

DECLARATION

I **NANTONGO EVA** declare to the best of my knowledge that this Dissertation has never been presented or submitted anywhere as a piece of work and that it is purely an original and novel work of my own.

 Date 10-6-2015

NANTONGO EVA

STUDENT

DEDICATION

This work is dedicated to my **Mr. and Mrs. Lukwago** for their constant love and support. I appreciate with utmost sincerity your generous contributions during and after the completion of the course. May the Good Lord richly and abundantly bless you.

APPROVAL

This dissertation has been submitted for examination to the school of law with my approval as the student supervisor.



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Date: 10-6-2015
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SUPERVISOR:

PROF. CHIMA MAGNUS

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LIST OF STATUTES AND INTERNATIONAL INSTRUMENTS

The Constitution of Republic of Uganda, 1995 as amended.

The Uganda People Defence Forces Act 2005

The Amnesty Act Cap 294

The Children's Act (2000), Cap 120

The African Charter on the Rights and Welfare of the Child

The Rome Statute of the International Criminal Court

ILO Worst Forms of Child Labor Conventions 182

The Optional Protocol on the Involvement of Children in Armed Conflict

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LIST OF ABBREVIATIONS

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

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

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background to the study

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

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

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

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

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

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

⁴ Human Rights Watch (HRW) Facts about child soldiers (2004) <<http://www.humanrightswatch.org/campaigns/lcrp/facts.htm>> (accessed 22 March 2005).

commanders exposed to drugs and forced labor showing the cross cutting nature and magnitude of the problem of child soldiers.

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

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

1.2 Research questions

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

- If not, what are the flaws?
- How have these flaws affected the lives of child soldiers in Africa?

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

- What is the best way to go about addressing these flaws?
- What possible normative as well as implementation mechanisms can be put in place at the continental level in addressing the issue?

1.3 Significance of the study

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

1.4 Literature review

Generally speaking on research done on the issue of child soldiers, Danso rightly argues that since the problem of children in armed conflict has only recently been pushed onto the international stage, theoretical discourses on

⁶ HRW more than 120, 000 child soldiers fighting in Africa 92004
<<http://hrw.org/english/docs/1999/04/19/africa852.htm>>(accessed 22 March 2005).

the subject are relatively few.⁷ Most of the work that has been done in this area has been based on fieldwork research and linked to the programme of non-governmental organizations (NGOs).⁸ Thus, there is a growing need for a theoretical framework within which the discussion, design and implementation of programmes for the prevention and rehabilitation of child soldiers can be situated.

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

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

⁷ A Danso 'The co-optation of childhood: Africa's young soldiers'

⁸ <<http://Nm.w.iss.co.za/Pubslmonographs/no82/intro.html>> (2003) (accessed at 31 March 2005).

⁹ As above

¹⁰ LA Barnitz *Child Soldiers. Youth Who Participate in Armed Conflict* (1997).

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

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

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

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

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

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

1.5 The statement of the problem

The problem of child soldiers in Uganda is a very big problem where children are mostly used as soldiers by rebel groups which include inter alia; NRA, ADF, LRA, and SEREKA Rebels. For example during the war in the 1980's large numbers of children were used as soldiers by Museveni's National Resistance

¹⁴ G Machel Report to the Secretary General on the impact of armed conflict on children (1996)

<<http://www.unicef.org/graca>> (accessed 17 July 2005).

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

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

Army.(NRA) In an address to a workshop of the Network of Ugandan Researchers and Research Users (NURRU), in Kampala, Mr. Eriya Kategaya, first Deputy Prime Minister defended the conscription of child soldiers during the NRA bush war. He said that; “most of these kadogo’s were from peasant families and apart from the prestige, the facilities in the army are better than those in their homes. They have everything to enjoy in the army, he added that the government cannot take the blame for the high dropout rate of girl kadogo’s because their situation is not different from the rest of the country¹⁷.

Both rebel group (Lord’s Resistance Army and Allied Democratic forces recruit children below the age of 18 years of age. It’s estimated that over 8,000 children were abducted in northern Uganda. The concerned parents Association place the figure at about 10,000. Its estimated that around 90 percent of LRA soldiers are abducted children by coercion at gun point and its widely believed that the group could not operate without them.¹⁸

The factors responsible for the problem of child soldiers in Uganda include inter alia; violation of national/ municipal laws, poverty as Mr. Kategaya contended in the above statement, coercion at gun point where these children are forced to join the rebel army groups for fear for their lives.¹⁹

However, these children have been affected the most accurately by those conflicts, with thousands abducted used as child soldiers and sex slaves,

¹⁷ Mujuni, J, “Girls for special package” The New Vision, 7, December 1998

¹⁸ UNICEF, The state of affairs of the World’s children 1999, Oxford University Press, Oxford 1998

¹⁹

beaten and forced to torture and kill friends, family and innocent people. Those lucky enough to escape the clutches of the LRA deal with on going psychological trauma from their experiences and huge problems re-integrating back into their communities, hundreds and thousands have been displaced from their communities.²⁰

1.6 objectives of the study

- To find out the normative frameworks that protects child soldiers in Africa.
- To find whether or not the normative frameworks afford an adequate protection to child soldiers in Africa.
- To find out avenues that can be used to improve them.

1.7 Methodology

This chapter describes the techniques of research which were used in collecting data during the study and research design.

1.6.1 Research Design

The study used an exploratory and descriptive study design. Only qualitative research method was used in the study. The aim was to enable the study offer and stimulate explanations about the problem of child soldiers in Uganda, whether the normative frame works have afforded enough protection to child soldiers and solutions or recommendations to address the problem.

²⁰

1.7.2 Data Collection Instruments

The following research instruments were used for carrying out the study

1.7.2.1 Qualitative Data Collection Instruments

(a) **Published/Unpublished Materials:** these were used to help in the collection of qualitative information that can be used to validate data collected from other desk review of legal instruments methods. Materials such as academic research reports from civil society organizations and other related literature will be consulted.

1.8 Overview of chapters

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

A comprehensive approach in addressing the problem of child soldiers calls for setting out possible mechanisms in treating child soldiers both as victims and “perpetrators”. Speaking of child soldiers as perpetrators, the fourth chapter looks at the impact of war on child soldiers. Chapter includes recommendations and conclusion.

CHAPTER TWO

THE LEGAL PROTECTION OF CHILD SOLDIERS IN UGANDA

2.1 Introduction

One of the most alarming trends relating to children and armed conflicts is their participation as soldiers. Children are fighting in nearly every major armed conflict in the world today.²¹ While the use of child soldiers is a worldwide problem, it is particularly acute in Africa²². In recent years, the coalition to stop the use of child soldiers by both government forces and insurgent groups in African countries under the age of 18 stated that more than 120,000 children were participating in armed conflicts across Africa. The most affected countries include inter alia; Angola, Burundi, the Democratic Republic of the Cong, Sierra Leone, Rwanda, Burundi, Liberia Uganda and Sudan.²³

Over the past twenty years, the international child rights movement has undertaken the development of international law, policies, and programs for the protection of children. As part of the move to alleviate the problem, legal devices have been created which address the involvement of children in armed conflict. The areas of law covering this are; the municipal/substantive law, humanitarian law, human rights, law international criminal law and labour law

²¹J Becker 'Child soidiers: Changing a culture of violence' (2005) 32 Human Rights Winter 16.

²²(in 6 above).

²³UNICEF, *The State of the World's Children 1999*, Oxford University Press, Oxford/New York, 1998

Applicable instruments include the four Geneva Conventions of 1949²⁴ and their two Additional Protocols,²⁵ the Convention on the Rights of the Child (CRC),²⁶ the African Charter on the Rights and Welfare of the Child (“African Children’s Charter”),²⁷ the Rome Statute,²⁸ the International Labour Organization’s UN Convention No. 182 on the Elimination of the Worst Forms of Child Labour (ILO Convention 182),²⁹ and the Optional Protocol. The following section presents the chronological discussion of the creation and development of these devices with a special emphasis on their protection of child soldiers.

2.2 The 1995 Constitution of the Republic of Uganda as Amended.

Article 34 (4) states that children are entitled to be protected from social or economic exploitation and shall not be employed in or required to perform work that’s likely to be hazardous or interfere with their education or to be harmful to their health or physical, mental, spiritual, moral or social development.

Article 34(5) states that for the purpose of clause (4) of the Article, children shall be persons under the age of eighteen years.

²⁴ Geneva Conventions (first, second, third and fourth) (adopted 12 August 1949 and entered into force 1950).

²⁵ Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of international Armed Conflicts (adopted 1977 and entered into force 1979); Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, (adopted 1977 and entered into force 1979).

²⁶ UN Convention on the Rights of the Child (adopted 20 November 1989) (entered into force September 1990).

²⁷ African Charters on the Rights and Welfare of the Child. OAU Doc. CAB/LEG/24.9/49 (adopted 1990), (entered into force 29 November 1999) <<http://www.africa-union.org>>.

²⁸ Rome Statute of the ICC (adopted 17 July 1998) (entered into force in 2002).

²⁹ Convention Concerning the Prohibition and immediate Action for the Elimination of the Worst Forms of Child Labour, (adopted 17 June 1999).

The 1995 constitution of the Republic of Uganda states in its article 17(1)(e) that it's a duty of every citizen of Uganda to defend Uganda and to render national service when necessary

Article 210(b) of this constitution makes the parliament responsible for making law regulating the Uganda Peoples' Defence Forces (UPDF), and in particular providing for recruitment into the armed forces and ensuring that members of the UPDF are recruited from every district of the country.

2.3 The Uganda Peoples' Defence Forces Act, 2005

Section 51(1) states that authority to recruit persons into the Defence Forces is vested in the Defence Forces Council.. Members of the Defence Forces shall be recruited from every district of Uganda

Every person who wishes to be recruited into the Defence Forces shall first get recommendation of his or her village council notwithstanding subsections 2 and 3, the Defence Forces Council may undertake such special recruitment as the interests of the Defence forces require.

Section 52 (1) states that persons shall be enrolled into the as Defence Forces officers on appointment to a commission or as militants, in accordance with regulations made under this act.

Subsection 2 states that no person shall be enrolled into the Defence Forces unless;

- a. Is a citizen of Uganda;
- b. Is of good character;
- c. Is at least 18 years of age and has attained such level of education as may be prescribed;

2.4 The Amnesty Act cap 294

According to section 2, an amnesty is declared in respect of any Ugandan who has at any time since the 26th of January, 1986, engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by;

- 1. Actual participation in the combat
- 2. Collaborating with the perpetrators of the war or armed rebellion
- 3. Committing any other crime in the furtherance of the war or armed rebellion or;
- 4. Assisting or aiding the conduct or prosecution of the war or armed rebellion.

(2) A person referred to under subsection (1) shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the cause of the war or rebellion for any crime committed in the cause of the war or armed rebellion.

Under section 3, a reporter shall be taken to be granted the amnesty declared under section 2 if the reporter-

1. Reports to the nearest army or police unit, chief, a member of the executive committee of a local government unit, a magistrate or a religious leader within the locality
2. Renounces and abandons involvement in the war or armed rebellion
3. Surrenders at any such place or to any such authority or person any weapons in his or her possession and;
4. Is issued with a certificate of amnesty as shall be prescribed in regulations to be made by the Minister.

By virtue of the above sections of the Amnesty Act cap 294, children who surrender, renounce and abandon the involvement in the war or armed rebellion are granted Amnesty and hence protected.

2.5 Children's Act Cap 59 provides for the care, protection and maintenance of children and defines a child as one below the age of 18 years.

2.6 The four Geneva Conventions and the two Additional Protocols

The four Geneva Conventions of 1949 and their two Additional Protocols together make up the body of international humanitarian law and Uganda is a signatory and ratified the conventions in 1964, 1991, 1991, and 2008. In the Geneva Conventions, children are protected as members of the civilian population and therefore, by definition, as non- participants in the armed

conflict.³⁰ Although child participation had taken place in the past, such occurrences were exceptional.

Accordingly, under the fourth Geneva Convention on the Protection of Civilians, specific provisions were drawn up to ensure special treatment for children with regards to material for relief, distribution of food, medical care, as well as family reunification.³¹ Therefore these provisions fail short of addressing the protection of child soldiers specifically. The application of the Geneva Conventions is also limited to international armed conflicts

However, in regard to the two Additional Protocols, Additional Protocol I provides for the protection of victims of international armed conflict.³² Moreover, Additional Protocol II provides for similar protections except it is geared towards non-international armed conflicts.³³ While article 4(3)(c) of Additional Protocol II specifically prohibits the recruitment of children under fifteen years of age and their participation, whether direct or indirect, in hostilities, article 4(3)(d) provides that children under fifteen who take direct part in the hostilities and whom enemy forces capture do not lose the special protections guaranteed under article 4. There is some evidence to suggest that the states participating in the Diplomatic Conference - the gathering of state

³⁰The Fourth Geneva Convention of 1949 protects civilians. The other three deal with soldiers and prisoners of war. No specific provisions on children are included.

³¹See for example articles 14, 17, 23, 24, 38, 50, 82, 89, 94, and 132 of the fourth Geneva Convention.

³²Additional Protocol I provides for the protection of children and their interests during crisis. These protections include for example article 14, 17, 23, 24, 38, 50, 82, 89, 94, and 132.

³³Articles 4, 6, 78, and 79 of Additional Protocol II.

representatives that negotiated the instrument - indeed intended to impose a stricter standard on parties involved in an internal armed conflict than on those involved in international armed conflict.³⁴

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

2.7 Convention on the Rights of the Child

Uganda signed the CRC on August 17, 1990 and ratified it on September, 16, 1990 and so it's obliged to respect, uphold and observe its provisions.

Children are protected by general human rights instruments. In addition, they are entitled to the protection under child rights instruments directly addressed to them.³⁵ Among these instruments is the CRC which the UN General Assembly adopted on 20 November 1989 and which came into force in September 1990. The CRC is the most comprehensive and widely ratified human rights treaty in existence.³⁶ It sets out a comprehensive array of civil

³⁴Institute for Security Studies 'Child soldiers and international law' 1997)
<<http://www.Jss.co.zap/PubsIASR/6No3/Fontana.html>> (accessed 17 March 2005).

³⁵Before the CRC. Children were protected under, for instance, the Declaration of the Rights of the Child, Proclaimed by General Assembly resolution 1386(XIV) of 20 November 1959.

³⁶The only non-parties in the world are the US and Somalia.

and political as well as the economic, social and cultural rights of children therefore serving as a milestone in the establishment and recognition of children's rights

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

[w]hen the UN embarked on the drafting of a convention that would solely address the rights of the child, the inclusion of a provision addressing the situation of armed conflicts was considered essential. Some states and non-government agencies hoped it would be the perfect opportunity to improve the provisions of International Humanitarian Law on the question of age, type of recruitment, and type of participation.³⁷

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

³⁷ (in 30 above).

³⁸ Article 38 of CRC.

This provision is derived from article 77 of Additional Protocol 1. During the drafting stage of the CRC,³⁹ although there was attempt to provide for a better standard of protection than the one in Additional Protocol I, it did not materialize.⁴⁰ The representative from the US argued that “because the language used in the Additional Protocol was a result of a lengthy debate in the Diplomatic Conference convened during the last decade to draft the Protocols, a working group on a draft CRC was not an appropriate forum to revise existing international law in this area.”⁴¹

The adoption of the CRC no doubt positively contributes to the rights of children. The recognition by the CRC, under article 38, of human rights law and humanitarian law makes it an unusual treaty.⁴² It is an indication that, at least in relation to children, the two can no longer be seen as distinct bodies of law.⁴³

However in relation to article 38 what comes a surprise at first glance is that even though article 1 defines a child as “any person under the age of 18 unless under the law applicable to the child majority is attained earlier it provides for a minimum age of recruitment at 15 years.. The “straight 18” position could not be adopted as it faced a serious challenge from countries like the US. It is actually reported that article 38 remained one of the four most difficult issues

³⁹S Detrick A commentaiy on the United Nations Convention on the Rights of the Child 653

⁴⁰As above.

⁴¹Detrick (n 35 above) 654.

⁴²G Van Bueren The international law of the rights of the child 349

⁴³As above.

to resolve until the final draft was completed.⁴⁴ Ultimately, the failure to adopt the “straight 18” position led to the initiation of the drafting and subsequent adoption of the Optional Protocol.

2.8 African Charter on the Rights and Welfare of the Child

Uganda signed the African Charter on the rights and Welfare of the child on February 16, 1992. Its duty bound to uphold, observe and respect the provisions contained therein.

The African Children’s Charter was Africa’s recognition to the ideals of the CRC but with an African emphasis because of the perceived exposure of the African child to a particular set of dangerous circumstances. Uganda signed in 1992 and ratified in 1994. Adopted by the Organization of African Unity (OAU) (now the African Union, AU) in 1990, it incorporates civil and political rights, as well as economic, social and cultural rights of the child. It is also the only regional treaty in the world which addresses the issue of child soldiers.

Among the reasons that required the drafting of the African Children’s Charter was the use of children as soldiers and the institution of a compulsory minimum age for military service.⁴⁵ Under article 22(2), the African Children’s

⁴⁴ML Hackenberg ‘Can the Optional Protocol for the Convention on the Rights of the Child protect the Ugandan child soldier?’ (2000) 10 *Indiana International and Comparative Law Review* 428.

⁴⁵L Muthoga introducing the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of the Child’ (paper delivered at the international Conference on the Rights of the Child. Community Law Centre, University of the Western Cape, 1992) as cited in F Vijjoen *The African Charter on the Rights and Welfare of the Child*’ (2000) in CJ Davel (ed) *Introduction to Child Law in South Africa* 219. See also D Chiiwa *The merits and demerits of the African Charter on the Rights and Welfare of the Child*’ (2002) 10(2) *International Journal of Children’s Rights* 157; D Olowti “Protecting children’s rights in

Charter prohibits the recruitment and use of children under 18 in both international and internal armed conflicts and requires' states to "... take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child." Unlike the CRC and the Optional Protocol, it adopts a "straight 18" position in its definition of a child. It therefore sends a clear message that the participation of children in conflict is unacceptable and will not be tolerated on the continent.

The African Children's Charter also established the African Committee of Experts on the Rights and Welfare of the Child (African Committee) whose mission is to promote and protect the rights established by the Charter.⁴⁶ The African Committee has the power to consider state party reports as well as individual complaints and inter-state communications which presumably gives additional teeth to its provisions.⁴⁷

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

The Rome Statute establishes a permanent court to try persons charged with committing war crimes, crimes against humanity, and genocide.⁴⁸ Uganda signed in 1992 and ratified on 14th June 2002. In its definition of war crimes, the Statute includes "conscripting or enlisting children under the age of fifteen

Africa: A critique of the African Charter on the Rights and Welfare of the Child (2002) 10(2) International Journal of Children's Rights 127.

⁴⁶Article 32 of African Children's Charter.

⁴⁷Article 44 of African Children's Charter.

⁴⁸The crime of aggression has been deferred from the jurisdiction of the ICC for the time being until a definition of the phrase is adopted.

years into national armed forces or using them to participate actively in hostilities”⁴⁹ and in the case of an internal armed conflict, “conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities”⁵⁰

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

The words “using” and “participate” have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying sabotage and the use of children as decoys, couriers or at military checkpoints.⁵¹

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

⁴⁹Article 8(2)(b)(xxvi) of the Statute.

⁵⁰Article 8(2)(e)(vii) of the Statute.

⁵¹See draft Statute for the ICC, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Part One, A/Conf.18312/Add.1 (14 April 1998) 21 as cited in H Hebel and D Robinson, “Crimes within the jurisdiction of the Court” in R S Lee (ed.), *The international Criminal Court, The making of the Rome Statute. issues, negotiations, results* (1999) 118.

In regard to the notion of “to enlist”, it is submitted that it comprises both the act of recruiting and the act of conscripting.⁵² It is argued, therefore, that the term to “enlist” encompasses every act - formal or de facto- of including persons in the armed forces.⁵³ The Rome Statute also ensures that the conscription and use of child soldiers is not simply a crime when carried out in international armed conflicts, but also makes the practice a crime under ICC jurisdiction even when carried out nationally, within a country, such as during civil war.⁵⁴ Therefore the criminalization as a war crime of the recruitment of children into national armed forces or armed groups and their use in hostilities whether the conflict is international or internal, is an important feature of the Rome Statute of the ICC towards the protection of child soldiers.

2.10 ILO Worst Forms of Child Labour Convention 182

In 1999, all 174 Member States of the ILO unanimously adopted ILO Convention 182.⁵⁵ The government of Uganda ratified ILO on June 21, 2001It commits each state which ratifies it to “take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency”.⁵⁶ The term “child” applies to all persons under the age of 18 years and the worst forms of child labour include among others, all forms of

⁵²K Dormann Elements of War Crimes under the Rome Statute of the International Criminal Court; Sources and Commentary' (2003) 377.

⁵³As above.

⁵⁴Article 8(2)(e)(vii) of the Statute.

⁵⁵Convention Concerning the Prohibition and immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999. S. Treaty Doc. No. 106-S (1999). 38 I.L.M. 1207 (entered into force Nov. 19, 2000).

⁵⁶Article 1 of ILO Convention 182.

slavery or practices similar to slavery including forced or compulsory recruitment of children for use in armed conflict.⁵⁷

Recommendation 190 accompanying ILO Convention 182 also encourages states to make forced or compulsory recruitment a criminal offence.⁵⁸ Although the recommendation does not have a binding effect it is an authoritative interpretation of ILO Convention 182 and offers guidance for state parties in complying with their obligations under the Convention.

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

However, conspicuously absent from the list of the worst forms of child labour is a total ban on the use of children as soldiers in armed conflict. As already mentioned above, in lieu of such a broad ban, the CRC prohibits “forced or compulsory recruitment of children for use in armed conflict.”⁵⁹ The legal adviser to the U.S. delegation who negotiated C182 said this was the most controversial aspect of the negotiations.⁶⁰ “Child soldiers are in terrible danger no matter how they are recruited,” said Becker, Children’s Rights Advocacy

⁵⁷ Article 3(a) of ILO Convention 182.

⁵⁸ See Recommendation Concerning the Prohibition and immediate Action for the Elimination of the Worst Forms of Child Labour (17 June 1999) <<http://uioiex.ilo.ch:1567/scripts/convde.pl?R190>> (22 March 2005).

⁵⁹ HRW US Blocks Efforts to Ban the Use of Child Soldiers: Clinton urged to Back Stronger Measures in Geneva (15 June 1999), <<http://lw4w.hrw.org/press/1999/unlaborG99.htm>> (accessed 23 March 2005)

⁶⁰ M Dennis ‘The ILO Convention on the Worst Forms of Child Labour’ (1999) 93 American Journal of International Law 944.

Director for Human Rights Watch.⁶¹ “This narrow provision fails to protect thousands of child soldiers who are lured or coerced into warfare.”⁶²

The ILO Convention 182 also prohibits “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children,”⁶³ but leaves it to the national authorities to determine, after consultation with associations of workers and employers, have a say in what should be included under this prohibition. States could include all participation in hostilities and all military recruitment of under-18s in this category. Currently, out of the 132 ratifications, 40 are African states.

2.11 The Optional Protocol on the Involvement of Children in Armed

Conflict

During the drafting of the CRC, there was concern that article 38 was inadequate and the proposal for an optional protocol to the CRC arose from the first General Discussion held by the CROC on Children in armed conflicts (5 October 1992) ⁶⁴By 2000 international campaigning by NGOs notably the Coalition to Stop the Use of Child Soldiers, led to the adoption of the Optional

⁶¹As above.

⁶²As above. Other critics think that military regimes like the one in Burma will exploit the “voluntary” enlistment loophole in order to gain international legitimacy while continuing to fill up to half their battalions with children under the age of eighteen.

See also ‘Child Labour Convention Means Little. Critics Say’ Inter Press Service (12 August 2000)

<http://www.ips.org/ips/human.N./1_d3eie76909c9847c22568020035e2bi?OpenDocume>

(accessed on 12 March 2005),

⁶³Article 3(d) of ILO Convention 182,

⁶⁴UNICEF Implementation handbook for the Convention on the Rights of the Child (2002) 642. See also CR Revaz “The Optional Protocols to the UN Convention the Rights of the Child on sex trafficking and child soldiers” (2001) 9 No. 1 Human Rights Brief 13.

Protocol which significantly strengthened legal norms regarding the use of child soldiers.⁶⁵ By 2002, the Optional Protocol had come into force.

The Optional Protocol, under article 1, increased the minimum age of direct participation in hostilities from 15 years to 18 years, as already discussed above; the minimum age for direct participation in hostilities was set at 15 by Additional Protocol I and the CRC.⁶⁶ Additional Protocol II also sets the standard at 15, but does not make a distinction between direct or indirect participation. However, the Optional Protocol retained 15 years as the minimum age for voluntary enlistment.⁶⁷

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

Importantly, the Optional Protocol recognizes the vital need for proper rehabilitation and social reintegration for child soldiers.⁶⁸ This is not just an obligation for the State involved in the armed conflict. The Optional Protocol

⁶⁵ As above.

⁶⁶ Article 77 of Additional Protocol and article 38 of CRC.

⁶⁷ Article 3(3) of Optional Protocol.

⁶⁸ Article 7 of Optional Protocol.

under article 7(1) specifies that State Parties “shall cooperate in [this] ... through technical cooperation and financial assistance”.

Currently out of the 101 ratifications to the Optional Protocol there are 19 African states including Sudan that became a party in July 2005.⁶⁹ In line with state obligations the UN Committee on the Rights of the Child (CROC) has already started consideration of initial reports of state parties.⁷⁰ The Optional Protocol, although far from being the end of the road, is the best protection to date and an important step along the way for children involved in armed conflict.

⁶⁹ See <<http://www.ohchr.org/english/bodies/irc/index.htm>> (accessed 1 August 2005).

⁷⁰ As above.

2.12 Conclusion

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

CHAPTER THREE

CHILD SOLDIERS IN UGANDA: IN SEARCH OF ADEQUATE LEGAL PROTECTION

3.1 Introduction

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

3.0 Domestic Legislation and the Use of Children in Armed Conflict

Uganda has taken some positive strides towards ending the armed conflict through enactment of the Amnesty Act 2000 Cap 294, to pardon former combatants and collaborators, including children, if they renounce and abandon armed rebellion. This is aimed at encouraging a peaceful resolution to the rebellion, particularly by the LRA in Northern Uganda. The provision therein provides for a commission with regional offences to grant amnesty.⁷¹

⁷¹Rapid assessment Report in Trafficking of children into worst forms of labour, including children soldiers, in Uganda. February 2007, International Programme On the Elimination of child Labour. (IPEC)

The government with the support of World Banks Disarmament, demobilization and re-integration programme is supporting the Amnesty Commission to resettle the formerly abducted children though figures were not easy to get.⁷²

In addition, the ministry of Gender, Labour and Social development report indicated that out of the 30,000 children forcefully recruited, over 25,000 have returned, escaped or been rescued by UPDF. About 6000 children are still uncounted for.⁷³

The Ugandan government with the help of its Tanzanian counterparts on 7th January 2015 apprehended Jamil Mukulu, the leader of the Congo based Ugandan Islamist and rebel group, Allied Democratic Forces, in a major boost for the United Nations backed operations to pacify the lawless region. The above rebel group has been both voluntarily and involuntarily recruiting child soldiers in the rebel group so his arrest will be a deterrence action to the recruitment of child soldiers in Uganda.⁷⁴

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

⁷² See the Implementation of the optional Protocol to the convention on the rights of the child on involvement of children in armed conflict. First periodic report from the Ministry of Gender, Labour and Social development. May 2006/

SUPRA⁷³

⁷⁴

Therefore, it is with this premise that the suggestions to come up with a comprehensive and up-to-date normative framework are made.

At last, it is not believed that better legal standards even with full implementation are a magic wand. Admittedly, the most effective means of ending this offensive is a multifaceted approach.⁷⁵ However, the attempt made here is to indicate how the law can at its utmost contribute its share towards fighting this “evil”

Despite the fact that Article 34(4)⁷⁶ and other relevant statutes prohibit and protects children from indulging in any work which is likely to be hazardous to both their education and health or physical, mental, spiritual, moral or social development, children below the age of 18 years have been and are still being engaged in such activities as indicated there under. This is due to failure to implement those laws by the state.

In November 1998, UPDF recruited 500 youths; most of them were below the age of 18 years and with questionable discipline were recruited without the consent of their parents. It's believed that the recruitment was carried out by security officer (DISO) in Hoima with the aid of the Gombolola security officer (GISO). The DISO of Hoima confirmed this recruitment and added that it was

⁷⁵Providing better economic opportunities, providing education to both children and parents, curbing the easy availability of small arms and military aid, avoiding situations which generally cause armed conflict are some of the elements in this multi-faceted approach.

done in broad day light and all the youths were volunteers. He then denied that they were sent to DRC.⁷⁷

In October 1998, Andy Williams of Tigers, an NGO running a project for street children in Kampala, said that street children had been approached by soldiers and forced to join the army to be sent to Democratic Republic of Congo and fight on the side of rebels. This allegation was denied by Uganda National Council for Children and the then Minister of State for defense, Steven Kavuma.⁷⁸

On 5th February, 1999, Brigadier Katumba Wamala who was in charge of military operations against the LRA, claimed on the Ugandan state television that his troops had rescued 2,172 people in 1998, most of them children and teenagers. In April 1998, 25 boys were charged with treason and were awaiting for trial.

In the late 1998, the Deputy Prime Minister, Eriya Kategaya announced that an amnesty law would be adopted for members of LRA who surrender. He added that brutal means would not be used since some of the LRA soldiers had been kidnapped and forced to fight and that most of them were kids.⁷⁹

⁷⁷Yunus, M., "Angry Parents Protest UPDF recruitment of 500 security", The Daily Monitor, 20 November, 1998.

⁷⁸(CCSUCS), Africa Report, April 1999 Citing, "Uganda Children's Body denies allegation of forced army recruitment, "AFP, 23 October, 1998.

⁷⁹

Nevertheless, in January 1999, the UPDF executed in circumstances to be clarified, five teenage boys between the age of fourteen and seventeen suspected of being ADF rebels.⁸⁰

It has been reported by a confidential source that there are a number of child soldiers from West Nile Bank Front who are currently in government custody, some as young as ten.⁸¹

However, although the government has to a great extent failed to protect child soldiers in Uganda, it has launched programmes and passed policies to eliminate child labour and child soldiers at large.

3.2 National Programme to Eliminate Child Labour

In collaboration with ILO-IPEC and with funding from USDOL, Uganda launched a National Programme to Eliminate Child Labor in 1999. The programme contributes to the progressive elimination of exploitative child labour through prevention, withdrawal, rehabilitation of children who have escaped or saved by government forces from rebel groups and provision of alternatives to working children. The projects focus on sensitization, advocacy, media awareness, and formation of district groups aimed at addressing children's issues.

⁸⁰"Fort Portal boys killed", The New Vision, 28 January 1999; IRN Central and Eastern Africa, Update no. 598,29.

⁸¹Ibid

3.2.1 National child Labour Policy.

This was recently passed at the end of October 2006, by the government of Uganda. The policy has defined child labour and the worst forms that need to be given urgent action. The specific objectives of the policy are; firstly to integrate child labour concerns into the national, district and community programs and to stimulate collective and concerted efforts to eliminate child labour at all levels.

3.3 International humanitarian law

As pointed out in the previous chapter, international humanitarian law has some role to play in protecting children in general and child soldiers in particular.⁸² The first three Geneva Conventions afford little or no protection for children in general.⁸³ Although the fourth Geneva Convention provides specific protection to children in general, it falls short of addressing protection for child soldiers.⁸⁴ Therefore, this leaves the two Additional Protocols as the only relevant international humanitarian law instruments worthy of further discussion.

One general strong point of international humanitarian law from the perspective of child soldiers is that it applies once a conflict has begun. Beside this it also binds equally all sides of the conflict, including insurgent groups

⁸² See sub-section 2.2 above for details.

⁸³ The Conventions relate to wounded and sick, the ship wrecked and prisoners of war and do not address the concerns of children specifically.

⁸⁴ The provisions do not aim to regulate the participation of children in hostilities. See sub-section 2.2 above for details.

who do not have the legal capacity to sign the Geneva Conventions.⁸⁵ In this regard, even rebel groups who are not signatories of the relevant legal instruments are bound and obliged to abide by the relevant provisions of the law.

However in general it is rightly argued by Wells that

“...international humanitarian law maintains dated distinctions between persons involved in hostilities and persons needing protection from the effects of hostilities that do not reflect conditions of modern armed conflicts and act to preclude needed legal protection of those among the most vulnerable in wartime, namely child soldiers.”⁸⁶

This argument holds water, for instance, in relation to Additional Protocol 1 as it is limited to international conflicts.⁸⁷ Presently in Uganda, where conflicts have taken the strict dimension of being internal,⁸⁸ Additional Protocol 1 fails to provide protection for the child soldier in internal armed conflicts.

On the other hand, although Additional Protocol II is commendable for child soldiers in Africa as it applies to non-international armed conflicts, it does not establish any measures of implementation or supervision to ensure compliance

⁸⁵SL Wells “Crimes against child soldiers in armed conflict situations: Applications and limits of international humanitarian law (2004) 12 *Tulane Journal of International and Comparative Law* 292.

⁸⁶Wells (n 72 above) 288.

⁸⁷The word ‘international armed conflict’ is some what misleading because Additional Protocol I does not apply only to the international armed conflicts covered by common article 2 of the Geneva Conventions, which are defined as conflicts between two or more States Parties to the treaty. Instead, for instance, according to article 1(4) of Additional Protocol I applies to “armed conflict against racist regimes in the exercise of self-determination...”.

⁸⁸See, for example, the conflicts in Sudan, Uganda. DRC. Sierra Leone, Liberia and Burundi which have all engaged child soldiers.

with its provisions⁸⁹ In addition, it requires a higher degree of intensity for its application as it does not apply to riots, isolated and sporadic acts of violence which have not reached the level of internal armed conflicts.⁹⁰ Moreover, both Additional Protocols, just like the Rome Statute prescribe fifteen as the minimum age for recruitment and participation in hostilities.⁹¹ This is a major drawback and an inconsistency with other international legal standards for the protection of the child which have adopted 18 as the maximum threshold. It also sends the wrong message that the recruitment and use of children between 15 and 18 is acceptable. Rectifying this drawback in line with current international legal standards could optimize the role international humanitarian law could play.

3.4 International human rights law

3.4.1 General

In spite the fact that Uganda has ratified several international instruments including the optional protocol to the convention on the Human Rights of a child(CRC OP AC) on the involvement of children in armed conflict on 6th May, 2002. The armed conflict affecting children continue to violate the Uganda's constitution 1995 which has domesticated the international laws, which obliges the state to protect its citizens.

⁸⁹See, generally, S Ramcharan 'The role of international bodies in the implementation and enforcement of humanitarian law and human rights law in non-international armed conflicts' (1983) 33 American University Law Review 99.

⁹⁰Most current conflicts involving child soldiers in Africa are internal and below the Additional Protocol II minimum threshold: Article 22(3) of the African Children's Charter provides that it does not only apply to children caught up in international and internal armed conflict, but also to lower levels of violence described as "tension and strife". Thus the African Children's Charter recognizes that it is the best interest of the child which ought to predominate in international law and not the form of the conflict.

⁹¹Article 77 of Additional Protocol I and article 4 of Additional Protocol II.

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

3.4.2 The "straight 18" position: Reasons for resilience

Article 1 of the CRC establishes that a "child means every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier." The function of this article is to define who is to be considered a child for purposes of the CRC.⁹² The only restriction placed on this principle in the CRC itself is to be found in article 38 on recruitment and participation in hostilities which allows the minimum age to be at 15. The Optional Protocol makes reference to article 1 of the CRC for its definition of the "child".⁹³

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

According to Alston, the CRC's drafters put 18 as the age limit in order to maximize the protection offered by the CRC and to ensure that the rights sets

⁹²Detrick (n 35 above) 51.

⁹³Para 7 of Preamble of Optional Protocol.

forth therein would uniformly apply to as large a group as possible⁹⁴ Probably a similar reason could be ascribed to the drafters of the African Children's Charter Therefore as child soldiers are one of the most vulnerable groups of children, it becomes imperative to ensure they benefit from the maximum threshold of the age 18.

Furthermore, there is a tendency within the international community to fix the age of majority at 18.⁹⁵ By way of example, the experts meeting in Vienna from 30 October to 4 November 1994 to discuss the question of children and adolescents held in detention, urged States to ensure "that legislation concerning the age of criminal responsibility, civil majority and consent does not have the effect of depriving any child of the full enjoyment of the rights recognized by the CRC."⁹⁶ Similarly, in interpreting article 10 of the ICCPR, the Human Rights Committee mentioned that the age of majority should be 18 as far as criminal matters are concerned.⁹⁷

By adhering to 18, it is not implied that someone by some magic wand on the stroke of a pen turns into a fully competent, mature, wise and autonomous individual upon attaining a certain arbitrarily fixed age.⁹⁸ Rather, it is necessary for international law to do so in order to grant a comprehensive

⁹⁴P Alston "The legal framework of the Convention on the Rights of the Child" (1992)91 UN Bulletin of Human Rights.' The Rights of the Child 2. 3.

⁹⁵For example, the regional European Convention on the Exercise of Children's Rights adopted by the Council of Europe on 26 January 1996 states that the age of majority is 18 years. See 13European Treaty Series. No. 160, article 1. para 1.

⁹⁶UN doc. E/CN.4/1 995/1 00, para. 28(a) of the Recommendations.

⁹⁷Report of the Human Rights Committee of 9 October 1992. UN doc. A/47/40, para. 13.

⁹⁸M GoseThe African Charter on the Rights and Welfare of the Child: An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child (2002) 28.

protection for all persons under the age of 18 years who are deemed to be in need of protection. It is the best way of achieving the Convention's and Charter's aim of protecting the youngest and most vulnerable members of society, and in this particular case child soldiers.

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

Finally, from a practical point of view for recruitment and participation purposes, the "straight 18" position offers an advantage. This is because, for instance, in cases where children do not possess birth certificates, it is easy for their superiors to pass them off as being older than they really are.⁹⁹ However, if the age limit were fixed at 18 years, the recruitment of very young children could certainly be avoided, as their reduced physical appearance would speak for itself.

⁹⁹A good example is Southern Sudan where the physical appearance of the children is relatively larger than their real age.

3.4.3 The nature of state obligation

The Optional Protocol is a compromise.¹⁰⁰ As a result, the nature of the state obligation suffers from vagueness. The employment of the phrase “all feasible measures”, for instance, as opposed to “ensure” could be considered as a lesser and more imprecise obligation on the part of the state.

In this regard, article 1 of the Optional Protocol stipulates that states “shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.” The deliberate vagueness of this provision enables states to determine what constitutes “all feasible measures” and to define “direct part in hostilities.” By setting the standards by which they are judged. States may easily escape the scrutiny of the international community.¹⁰¹

For example, a commander might think that it is not feasible to let his soldiers under the age of 18 not to be deployed in direct hostilities because the other party in the conflict has more power than his. In this situation the state is not in violation of its “all feasible measures obligation as feasibility is limited by whether the actual possibility of undertaking a certain measure exists while “all necessary measures” would not have looked to the possibility of the realization of a measure, but to whether there is an actual need.¹⁰²

¹⁰⁰ (in 61 above).

¹⁰¹ S Abraham “Child soldiers and the capacity of the Optional Protocol to protect children in conflict” (2003) 10 Human Rights Spring: American Bar Association 15.

¹⁰² Gose (n 85 above) 78.

Therefore, although article 1 is the most important provision of the Optional Protocol, the scope of the obligation contained in it is one of conduct rather than of result.¹⁰³ It would have provided children with better protection if states had undertaken to take all necessary measures” to this end or, even better, if they had a duty to ensure” that such participation does not take place.¹⁰⁴ It is to be hoped that the Committee on the Rights of the Child will apply a strict interpretation when reviewing whether States have indeed taken all feasible measures” towards the stated objective.¹⁰⁵

In the meantime, for instance, the obligations under article 2 of the Optional Protocol place a stronger obligation of “to ensure” that persons who have not attained the age of 18 years are not compulsorily recruited into armed forces.¹⁰⁶ Also, under the African Children’s Charter, the obligation that a state undertakes is “to take all necessary measures to ensure” that no child takes a direct part in hostilities and refrain in particular, from recruiting any child.¹⁰⁷ This obviously accords a better standard for the protection of children and is commendable.

3.4.4 Direct and indirect participation in hostilities

The participation of children in armed conflicts brings into focus what should be made of the words “direct” and “indirect” part in hostilities. The CRC under

¹⁰³ It contains a wording that is largely in common with the corresponding text of Additional Protocol 1.

¹⁰⁴ ICRC “Optional Protocol to the Convention on the Rights of the Child concerning involvement of children in armed conflicts: Position of the International Committee of the Red Cross” (1998) 322 International Review of the Red Cross 113.

¹⁰⁵ As above.

¹⁰⁶ See also article 4(2) of Optional Protocol.

¹⁰⁷ Article 22(2) of African Children’s Charter.

article 38(2), the Optional Protocol under article 1 and the African Children's Charter under article 22(2) all prohibit children taking a direct part in hostilities". "Direct" seems to imply a combatant position and exclude supplementary roles (serving as a scoter, porter and the like) which also involve a great risk for the survival and development of the child.¹⁰⁸

During the drafting of the CRC the phrase "direct part in hostilities had faced a lot of challenge and criticism from a number of delegations¹⁰⁹. This is the same phrase that was already in existence in Additional Protocol II under article 77(2), and it has proved inadequate to protect children in armed conflict. In this regard it is argued that it is surely correct to question the usefulness of a new treaty standard that merely reiterates existing standards and approaches.¹¹⁰

In order to provide children with the maximum level of protection, as Bueren rightly argues, a combination of "to take part in hostilities" as incorporated in article 4(3) of Additional Protocol II and the "to take all the necessary measures to ensure that children under 18 would not participate" obligation of article 22(2) of the African Children's Charter is important.¹¹¹ Otherwise, children who are involved in non-combatant status but in the meantime are at the risk of real danger towards their survival and development would not be able to benefit from the protection that is called for.

¹⁰⁸For the position taken during the negotiation of the drafting of the ICC in regard to what is meant by "direct part in hostilities" see sub-section 2.5 above.

¹⁰⁹See Detlick (n 35 above) 652-656.

¹¹⁰Van Bueren (n 38 above) 335.

¹¹¹As above.

3.4.5 Voluntary recruitment¹¹²

3.4.5.1 How voluntary is 'voluntary'?

Under the Optional Protocol, while other provisions raise the minimum age of compulsory recruitment to eighteen, it allows for voluntary recruitment into a state's armed forces at a younger age.¹¹³ This provision also establishes that upon ratification of or accession to the Optional Protocol, governments must deposit a binding declaration stating their minimum recruiting age.¹¹⁴

However, to ensure that recruitment is voluntary, the Optional Protocol under article 3 mandates for four safeguards. These safeguards require that:(i) the recruitment is genuinely voluntary;(ii) the recruitment is carried out with the informed consent of the potential recruit's parents or legal guardians: (iii) the potential recruit is fully informed of the duties involved in such military service, and (iv) provides reliable proof of age prior to acceptance ¹¹⁵

The safeguards built in the provision are commendable as they can play a significant role in screening out those children who do not fulfill the requirements. Actually, voluntary recruitment with such safeguards has been tested and worked in countries like the US,¹¹⁶ which is the main driving force

¹¹²For the purposes of this study, 'volunteering' could be defined as not being abducted, not being physically forced, induced or coerced in any manner to join the armed forces or armed groups.

¹¹³100 Article 3(1) of Optional Protocol.

¹¹⁴Article 3(2) of Optional Protocol.

¹¹⁵Article 3(3) of Optional Protocol.

¹¹⁶Other countries that allow voluntary recruitment with safeguards include UK, Australia and France.

behind the inclusion of this provision.¹¹⁷ However, the reality in the context of Africa might prove otherwise.

In Africa, many child soldiers come from poor families or are in fact orphans.¹¹⁸ It comes as no surprise that orphans are the prime at-risk group for recruitment into armed conflict. Having kept this in the background, it sounds impractical to expect these vulnerable groups of children to register voluntarily with the consent of parents or legal guardians who do not exist. In spite of this, government forces may continue to abuse the vulnerability of these children through the leeway opened for them by the Optional Protocol by alleging that these children are in fact volunteers even though they fail to satisfy "...the informed consent of the potential recruit's parents or legal guardians" safeguard put in place.

With a similar reasoning, the safeguard requiring children to '....provide reliable proof of age prior to acceptance" is not of much practical effect in Africa. It is reported by UNICEF that in sub-Saharan Africa, 55 percent of children (nearly 15 million) are not registered by their fifth birthday, while in industrialized countries the figure stands at 2 per cent.¹¹⁹ This clearly shows

¹¹⁷ Throughout the negotiations over the Optional Protocol, the fundamental obstacle to achieving a consensus was US-led opposition to the minimum age requirement for military service. The US currently accepts seventeen year-old volunteers into its armed forces, contingent upon parental permission. The US refused to compromise on its policy of accepting seventeen year-olds into the military and of using them in armed conflict.

¹¹⁸ Orphan usually refers to a child under the age of 18 whose mother (maternal orphan) or father (paternal orphan) or both (double orphan) are dead. In the context of HIV/AIDS, by 2003, 15 million children under 18 had been orphaned worldwide, see UNAIDS/WHO 2004 Report on the global AIDS epidemic; About 12 million of these live in sub-Saharan Africa, and it is expected that this number will have risen to more than 18 million by 2010, see UNAIDS, UNICEF, USAID Children on the Brink (2004) A joint point of new orphan estimate's and a framework for action <http://www.unicef.org/publications/index_22212.html> (accessed 20 July 2005).

¹¹⁹ UNICEF The 'rights' start to life: A statistical analysis of birth registration (2005) <http://www.unicef.org/publications/files/irthReg1Oa_rev.pdf> (accessed 03 August 2005).

that it will often be difficult to prove a child's age when he or she volunteers even though governments might just continue their recruitment in the face of lack of the proof of age

Additionally, according to article 3(5) of the Optional Protocol, the requirement to raise the age limit for voluntary recruitment above 15 does not apply to schools operated by or under the control of the armed forces of the States Parties in accordance with the rights of education¹²⁰ of the child. Incidentally this is intended and helps to promote the right of education of these children. In the meantime, however, the possibility that the opposing parties to a conflict would consider these children as part and parcel of the armed forces is high, thereby making them targets rather than mere bystanders.

Another potential challenge for the application of this provision is the distinction it attempts to make between national armed forces and other armed groups. It might prove difficult at times to determine who is a government (national-armed force) and who is not.¹²¹ Some armed groups control territory and population, and resemble de facto governments.¹²² This practical difficulty in making a distinction might act to the detriment of child soldiers.

In the UN study on the Impact of Armed Conflict on Children, Machel, among other commentators, dismisses the idea of "volunteerism", arguing that when

¹²⁰Articles 28 and 29 of CRC: See also General Comment No. 3 of the CRC on the Aims of Education.

¹²¹An example could be Sierra Leone during the civil war when the junta by the name AFRC took power from the legitimate government and ran the country for over a year until it was ousted by ECOMOG forces, which put the legitimate government back in power. During the period AFRC was in power, it was difficult to determine whether it was a national armed group or not.

¹²²The RUF of Sierra Leone is a good example.

the only options are survival or poverty, the choices of the children can hardly be called free and fair.¹²³ It is clear that the degree of real choice varies from situation to situation. For instance, with the words of one self-defined volunteer describing the circumstances in which he joined “one of my friends... was shot in his head because he refused to join them. He was killed straight in front of me”.¹²⁴ Therefore, most “voluntary” recruitment should not be regarded as a genuine expression of the child’s free will. In this regard Vandergrift argues correctly that

One of the problems is that young people can easily be forced to say they joined voluntarily: we witness this in many places. Is it truly voluntary when there are immense pressures to join armed forces and there are few options for those who do not join?¹²⁵

Finally, in discussing “volunteerism”, it would not be complete without mentioning the tension created with the right of the child to freedom of association and freedom of expression on the one hand and those that dismiss the concept of volunteering outright¹²⁶. The former two rights are a reflection of one of the four cardinal principles of the CRC, namely the right to participation

¹²³Machel (n 14 above).

¹²⁴R Brett “Adolescents volunteering for armed forces or armed groups” (2003) International Review of the Red Cross No 852 <[http://www.icrc.org/Web/eng/siteengO.nsf/m lall/5WNJFXI\\$File/IRRC_852_Brett .pdf](http://www.icrc.org/Web/eng/siteengO.nsf/m lall/5WNJFXI$File/IRRC_852_Brett.pdf) (accessed 22 July 2005): Although this scenario relates to action by armed groups, there are a number of scenarios whereby a similar act has been committed by the Kamajors who formed part of the national armed forces, see generally <<http://www.childsoldiers.org/home/intro.asp>>. African Studies Centre “Sierra Leone: background report on child soldiers” <http://www.africa.upenn.edu/Newsletters/lirinw_7_1_599.html> (July 1999) (accessed 13 July 2005).

¹²⁵K Vandergrift “international law barring child soldiers in combat: Problems in enforcement and accountability: Challenges in implementing and enforcing children’s rights” (2004) 37 Cornell International Law Journal.

¹²⁶This is also referred to as the protection versus participation debate.

as incorporated in article 12 of the CRC. One argument favours the view that safeguards in article 38(2) and (3) of the CRC, and by comparative analysis article 22(2) of the African's Children Charter, restrict the manifestation of a child's right to freedom of expression and freedom of association.¹²⁷ This is because it is important to note that children are not always forcibly recruited into the armed forces¹²⁸ and only voluntary enlistment is focused upon here.

However, the counter argument rightly has it that the protection accorded is an appropriate humanitarian gesture although its underlying philosophy may conflict with regard to, for instance, the expression of political views.¹²⁹ It is further submitted that the participation of children in armed conflicts could be equated to a specific forms of exploitation as armed conflicts are inherently brutalizing and their very nature makes it impossible for those under 18 to give free and informed consent.¹³⁰

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

¹²⁷Van Bueren is of the view that the argument for protection is more convincing than the one forwarded by the position for the right to freedom of association. See Van Bueren (n 38 above) 816.

¹²⁸A good example would be wars of national liberation.

¹²⁹F Olsen "Children's rights: Some feminist approaches to the United Nations Convention on the Rights of the Child' (1992) 6 International Journal of Law and the Family 214 as cited in C Jesseman "The protection and participation rights of the child soldier: An African and global perspective" (2001) 1 African Human Rights Law Journal 151. "

¹³⁰.Van Bueren (n 38 above) 335.

3.4.5.2 Double standard as “no standard”

Article 3(3) of the Optional Protocol, in stating that “[state Parties that permit voluntary recruitment does recognize the possibility of voluntary recruitment of children below the age 18 only by government forces. Article 4(1) further explicitly provides that

Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.¹³¹

At face value, this is a commendable step. This is because, although not always, the recruitment and use of child soldiers is more rampant among armed groups than within government forces.¹³² But, in the meantime, this double standard sets a wrong precedent for a number of reasons.

To belabor the obvious, international law is important to efforts to ensure armed groups respect human rights. Firstly, it provides criteria and it has distinct advantages over national law as armed groups will not readily accept the legitimacy of national law.¹³³ International law, even though it is developed

¹³¹ Article 4(1) of optional Protocol

¹³² For instance, the RUF of Sierra Leone and LRA of Uganda, which are both armed groups, have recruited more child soldiers than their respective government forces. In the LRA it is reported that minors make up 80% of its forces. See for instance the Washington Times “Africa’s forgotten war by S Brownback and RE Stearns <<http://washingtontimes.com/op-ed120050308-094129-9853r.htm>> (March 2005) (accessed 22 August 2005).

¹³³ For instance, if they are secessionist movements, they are likely to disagree that the state has authority to pass laws that are valid in contested territories. Similarly, revolutionary or insurrectionist groups that seek to overturn the government of a country illy to Ghllena ll lpi l may of that governments laws. National law is tainted by its association with the state or government in power

by states, has the advantage of being distinct from any particular state.¹³⁴ More importantly to the discussion at hand, international law provides a common standard and does not have partiality.¹³⁵

The application of the Optional Protocol to armed groups as non-state actors is already challenged as being out of line with the classical conception of a human rights instrument which only binds governments and citizens.¹³⁶ Additionally, including a double standard, with one set of norms which applies for government forces and another for armed groups is similar to adopting no standard.¹³⁷ This derogates from the advantages mentioned above that international law has over national law. The likelihood that armed groups will treat it as a legal obligation is minimal, which in effect might put in question the impartiality of the whole instrument from their perspective.

3.4.6 Disarmament, demobilization and reintegration (DDR)¹³⁸

Although at face value the issue of DDR might seem to be strictly a social issue a significant role that the law should play. Therefore, the Optional Prot. addresses post-conflict issues, including demobilization of child soldiers. Article Optional Protocol provides that persons “recruited or used in hostilities”

¹³⁴In other words, since it is supra-national in character, it provides a degree of legitimacy for armed groups that national law does not.

¹³⁵International Council on Human Rights Policy “Ends & means: human rights approaches to armed groups”

<<http://www.reliefweb.int/library/documents/2001EndsandMeans.pdf>>(2001) accessed 26 July 2005).

¹³⁶As above.

¹³⁷It may be observed in this regard that humanitarian law has always been based on the premise of equal obligations on all sides, and that this argument is often put forward when seeking to induce parties to conflict to implement the law.

¹³⁸Disarmament is the process of handing in arms, demobilisation is the format process of being released from duty and reintegration is a range of processes which helps the person get back to normalcy.

are demobilized and accorded “all appropriate assistance for their physical psychological recovery and their social reintegration.¹³⁹ Notably, the language is clear that children voluntarily or forcibly recruited into armed groups, as well as non- forces, are to be included in demobilization and reintegration efforts.

Another area that needs to be emphasized by the law is that DDR must be undertaken swiftly. This helps to minimize the possibility of re-recruitment and continuing exploitation of children within a region.¹⁴⁰ Moreover, the phrasing under article 6 of the Option Protocol should be taken to include health care, psychosocial counseling, educational programs, vocational training, family reunification, and the basic needs of food and shelter.

At times, because children are not thought to be a “threat and of not much ‘importance’, the DDR programmes might overlook their involvement in the DDR process.¹⁴¹ For instance, the majority of former fighters interviewed who had participated in the 2000- 2003 United Nations-sponsored Sierra Leonean DDR program received only partial benefits, were kept out of the skills training component of the program or failed to receive any benefits at all.¹⁴² Of the 21,000 children recruited by both rebel and government forces during the Liberian civil war — some as young as six years old — only 4300 were

¹³⁹ Article 6 (3) of Optional Protocol.

¹⁴⁰ See, for further details, section 3.7 below on cross-border recruitment

¹⁴¹ Governments tend to consider adult soldiers more of a threat than child soldiers and prefer to see the DDR of adult soldiers first.

¹⁴² Amnesty International “Côte D’Ivoire: Cross-border child soldiers (10 August 2005).

[http://www.amnesty.ca/take_action/actions/cote_divoire_childsoldiers .php](http://www.amnesty.ca/take_action/actions/cote_divoire_childsoldiers.php)> accessed 22 August 2005).

demobilized.¹⁴³ Among the child soldiers themselves, the lack of a gender sensitive approach to girl child soldiers is another shortcoming.¹⁴⁴ To conclude, in accordance with article 7 of the Optional Protocol which obliges “[s]tate Parties to cooperate in the implementation of the protocol” the issue of DDR for child soldiers is an area whereby a great deal of international cooperation can be sought.¹⁴⁵

3.4.7 Girl soldiers

There was a time when the prevailing opinion was that all child soldiers were boys. This is because war has traditionally been considered as a male preserve, and this remains predominantly true. But we now know that child soldiers include boys as well as girls. Women and girls participate in warfare to a far greater degree than is generally recognized.¹⁴⁶ In addition to armed combat, girl soldiers are often forced to serve as sexual slaves of armed groups.¹⁴⁷ Girl soldiers have also been used to augment the number of rebel fighters in supplementary roles, such as cooks, domestics, and porters, and are

¹⁴³ As above.

¹⁴⁴ For a discussion on girl child soldiers, see section 3.3.7 below.

¹⁴⁵ Because DDR programmes often fail due to financial constraints, states could co-operate to meet the resources required to optimise the effect DDR can have on child soldiers. A severe funding shortage of US \$39 million in the Liberian disarmament program not only left some 40,000 combatants at risk of missing out on job training and education, but appealed to make them more vulnerable for re-recruitment to fight in future armed conflicts.

¹⁴⁶ All numbers and proportions are mythical, but estimates indicate that where girls do join armed forces or armed groups, whether they are forced or not, up to a third of the child soldiers will be girls. See R Brett “Girl soldiers: Challenging the assumptions (2002) <<http://www.geneva.quino.info/pdf/GirlSoldiers.doc.pdf>> (accessed 23 July 2005).

¹⁴⁷ The Prosecutor of the Special Court for Sierra Leone (SCSL) has filed the crime of bush wives” as a war crime against 6 defendants.

sometimes given positions of power as spies or commanders.¹⁴⁸ The experience of girl soldiers defeats the assumption that child soldiers constitute a monolithic category of children who possess the same characteristics and needs.

International laws which prohibit the use of child soldiers do not cater for the specific experiences of girl soldiers. Although Cohen identifies the CRC as all encompassing given that it protects and promotes the rights of the girl child,¹⁴⁹ the CRC is criticized for failing to adequately protect the girl child¹⁵⁰ The absence of targeted provisions addressing the gender specific problems of girl soldiers correctly forms part of this criticism.

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

¹⁴⁸S McKay, M Burman, M Gonsalves and M Worthen “Known but invisible: Girl mothers returning from fighting forces” (2004) *Child Soldiers Newsletter* 11.

¹⁴⁹CP Cohen and PM Olssen. ‘Status Report: United Nations Convention on the Rights of the Child’ (1991) 8 *New York Law School Journal of Human Rights* 367; C P Cohen “The United Nations Convention on the Rights of the Child: A feminist landmark” (1997) 3 *St. Mary Journal of Women and Law* 29.

¹⁵⁰See, generally, for instance on child marriage. L Askari “The Convention on the Rights of the Child: The necessity of adding a provision to ban child marriages” (1998) 5 *ILSA Journal of International and Comparative Law* 123.

contrary to the present Protocol owing to their economic or social status or gender”¹⁵¹

By the same token, although the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography¹⁵² addresses specific issues faced by girls, child soldiers do not generally fit within its mandate. With the words of Leibig

Child soldiers do not fit into the categories laid out here: in most cases they are not sold, but abducted: they are not prostitutes because they don't receive any material goods in exchange for their sexual servitude: child pornography and sex tourism are not applicable to child soldiers either. This is yet another example of the failure of the international community to create a body of law to protect female child soldiers ¹⁵³

At the continental level, although the African Children's Charter emphasizes the girl child in general, article 22 which deals with child soldiers does not provide for a way in which the specific concerns of girl soldiers are to be dealt with.¹⁵⁴ Moreover, as is commonly true with the above mentioned instruments, whether or not girls who work as sex slaves form part and parcel of the protection accorded to child soldiers is not clear. Therefore, notwithstanding

¹⁵¹Para. 15 of Preamble of Optional Protocol.

¹⁵²Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, (25 May 2000) UN GAOR, 54th Session, UN Document A/RES/54/12G3.

¹⁵³A Leibig Girl child soldiers in northern Uganda: Do current legal frameworks offer sufficient protection?" (2005) 3 Northwestern University Journal of International Human Rights 6.

¹⁵⁴For instance, female circumcision and early child marriage are not issues directly addressed by the CRC.

the acknowledgement of and support for the rehabilitation and reintegration of girls, so far girls seem to be lost in the rehabilitation process, and are continually marginalized by DDR programs at all levels.¹⁵⁵

To sum up, it is now uncontested that there are a substantial number of girls serving as soldiers at present. It is once again not debatable that these girl soldiers face a range of gender specific problems. The lack of specific legal provisions catering for their needs has adversely affected the best interests of this group of children. If any child rights instrument is to be complete and gender neutral, it should protect the rights of boys and girls in a manner that promotes substantive equality.¹⁵⁶

3.4.9 Enforcement

After setting out the substantive normative framework, a central challenge is to ensure its application. In the words of Otunnu, the Special Representative of the Secretary General of the UN for Children and Armed Conflict, “words on paper cannot save children in peril.”¹⁵⁷ Political willingness to adhere to already existing obligations, as well as readiness to think along new lines, are both necessary prerequisites for improved enforcement

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

¹⁵⁵In Angola, 8,500 boys were demobilized; No girls were demobilized despite the fact that the Angolan armed forces forcibly recruited girls and the rebel forces extensively used child soldiers. 30-40 percent of whom were girls. See Coalition to Stop the Use of Child Soldiers Child Soldiers Global Report (2001).

¹⁵⁶For a detailed discussion on substantive equality, see JD Waal, I Currie and G Erasmus The Bill of Rights handbook (4th ed) (2001) 200.

¹⁵⁷Office of the Special Representative for the Secretary General for Children and Armed Conflict <<http://www.un.org/special-rep/children-armed-conflict/>> (accessed 4 March 2005).

conduct of all parties and transmit regular reports to a central task force in New York.¹⁶⁶

As noted in chapter two, the ILO provided further protection to child soldiers with Convention 182 by affirmatively stating that no one under eighteen years of age should take direct part in hostilities. Despite the bold efforts of the ILO, it has no authority to force compliance or punish violations. It can only refuse or remove assistance it offers.¹⁶⁷

There are some indications that the issue of child soldiers could be better enforced at the regional level. The African Children's Charter entrusts the functions of promotion and protection of its provisions to the African Committee.¹⁶⁸ This Committee has wider powers than that of the CROC. The Committee is not only tasked with examining state reports but is also able to make recommendations arising from individual or interstate communications,¹⁶⁹ and to conduct investigations.¹⁷⁰ In fact, acceptance of this complaints mechanism is part and parcel of ratifying the African Children's Charter.¹⁷¹ Secondly, the Charter is very wide in relation to persons who can bring communications before it. Any person, group or non-governmental organization recognized by OAU (AU) or member states or the UN may bring

¹⁶⁶As above.

¹⁶⁷MG Davidson "The International Labour Organization's latest campaign to end child labour: Will it succeed where others have failed?" (2001) 11 *Transnational and Contemporary Problems* 209.

¹⁶⁸Article 32 of African Children's Charter.

¹⁶⁹Article 44 of African Children's Charter.

¹⁷⁰Article 45 of African Children's Charter.

¹⁷¹Article 44(1) of African Children's Charter.

communications before the Committee.¹⁷² Although the African Committee is still at its early stages,¹⁷³ with the necessary financial and technical support, it can prove itself to be a major tool for alleviating the problem of child soldiers in Africa.

Still within the continent the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) entered into force on 25 January 2004.¹⁷⁴ The Protocol under article 5(1)(e) explicitly provides that the African Committee has a standing and can bring a case before the Court. Bringing a case before the Court would be advantageous as the decisions of the African Court are binding and final.¹⁷⁵

In the absence of robust UN action, stronger efforts by regional organizations like the AU and individual governments are critical. In this regard the AU could be able to curb some of the problems the UNSC has failed to address.¹⁷⁶ This includes developing resolutions which have tangible repercussions for those who keep on violating the rights of these children.

¹⁷²Article 44 (1) of African Children's Charter.

¹⁷³For the work of the African Committee, see A Lloyd "How to guarantee credence? Recommendations and proposals for the African Committee of Experts on the Rights and Welfare of the Child" (2004) 12 The International Journal of Children's Rights 21.

¹⁷⁴Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998 (entered into force 25 January 2004) <<http://www.africaunion.org/innopac.up.ac.za:80/homet/welcome.htm>> (accessed 3 July 2005)

¹⁷⁵Article 28 (2) of African Court Protocol. As per article 28 (3), the only exception to finality is that the Court may review its own decision in the light of new evidence.

¹⁷⁶The SC resolutions are a repetition of an already existing resolution under which enforcement was tried and failed. Naming and "shaming" of the shameless" has proved a failure for enforcement purposes.

Apart from the AU, an opportunity that could be explored is through the New Partnership for Africa's Development (NEPAD). Although the main concerns of NEPAD are economic issues,¹⁷⁷ the African Peer Review Mechanism (APRM) could possibly address issues of human rights¹⁷⁸ under its "democracy and political stability" focus.¹⁷⁹ This is because, democratic governance should necessarily incorporate human rights and hence the issue of child soldiers.

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

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

¹⁷⁷ African Peer Review Mechanism Base Document, AHG/235(XXXVII) Annex II.

¹⁷⁸ The APRM is an instrument voluntarily acceded to by Member States of the African Union as an African self-monitoring mechanism. It is a mutually agreed instrument for self-monitoring by participating Member States.

¹⁷⁹ The other three are Economic Governance and Management [EGM]; Corporate Governance [CG] and Socio-Economic Development [SED].

international condemnation, on political will, and on ensuring that violators pay a price should they continue to recruit and deploy child soldiers.

3.5 International criminal law

Undoubtedly, ending the culture of impunity can contribute a great deal towards alleviating the problem of child soldiers. Under international law, the culture of impunity is a debilitating factor in the struggle for the rights of the child. Towards this end, as already pointed out in the previous chapter, one of the major successes of the Rome Statute has been the inclusion, as a crime, of the recruitment of children under the age of 15 as soldiers.¹⁸⁰ Accordingly, article 8(3)(b) provides that “conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities” is a war crime. Therefore, individual accountability is set in place for the crime of using child soldiers.¹⁸¹

A recent contribution in the area of international criminal law pertains to the decision of the SCSL in the Norman Case.¹⁸² In this case, the SCSL held that the recruitment of child soldiers below the age of 15 had become a crime under customary international law by 1996¹⁸³

¹⁸⁰ Article 8 (3)(b) of Rome Statute.

¹⁸¹ Although international criminal prosecution is one way of accountability, impunity could also be challenged through national courts, ad hoc tribunals, and other justice mechanisms.

¹⁸² See SCSL <www.sc-sl.org>. It is important to note that all the 13 indictments of the SCSL include the use of child soldiers by defendants accused of abuses during the civil war.

¹⁸³ SCSL <<http://www.sc-sl.org/summary-childsoldiers.html>> (accessed 24 April 2005).

Currently, the referrals under investigation by the Prosecutor of the ICC relate to Sudan, DRC and Uganda, conflicts that have engaged the use of child soldiers.¹⁸⁴

In December 2003, the government of Uganda announced that Joseph Konny and his other commanders would be referred to the international Criminal Court for prosecution. On 13th October 2005, the ICC issued arrest warrants for LRA leader, Joseph Konny, and four of his commanders. The five are accused of War crimes and crimes against humanity including murder, abduction, sexual enslavement, mutilation and forced recruitment of children¹⁸⁵. Konny and his commanders must be brought to book to account for the huge numbers of children who were involved in combat, those who disappeared and the heinous crimes committed with his commanders. This appears to be a strong deterring tool which may bar him and other militant rebel groups from indulging child soldiers in war.

Due to efforts of the ICC through issuance of warrant of arrest against the LRA leaders, Mr. Dominic Ongwen, a commander in LRA rebel group was arrested in Central African Republic and he is held to account for the alleged crimes of Murder, Mutilation, forced recruitment of child soldiers and the use of sex slaves. Mr. Ongwen also claims to have joined the rebel ranks when snatched as a child, is said to have commanded the Sinia Brigade which has been

¹⁸⁴The focus of the Prosecutor on the DRC gives one great hope that an important precedent will be set with respect to the criminality of the use of children as soldiers. Just as issues relating to war crimes against women have received increasing attention through the efforts of the ICTY and ICTR, it is key that the ICC brings attention to war crimes that affect children.

¹⁸⁵

blamed for some of the worst atrocities the group carried out in Northern Uganda where the LRA began its rebellion more than two decades ago.

The other relevance of the Rome Statute pertains to the role it creates for national courts to play. Because of the principle of complementarity,¹⁸⁶ the ICC will come into picture only when national courts are “unable” or “unwilling” to prosecute the crimes listed in the Statute.¹⁸⁷ To use the words of Schabas, the ICC requires that the State’s own courts get the first bite at the apple.”¹⁸⁸ It is this concept that the ICC partly refers to as “admissibility”¹⁸⁹ Therefore, as a way of implementing the provisions of the Statute, it would be advisable for a State Party to incorporate the crimes listed in the Statute in its national law for its criminalization in the national courts. This in effect creates an immediate avenue to criminally prosecute those who commit the crime. Moreover, the jurisprudence that will develop from the ICC will help guide national courts in adjudicating cases pertaining to the crime of recruiting or using child soldiers.

On another note, the Rome Statute allows the ICC to address the issue of reparations to victims, establishing general rules for “restitution, compensation and rehabilitation”.¹⁹⁰ As much as the ICC is entitled to “make an order directly

¹⁸⁶ Preamble para. 10 and article 1 of the Rome Statute.

¹⁸⁷ Article 17 of the Rome Statute.

¹⁸⁸ WA Schabas *An introduction to the International Criminal Court* (2nd ed) (2003) 68.

¹⁸⁹ See generally RB Philips “The international Criminal Court Statute: Jurisdiction and admissibility (1999)” *Criminal Law Forum* 61.

¹⁹⁰ M Christopher *Reparation to victims in Lattanzi and Schabas. Essays on the Rome Statute* (2003) 303-3 10.

against a convicted person specifying reparations” such reparations could be used for reintegrating child soldiers back to normal life.

However, the major flaw created by the Rome Statute is the age threshold which it set out in its definition of the crime, which is the recruitment or use of children below the age of 15. This is a key drawback because the development of international law pertaining to the child in general and child soldiers in particular is adopting the straight 18 position.¹⁹¹ It also sends the wrong message that the recruitment and use of children between 15 and 18 is acceptable and not a crime. Rectifying this drawback in line with current international legal standards could optimize the role the ICC could play. Be that as it may, however, the protection of child soldiers in Africa can be promoted through international criminal law and it would not be a misplaced optimism to look towards the ICC for such delivery.

3.6 Conclusion

The adequate legal protection of child soldiers is one of the multi-faceted approaches to addressing the problem. This chapter has critically analyzed and indicated that although there are standards that already exist, a full response to the problem calls for bolstering these standards. This is more so for the peculiar situation the African child soldier finds himself or herself in such as the more vulnerable situation of girl soldiers and the concept of cross-border

¹⁹¹International legal documents that followed in 1999 (ILO Convention 182) and 2000 (Optional Protocol) have risen the minimum age from 15 to 18.

recruitment. With some innovation and political will, it is possible and necessary to rectify the gaps.

CHAPTER FOUR

4.1 THE PSYCHOLOGICAL IMPACT OF WAR ON CHILD SOLDIERS

This chapter introduces us to the effects of war on the children who have participated in war as soldiers. These include the following,

(i) Exposure to traumatic stress

Severe and traumatic stress and its deteriorating effects for mental health, such as the development of post – traumatic stress disorder, (PTSD), a debilitating psychiatric conditions gain more and more importance in the description of societies affected by the new wars human right violations. Research has highlighted the role of a building block effect. Traumatic experiences build upon each other and cumulatively increase the chances of developing PTSD and depression.

They develop a fear network composed of interconnected trauma – related memories in which even only peripheral related trauma stimuli can cause a cascading fear response with flash – back properties. Therefore, the cumulative exposure to traumatic stress constitutes a predictor of endemic mental health issues.

A 20 year old woman who, at time of therapy (May 2006), had spent 10 years in abduction with the LRA Northern Uganda reported; “When I was 10 years, I got abducted by the LRA. I witnessed the torture and killings of a wizard. I was

given to one of the elder women of a commander as a helper and his husband raped me several times".¹⁹²

The study revealed that mental health impairment had remained chronic, because in majority of cases the interviews had taken place years after they had come back from captivity. One out of the four former child soldiers reported to be still currently disturbed by different intensities of self perceived spirits possession, which is a way to express and attribute symptoms of trauma- related illness and which in the studied population correlates well with a PTSD diagnosis.¹⁹³

In 2007, Bayer and colleagues (Bayer, Klasen & Adam 2007) carried out a study among Former Child Soldiers in Uganda and Congo. They interviewed 169 children and that they had been violently recruited by armed forces at a mean age of 12 years. They had served an average of 38 months in captivity. The most commonly reported traumatic experiences were having witnessed shooting (92.9%), having witnessed somebody being wounded (89.9%) and having been seriously beaten (84%). A total of 54% of the children reported having killed someone and 28% reported that they had exhibited a fully developed post – traumatic stress disorder.¹⁹⁴

¹⁹² Bayer, C.P., Klasen, F. & Adam, H. (2007). Association of Trauma and PTSD symptoms with openness to reconciliation and feelings of revenge among Ugandan former child soldiers. *The Journal of the American Medical Association*, 298(5), 555-559.

¹⁹³ *Ibid*

¹⁹⁴ Annan, J. & Blattman, C. (2006). Survey of war affected Youth. Kampala. United Nations Children Fund. (UNICEF)

The Large Survey of War Affected Youth (SWAY) study (Ahnan & Blattman) found very similar routes and types of traumatic experiences as all of the above mentioned. As an additional item, this study found 23% of the children had been forced to abuse dead bodies which violate the coalition to stop the use of child soldiers.¹⁹⁵

According to the Diagnostic and statistical Manual of Mental Disorders (American Psychiatric Association, 2000), a PTSD diagnosis is restricted to individuals who have experienced or witnessed at least one traumatic event in their life, i.e. a stressor that involved actual or threatened death or serious injury, or threat to the physical integrity of self or other, and subjective perception of intense fear, helplessness and/or horror. Victims, as well as eye witnesses can enter a psychological alarm state during the traumatic event and a cascade of responses in the body and mind is triggered which can damage both the mind and the body

During life threat, the defense cascade is activated as a coherent sequence of fear responses that escalates as a function of defenses possibilities and proximity to danger. These reaction patterns provide optional adaptation for particular stages of the imminence of threat. The actual sequence of trauma – related response dispositions act out in an extremely dangerous situation depends on the appraisal of the threat by the victim in relation to his/her own power to act. (e.g. age, gender) as well as the perceived characteristics of the

¹⁹⁵ Blattman, C. (2006). The consequences of child soldiering Retrieved January 30, 2015 from <http://www.chrisblattman.org/Blattman.consequenceschildsoldiering.pdf>

threat or perpetrator.¹⁹⁶ Repeated experience of traumatic stress forms a fear network that can become detached from contextual cues, such as time and location of the danger, and they may lead to psychological disorders.

i) Depression and Suicidality.

The significant correlation between post – traumatic stress disorder and clinical depression is scientifically well known. In a large study by Vinck and colleagues (Vinck et al. , 2007). In Northern Uganda, it was found that 52% of formerly abducted children suffered from depression symptoms.¹⁹⁷ A follow – up review of Pham et. Al (Pham et al., 2009) with former abductees showed that 40% fulfilled the symptom criteria for major depression. The few investigations that are among children indicate a significant correlation between a childhood diagnosis of PTSD and suicidal ideation, the guilt about having killed members of the family, friends or community members emerged as a key predictor of suicidal ideation. Suicidal ideation increases when the child’s functioning is impaired.¹⁹⁸

ii) Drug abuse

Systematic drug taking is especially reported among rebel groups. In fact, some authors consider hallucinatory drug intake a critical factor that has

¹⁹⁶ Ibid

¹⁹⁸ Vinck, P., Pham, P.N, Stover, E., & Weinstein, H. M. (2007). Exposure to war crimes and implications for peace building in Northern Uganda. *Jama*, 298(5), 543-554.

contributed to the decentralization of boy soldiers during their prolonged exposure to violent aggression and to prepare them for combat. Utas and Jorgel (2008) described in their account of the 'West Side Boy' child of Uganda, how most fighters used drugs in abundance: crack, cocaine, smoked heroin, ephedrine, benzodiazepines and marijuana.¹⁹⁹

iii) Anti social behavior

Research shows that former child soldiers have difficulties in controlling aggressive impulses and have little skills for handling life without violence. These children show on-going aggressiveness within their families and communities even after relocation to their homes. In qualitative study, it was reported that former child soldiers in northern Uganda mainly applied physical violence to resolve conflicts. Although the children sympathized with victims of violence, they could not think of non-violent alternatives reflecting an absence of adequate social skills.²⁰⁰

Most former child soldiers have spent several critical years of their development in captivity under the constant threat of abuse and manipulation by their commanders. Most probably, this period affects the development of a personal and collective identity²⁰¹.

¹⁹⁹ Utas, M., & Jorgel, M. (2008). The west side Boys: Military Navigation in the Northern Uganda civil war. *JOURNAL of modern African studies*, 46(3), 487-511

²⁰⁰ Magambo, C., & Lett, R. (2004). Post-Traumatic Stress in former Uganda child soldiers. *Lancet*, 363 (9421), 1647-1648

²⁰¹ Kanagaratham, P., Rannalden, & Asbjornsen, A.E (2005) **ideological commitment and post-traumatic stress in former family child soldiers. *Scandinavian Journal of Psychology*, 46(6) 511 - 520.**

In general, children exposed to war and children soldiering show a strong identification with their own group and develop a world view dominated by political and nationalistic categories and this often includes pro-war attitudes. It emerged that the longer children had stayed in abduction, the stronger was their rebel-related collective identity²⁰².

When comparing abductees with non abductees, Blattam (2006) came to the conclusion that especially traumatic experiences during abduction had an adverse impact on education, less years of schooling, greater reading problems, lower occupational functioning and lower work quality in life. What research has shown is that exposure to trauma in Formative years may affect the maturation of the central nervous system and the regulatory neuro-endocrine systems.²⁰³

(Vi) Transgenerational effects

Psychological exposure and suffering from trauma can cripple individuals and families even into the next generations. After having experienced organized violence, affected parents can leave an imprint in their grand children's generation

Concern about consequences for off springs, whose mothers were stressed during pregnancy, derives from evidence gained in experimental biology as

²⁰² Kanagaratham, P. Ranndalen, & Asbjornsen, A.E (2005) ideological commitment and post –traumatic stress in former family child soldiers. *Scandinavian Journal of Psychology*, 46(6) 511 – 520.

²⁰³ Blattaman, C. (2006). The consequences of child soldiering Retrieved January 30, 2015 from <http://www.chrisblattaman.org/Blattman.consequenceschildsoldiering.pdf>