> Convention 182, supra note 180.

<sup>313</sup> Id. at art. 1. An important note is that the ILO standards have no force in international law unless governments sign and ratify the recommendations set forth by the convention.

<sup>314</sup> Id. at art. 2. “For purposes of this Convention, the term “child” shall apply to all persons under the age of 18.”

<sup>315</sup> Id. at art. 3(a). The wording of this article was weakened at the strong insistence of the United States. The United States refused to support the ILO’s Convention if it contained a ban on recruitment of children under the age of eighteen; however, they would support such a measure if the wording was changed to include forced or compulsory recruitment. In order to obtain the support of the United States, the ILO conceded and changed the wording.

immoral to the health of children below eighteen years of age.<sup>317</sup> Convention 182 was the first international treaty that set an eighteen-year minimum age limit in relation to child soldiering.<sup>318</sup> It was also the first legal recognition of child soldiering as a form of child labor.<sup>319</sup> The main drawback of Convention 182 is that it does not prohibit voluntary recruitment but only forced and compulsory recruitment.<sup>320</sup> Therefore, children under eighteen years of age who volunteer to participate in armed conflict are not protected by Convention 182.

### **Rome Statute of the International Criminal Court (ICC)**

Besides international humanitarian law, human rights law, and labor law, regulating the use of child soldiers in armed conflict, international criminal law plays a vital role in punishing those that violate these rules. The Rome Statute of the International Criminal Court (ICC) is one of the instruments created by the international community that pertains to a child soldier's legal status and addresses criminal acts that are not limited by territorial boundaries.<sup>321</sup> The Rome Statute gives the court the jurisdiction to prosecute anyone who conscripts or enlists children below fifteen years of age or uses them to participate actively in both international armed conflicts and internal hostilities.<sup>322</sup> The "commanding authority doctrine," codified in the Rome Statute, gives the ICC's jurisdiction to reach those who order children to commit crimes.<sup>323</sup>

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<sup>316</sup> Id. at art. 3(d).

<sup>317</sup> Id. at art. 6, 7. "Each Member shall design and implement programs of action to eliminate as priority the worst forms of child labor." (Article 6). "Such programs of action shall be designed and implemented in consultation with relevant government institutions and employers' and workers' organizations, taking into consideration the views of other concerned groups as appropriate." (Article 7).

<sup>318</sup> Davison, *supra* note 37, at 135.

<sup>319</sup> Id.

<sup>320</sup> Convention 180, *supra* note 182, at art. 3(a): "For the purpose of this Convention, term "worst forms of child labour comprises: "All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict.

<sup>321</sup> Davison, *supra* note 37, at 148.

<sup>322</sup> Rome Statute, *supra* note 179, at art. 8(2)(b)(xxvi). The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as a part of a large-scale commission of such crimes. 2.

The question as to whether child soldiers committing crimes are victims or criminals is one issue with which the international community has had to struggle.<sup>324</sup> This is an uneasy question because of the uncertainty of where international law, humanitarian law, and human rights law stands in relation to this matter.<sup>325</sup> This uncertainty and lack of clarity is based on the premise that children can not form the requisite mens rea to commit crimes of genocide, war crimes, or crimes against humanity.<sup>326</sup> Adding to this is the fact that the international community prefers rehabilitation as a way of handling child soldiers as opposed to taking a punitive approach.<sup>327</sup> The United Nations Secretary General’s proposal to create a special “juvenile chamber” in the Sierra Leone Special Court, which would prosecute those between fifteen and eighteen years of age that had committed war crimes, was severely criticized by non-governmental organizations and human rights groups, resulting in its quick withdrawal.<sup>328</sup> The withdrawal of this proposal largely shows that the international community would rather categorize child soldiers as victims and not criminals.<sup>329</sup> On the other hand, those who have

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For the purposes of this Statute, “war crimes” means: (a) Grave breaches of the Geneva Conventions of 12 August 1949; (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: . . . (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities. . . . (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: . . . (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities . . . .

<sup>323</sup> Id. at art. 25, 28; Davison, *supra* note 37, at 148.

<sup>324</sup> Renteln, *supra* note 73, at 199.

<sup>325</sup> Id. at 199, 200.

<sup>326</sup> Id.

<sup>327</sup> Id., citing Article 5 of the U.N. Standard of Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) of 1985. The article specifies that rehabilitation should be emphasized, with focus on the juvenile’s well being; legal sanctions should take the juvenile’s circumstances into account. U.N. Standard Minimum Rules for the Administration of Juvenile Justice, Nov. 29, 1985, res. 40/33, reprinted in *Human Rights: A Compilation of International Instruments*, U.N. Sales No. E.93, XIV.1, 356-81.

<sup>328</sup> Davison, *supra* note 37, at 149; Daryl A. Mundis, *The Creation of New Ad Hoc International Criminal Tribunals and Other International Efforts to prosecute Violations of International Humanitarian Law*, 35 Int’l. Law 631, 633 (2001); See also Bruce Zagaris, *U.N. Considers Potential of Prosecuting Minors for War Crimes in Sierra Leone*, 16 No. 11 Int’l. Enforcement L.Rep. 1020 (2000) (disputes over handling minors in the Special Court for Sierra Leone highlights tension between international criminal law and human rights law).

<sup>329</sup> See Davison at 149.

suffered atrocities at the hands of child soldiers often need to see their perpetrators held accountable in some way or another.<sup>330</sup> For example, after the Rwanda genocide, public opinion favored holding children responsible.<sup>331</sup> Many Rwandans believed that if a child was mature enough to distinguish between a Tutsi and a Hutu and commit murder, then a child was mature enough to be punished.<sup>332</sup>

Nevertheless, Article 26 of the ICC Statute provides that no one under eighteen years of age at the time of commission of a war crime, crime against humanity, or genocide shall be tried in the tribunal.<sup>333</sup> This presumably means that an eighteen-year-old, who is considered a minor under international law may volunteer to fight in combat and knowingly commit a war crime, and yet not have to suffer criminal liability.<sup>334</sup> However, supposedly, this does not stop any state from prosecuting those who have committed war crimes when they were under eighteen-years-old in their domestic courts.<sup>335</sup>

### **C. Narrowing the Gap between Progress in the Law and Progress on the Ground**

Although there has been progress in developing the laws protecting child soldiers, as discussed above, there has not been as much progress on the ground. In theory, the laws protecting child soldiers are stronger than ever before, but in practice, child soldiering continues to thrive. There is a gap between progress made on paper and progress made on the ground. This chapter examines the reasons for this gap and how it can be bridged.

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<sup>330</sup> Id.

<sup>331</sup> Renteln, *supra* note 73, at 200.

<sup>332</sup> Id; Reis, *supra* note 194, at 634-35. “You will hear Rwandans say that if a child was able to discriminate between two ethnic groups, to decide who was a Hutu moderate and who wasn’t, 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.”

<sup>333</sup> Rome Statute, *supra* note 179, at art. 26.

<sup>334</sup> Davison, *supra* note 37, at 148, 149.

<sup>335</sup> Id. at 149, 150.

Over the past two decades, the international child's movement has spurred the development of international law, policies and programs concerning child soldiers and has put the concerns of child soldiers on the map.<sup>336</sup> Since the 1977 Protocols to the Geneva Convention,<sup>337</sup> the CRC,<sup>338</sup> the African Charter on the Rights and Welfare of the Child,<sup>339</sup> the International Labor Organization's Convention No. 182 on the Elimination of the Worst Forms of Child Labor,<sup>340</sup> and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict have been implemented.<sup>341</sup> For deterrence and criminal responsibility, we have the Statute of the International Criminal Court and Country-specific ad hoc tribunals that provide venues for addressing violations of law which preclude the recruitment and use of children in armed conflict.<sup>342</sup> In addition, the campaign to stop the use of children as soldiers has led to a series of regional agreements, including: 1996 OAU Resolution on the Plight of African Children in situation of Armed Conflicts, 1997 Cape Town Principles, 1998 European Parliament Resolution on Child Soldiers, 1999 Declaration by the Nordic Foreign Ministers Against the use of Child Soldiers, 1999 Berlin Declaration on the use of Children as Soldiers, 1999 Montevideo Declaration on the use of Children as Soldiers, 1999 Maputo Declaration on the use of Children as Soldiers, 2000 Organization of American States (OAS) Resolution on Children and Armed Conflict, and 2001 Amman Declaration on the use of Children as Soldiers.<sup>343</sup>

However, despite this strengthened legal regime, the improved monitoring and reporting standards on the use of children as child soldiers has revealed an excessive use and increase in

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<sup>336</sup> Symposium, supra note 4, at 531.

<sup>337</sup> Protocol I and II, supra note 145.

<sup>338</sup> Convention on the Rights of the Child, supra note 77.

<sup>339</sup> African Charter, supra note 182.

<sup>340</sup> Convention 182, supra note 180.

<sup>341</sup> Optional Protocol on the Involvement of Children in Armed Conflict, supra note 181.

<sup>342</sup> Rome Statute, supra note 179; Symposium, supra note 4, at 533.

the practice.<sup>344</sup> The Secretary General's annual reports and country-specific reports to the Security Council concerning child soldiers show that the situation is worsening.<sup>345</sup> In 2001, the Security Council requested that the Secretary General's annual reports include a specific list of governments and armed groups that recruit and use children in violation of international law.<sup>346</sup> The Secretary General's 2002 report to the Security Council listed twenty-three parties in five countries that were in violation of their obligations.<sup>347</sup> Moreover, the report also showed that there was illegal recruitment of child soldiers by an additional seventeen parties in eight conflicts that were not on the Security Council's agenda.<sup>348</sup> The Security Council took action by entering dialogue with the violating parties, requesting that the violating parties provide information regarding steps they had taken, and urging Member States to control the illicit trade of small arms to the parties in violation of the relevant legal standards.<sup>349</sup> Forty of the States mentioned in the 2002 report were monitored throughout the following year.<sup>350</sup> The 2003 Secretary General's reports revealed that all parties listed in the 2002 report continued to recruit and use children as soldiers.<sup>351</sup> In addition, there were a new total of over fifty-five parties.<sup>352</sup> The Council considered the expanded list in an open debate on January 20, 2004 and issued a resolution on April 22, 2004.<sup>353</sup> The Secretary General's report set out measures that the Security Council might consider taking against parties who had made insufficient or no

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<sup>343</sup> Singer, *supra* note 7, at 568.

<sup>344</sup> *Id.* at 569.

<sup>345</sup> Symposium, *supra* note 4, at 533.

<sup>346</sup> See symposium at 533; S.C. Res. 1379, U.N. SCOR, 56<sup>th</sup> Sess., 4423<sup>rd</sup> mtg., U.N. Doc. S/RES/1379 (2001).

<sup>347</sup> See symposium at 533; Report of the Secretary General on Children and Armed Conflict, U.N. SCOR, 57<sup>th</sup> Sess., U.N. Doc. S/2002/1299 (2002).

<sup>348</sup> See symposium at 534.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*; Children and Armed Conflict: Report of the Secretary-General, U.N. SCOR, 58<sup>th</sup> Sess., U.N. Doc. S/2003/1053, revised by U.N. Doc. S/2003/1053.

<sup>352</sup> See symposium at 534.

<sup>353</sup> *Id.*; S.C. resolution 1539, U.N. SCOR, 59<sup>th</sup> Sess., 4948<sup>th</sup> mtg., U.N. Doc. S/RES/1539 (2004).

progress.<sup>354</sup> These measures included imposing travel restrictions on leaders and excluding them from governance structures and amnesty provisions, a banning of exports or supply of small arms, banning of military assistance, and restricting the flow of financial resources to the parties concerned.<sup>355</sup>

The above is a demonstration of a pattern that has been going on for years. The Secretary General provides information and recommends steps, the Security Council affirms and reaffirms its commitment to take firm steps, but the situation for children gets worse and few of the steps identified are taken.<sup>356</sup> As a result, progress in the law through adoption of new treaties and passing of resolutions increases while progress on the ground is minimal or non-existent. If the gap between progress in the law and progress on the ground is to be narrowed, three tendencies in the field of child rights in armed conflict need to be addressed by the international community.<sup>357</sup> These tendencies are: the tendency to focus more on developing human rights law protecting child soldiers than on addressing the humanitarian reality on the ground; the tendency to pursue advocacy and humanitarian programming without serious assessment of the political, economic, and social dynamics driving a particular conflict; and the tendency to avoid assessing the long term qualitative impact of the many and varied interventions that have been made on behalf of war-affected children. All three tendencies need to be addressed.

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<sup>354</sup> See symposium, *supra* note 4, at 534.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at 535.

<sup>357</sup> Symposium, *supra* note 4, at 535.

## **The Human Rights vs. Humanitarian Impulse**

Child rights advocates have focused heavily on the normative protection for children in armed conflict, and, as discussed earlier, there has been great progress toward this goal.<sup>358</sup> On the other hand, discerning the progress on the humanitarian side is difficult since the number of child soldiers is no different today from when the campaigning escalated a decade or so ago.<sup>359</sup> During the child rights movement, child rights advocates focused on achieving a consensus on the text of the Optional Protocol with slogans that did not address the complex root causes of the use of child soldiers.<sup>360</sup> The slogans simply called on States to “stop the recruitment of child soldiers” by adopting a “straight-eighteen approach” to child soldiers that would prohibit the voluntary or compulsory recruitment or use of anyone under eighteen years of age in armed forces or groups.<sup>361</sup> Many humanitarian agencies joined the advocacy groups in the Optional Protocol campaign and failed to pose questions derived from practical facts they knew well from their experience on the ground.<sup>362</sup> For example, field-based organizations did not ask about the likelihood of achieving compliance with a new standard when earlier domestic and international standards were consistently violated.<sup>363</sup> They did not ask if and how a new human rights legal standard could reach the primary offenders in conflict settings and non-state armed groups, and if or how the assignment of individual criminal responsibility to recruiters would stop children from volunteering or alter the social, political, and economic factors at the root of volunteerism.<sup>364</sup> For the five years of the negotiations of the Optional Protocol, the child rights

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<sup>358</sup> Id.

<sup>359</sup> Id.

<sup>360</sup> Id. Some of the root causes of the recruitment and enlistment of child soldiers are shortage of manpower in armed forces and groups, manipulation of children into armed forces, poverty, lack of economic and educational opportunities, peer pressure, need for revenge, religious motivations, etc.

<sup>361</sup> Id.

<sup>362</sup> Id. at 536.

<sup>363</sup> Id.

<sup>364</sup> Id.

movement failed to raise the hard questions and generate commitment that would have addressed the harder realities underlying the problem.<sup>365</sup>

### **Advocacy without Conflict-Specific Analysis**

Advocacy for child rights in armed conflict has been pursued not only with little attention to what the humanitarian workers in the field know but also without sufficient analysis of the political, social, economic, and military dynamics of particular conflicts.<sup>366</sup> This can be a serious obstacle to progress in concrete situations. To generate compliance with commitment, the child's rights movement needs to go beyond slogans calling for compliance but should also delve into the dynamics of each particular conflict.<sup>367</sup> This can be achieved by building partnerships with political scientists, economists, country analysts, bankers, and others that have a better understanding of what is driving a particular conflict or warring party.<sup>368</sup> For instance, the Representative of the Secretary General for Armed Conflict, during his field visits, elicited several commitments to end or restrict the use of child soldiers from non-governmental armed groups.<sup>369</sup> Members of the child rights movement have rallied behind these commitments, calling for compliance and reports by monitoring groups, but they do not seem to have built bridges with the relevant authorities.<sup>370</sup> Child rights advocates need to network with political scientists, economists, bankers, and corporate actors, who either have influence in or understanding of what is driving a particular conflict or warring party, so that they can develop

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<sup>365</sup> Id.

<sup>366</sup> Id.

<sup>367</sup> Id.

<sup>368</sup> Id.

<sup>369</sup> Becker, *supra* note 12, at 17.

<sup>370</sup> Symposium, *supra* note 4, at 537.

initiatives that compel compliance of commitments and that make non-compliance too costly for a particular armed force or group to bear.<sup>371</sup>

Armed forces and groups have not complied with commitments to demobilize child soldiers or to stop their recruitment, and all the armed forces or groups that made commitments now appear on the Secretary-General's lists of child soldiers recruiters.<sup>372</sup> Pledges made by such groups are rarely fulfilled.<sup>373</sup> Many of these groups make pledges to stop using children as child soldiers for public relations purposes but lack the political will and resources to follow through.<sup>374</sup>

The child rights movement has been slow at building the necessary networks.<sup>375</sup> The child rights community must build partnerships with political scientists, country analysts, the private sector, and others in order to develop specific initiatives likely to compel compliance with child protection commitments and obligations.<sup>376</sup>

### **Failure to Assess the Long-Term Impact of Preventive or Responsive Interventions**

Failure to stay long enough to assess the qualitative impact of interventions made on behalf of war-affected children over the medium and long term hinders the ability of humanitarian and human rights actors to advocate for particular programs, to guide the flow of donor contributions, and to refer confidently to "best practices" or "lessons learned" in programming for war-affected children.<sup>377</sup> "We simply fail to stick around long enough to learn

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<sup>371</sup> Id.

<sup>372</sup> Id.

<sup>373</sup> Id.

<sup>374</sup> Id.

<sup>375</sup> Id.

<sup>376</sup> Id.

<sup>377</sup> Id.

whether our programs have made a positive difference in the lives of children.”<sup>378</sup> “How do we know about which programs work or what assistance is appropriate?”<sup>379</sup> Since the late 1980’s, the international community has assisted in the demobilization of child soldiers, but there is still a muddle of programs and approaches.<sup>380</sup> For example, child soldiers who wanted to demobilize in Sierra Leone were required to hand in a weapon to gain access to the program.<sup>381</sup> Yet all UN policy on child soldier demobilization stipulates that no gun requirement should be applied to child soldiers because commanders are unlikely to demobilize child soldiers if they must give up a weapon.<sup>382</sup> In addition, child rights organizations disagree on whether children ought to be reunited with their families immediately or housed for some period of time in interim care centers where several services and opportunities are provided.<sup>383</sup> Another question is if they should stay in interim care centers, how long they should stay there is unclear.<sup>384</sup> The issue of how to best serve and assist girls who have served as soldiers, camp followers, wives or sexual slaves of combatants or mothers of children of combatants into the demobilization and reintegration process is unclear as well.<sup>385</sup> The Optional Protocol requires States to provide appropriate assistance.<sup>386</sup>

In summary, if these three tendencies are addressed, then the gap between law and reality on the ground can hopefully be narrowed.

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<sup>378</sup> Id.

<sup>379</sup> Id.

<sup>380</sup> Id.

<sup>381</sup> Id.

<sup>382</sup> Id. at 538.

<sup>383</sup> Id.

<sup>384</sup> Id.

<sup>385</sup> Id.

<sup>386</sup> Id.

## **CHAPTER FIVE**

### **CONCLUSION**

The development of international standards concerning the involvement of children in armed conflict has been significant. The widespread acceptance of the Optional Protocol on the Involvement of Children in Armed Conflict has been a big step forward. However, despite these developments, protracted conflicts and the threat of new ones still call for vigilance and commitment from the international community. Therefore, implementation, reporting, and monitoring mechanisms of existing laws protecting child soldiers need to be strengthened and more practical. These laws need to be enforced to their full measure.

Most important, the gap between the developing law and practice on the ground needs to be narrowed by addressing the root causes of child soldiering. This can be achieved by: (a) understanding the context in which children become soldiers and using the practical knowledge gained concerning child soldiering to identify practical solutions; (b) building bridges and networking with relevant authorities who have a better understanding of what drives a particular conflict or armed group; and (c) sticking around long enough to see if preventative or responsive interventions work. In so doing, the international community will get a better understanding of the root causes of child soldiering, develop a strong network at both national and international levels that can play a big role in influencing compliance from armed groups, and gain a better understanding of which preventative and responsive programs work, which will help guide implementation of future programs and assistance for war-affected children. Only when the

socio-political environment of the child soldier is taken into account will the international community be able to formulate policies that can truly address the problem

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