

***DOES INTERNATIONAL LAW PROTECT CHILDREN  
AGAINST RECRUITMENT INTO ARMED FORCES? THE  
CASE OF AFRICA***

**BY  
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I ELNA KUNDISHORA declare that

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## **DEDICATION**

**This dissertation is dedicated to my late Aunt, Agatha Matanda. May your soul rest in peace! I know you are watching down on me from Heaven. They say time heals, but it actually doesn't – some days are just better than others. Thanks for all the encouragement and support that you gave me when you were still alive. Hope you are proud of the woman that I have become, and I hope that every time you look down at me from Heaven you smile.....**

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## LIST OF ACRONYMS

**AFRC** - *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santige Borbor Kanu* SCSL-04-16-T

**AP-I** - 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Geneva: United Nations 1125 UNTS 3 (1978)

**AP-II** - 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non- International Armed Conflicts (Protocol II). Geneva: United Nations 1125 UNTS 609 (1978)

**CDF** - *Prosecutor v Moinina Fofana & Allieu Kondewa* SCSL-04-14-T

**CRC** - Convention on the Rights of the Child, 1989 Doc A/RES/44/25 (1989)

**ECOWAS** - Economic Community of West Africa

**ECOMOG** - Economic Community of West Africa Cease-Fire Monitoring Group

**FMG** - Female genital mutilation

**ICC** - International Criminal Court

**ICTR** - International Criminal Tribunal for Rwanda

**ICTY** - International Criminal Tribunal for the former Yugoslavia

**IHL** - International humanitarian law

**IHRL** – International human rights law

**ILO Convention 182** - International Labour Organisation's Worst Forms of Child Labour Convention, 2000 ILO Convention 182 (2000)

**LRA** - Ugandan Lord's Resistance Army

**LDU**- Local Defense Unit

**OAU** - Organisation of the African Union

**OSCE** - Organization for Security and Co-operation in Europe

**POA** - UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons

**RUF** - Revolutionary United Front

**SALW** - Small Arms and Light Weapons

**SCSL** - Special Court of Sierra Leone

**UN** - United Nations

**UN Charter** - Charter of the United Nations (1945)

**UNSC** - United Nations Security Council

**UPDF** - Uganda People's Defence Force

**US** – United States of America

## ABSTRACT

The involvement of children in conflict is not a recent phenomenon. The military use of children dates back to ancient times. The change of warfare and the advocating of the protection of children's rights within the global discourse context have taken the discourse on child and youth involvement in conflict out of the political and military context and placed it into one circumscribed by legal and moral concern. Since the late 1970s, a number of international instruments have been promulgated to limit the recruitment of child soldiers, but even though the numbers of children being recruited into armed forces have decreased, children continue to be deployed into armed forces, particularly in Africa. 'Loopholes', vagueness and inconsistencies in the treaties and the strengths and weaknesses of the enforcement and monitoring mechanisms have created legal uncertainty which have ultimately resulted in further injustice for the child. However, legal uncertainty is not *per se* the cause of recruitment continuing; the cause being more complex. Researches and treaties have failed to address the obstacles to the implementation of the relevant international law. The issue(s) of culture and child cross-border recruitment have served as obstacles to an effective protection of children against recruitment by international law.

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## CHAPTER 1: INTRODUCTION

### 1.1 BRIEF OVERVIEW OF THE TOPIC

A 'child soldier' is commonly defined as any person below 18 years of age who is recruited into an armed force for the purposes of either, direct or indirect (or even both) participation in hostilities.<sup>1</sup> The prohibition of the recruitment of child soldiers has been explicitly repeated by the international community in various international human rights, humanitarian, criminal law and even labour treaties.<sup>2</sup> Yet, despite this wealth of international law providing for the protection of children against recruitment, in several countries in Africa (as well as in other parts of the world) the recruitment of child soldiers is on a rampage.<sup>3</sup>

This dissertation is centred on the effectiveness of international law in respect of the protection of children against being recruited into armed forces, particularly in Africa. The researcher will investigate the contribution of the inefficiency of international law in the continuation of recruitment and discuss potential solutions. The angle of the investigation will be from a perspective of enforcement and monitoring mechanisms. Furthermore, the researcher will examine the obstacles to its implementation, particularly aspects less explored – the issue(s) of culture and child cross-border recruitment – and also discuss possible solutions. The research concludes with recommendations based on the research findings.

As indicated above, this research will focus on Africa. The motivation for this choice is that, although the issue of 'child soldiers' is not peculiar to Africa, research has shown that this problem is critical on this continent.<sup>4</sup> An astonishing part of the African continent has been at war, both inter- and intra- state conflicts, for the past decades. In 1992, Africa was declared the most violent continent in the world, and in 1993, 11 of the 26 major conflicts in the world occurred in Africa.<sup>5</sup> A common feature of these conflicts is the extensive

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<sup>1</sup> This is the definition of a 'child soldier' as developed in 1997 during the Cape Town Conference on Child Soldiers and it has become the standard universal definition. <http://childsoldierrelief.com/2008/07/22/official-definition-of-a-child-soldier-from-cape-town-principles/> (accessed 5 February 2009).

<sup>2</sup> S. Tiefenbrum "Child soldiers, slavery and the trafficking of children" (2008) *Fordham International Law Journal* 415, 434.

<sup>3</sup> D. Singh 'When a child is not a child: The scourge of child soldiering in Africa' (2007) 7 *African Human Rights Law Journal* 206, 206.

<sup>4</sup> *Ibid.*

<sup>5</sup> A. Sesay *et al* 'Liberian Child Soldiers: Prospects and Problems' (2000) *Scientia Militaria* 30(1) 44, 44.

recruitment of the child soldiers. It has been estimated that there are approximately 300,000 child soldiers worldwide, of which half are in Africa.<sup>6</sup> However, reliable statistics and documents are inadequate since most armed forces; including government forces, deny that they are recruiting children. As a result, the precise number of child soldiers cannot be assessed and, therefore, they remain 'invisible'.<sup>7</sup>

The Organisation of the African Union (OAU) States have adopted the African Charter on the Rights and Welfare of the Child (African Charter),<sup>8</sup> which creates a more stringent protection against recruitment of African children,<sup>9</sup> as compared to the other treaties that prohibit the recruitment of children into armed forces.<sup>10</sup> The African Charter has adopted a 'straight 18' position, which is compliant with the overall definition of a child.<sup>11</sup> Furthermore, it is the only charter at a regional level dealing with the issue of child soldiering and children in armed conflict. The Charter compositely addresses both issues of age and nature of hostilities that appear to confound the other treaties.<sup>12</sup>

Despite this, recruitment of child soldiers continues to be a problem in Africa because, inter alia, political support to stop the tendency towards recruiting children is missing. When desperate to 'refill', government forces themselves give way to the temptation of recruiting children into their forces.<sup>13</sup> The African Charter is not the only international convention relevant for the protection of children against recruitment to which the African countries

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<sup>6</sup> G. M. Musila, 'Challenges in establishing the accountability of child soldiers for human rights violations: Restorative justice as an option' (2005) *5 African Human Rights Law Journal* 321, 322.

<sup>7</sup> A. Twun-Dauso 'Africa's Young Soldiers: The Co-option of Childhood' (2003) Monograph 82 *Institute for Security Studies*, 1, 12.

<sup>8</sup> African Charter on the Rights and Welfare of the Child, 1990 OAU Doc CAB/LEG/24.9/49 (1990) hereafter the African Charter.

<sup>9</sup> The African Charter is the only charter at a regional level dealing with the issue of child soldiering and children in armed conflict. The Charter does not make the distinction between people younger than 18 years and those younger than 15 years: A child is simply anyone younger than 18 years. The Charter compositely addresses both issues of age and nature of hostilities that appear to confound the other treaties.

<sup>10</sup> The 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Geneva: United Nations 1125 UNTS 3 (1978) hereafter AP-I, 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non- International Armed Conflicts (Protocol II). Geneva: United Nations 1125 UNTS 609 (1978) hereafter AP-II, Convention on the Rights of the Child, 1989 Doc A/RES/44/25 (1989) hereafter the CRC, and the Rome Statute of the International Criminal Court, (1998) U.N. Doc. A/CONF.183/9 (1998) hereafter the Rome Statute, define a child as any person under the age of 15, and the other treaties, with the exception of the Rome Statute, do not address both the issues of age and nature of hostilities.

<sup>11</sup> B.D. Mezmur 'Children at Both Ends of the Gun: Child Soldiers in Africa' in J Sloth-Nielsen (ed) *Children's Rights in Africa: A legal perspective* 199, 202.

<sup>12</sup> Singh (see note 3 above) 219.

<sup>13</sup> For example, in Uganda, the Uganda People's Defense Forces (UPDF), which is the army of the government also recruits children into its forces.

are parties.<sup>14</sup> Despite this apparently strong international commitment, the recruitment of child soldiers continues to be a problem in Africa.

When discussing the situation on the African continent, the researcher will make repeated referrals to three countries, namely Uganda, Sierra Leone and the Democratic Republic of Congo (DRC). This allows for a practical analysis of the problem of child soldiers based on contemporary examples. These countries are also significant because the recruitment of children is relatively widespread within their jurisdiction, and they are also parties to the relevant conventions.<sup>15</sup>

Based on the research done thus far, there is an indication that the weaknesses in enforcing and monitoring international law might have a role in the continuation of child recruitment. For example, analysing the CRC, African Charter and the Optional Protocol to the CRC, the main problem in enforcement is that their enforcement mechanism is very weak.<sup>16</sup> The main mechanism for accountability is reporting, and a report may or may not be taken seriously as an enforcement vehicle by the receiving state.<sup>17</sup> Important to note is that political willingness to adhere to already existing obligations, as well as readiness to think along new lines, in terms of more effective enforcement mechanisms, are both necessary prerequisites for improved enforcement.<sup>18</sup>

Nevertheless, the African Charter's enforcement mechanisms for accountability are not restricted to reporting procedure; they also include individual complaints and investigations.<sup>19</sup> The individual complaints are a powerful mechanism within the African

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<sup>14</sup>They are also party to the AP-I, AP-II, CRC, International Labour Organisation's Worst Forms of Child Labour Convention, 2000 ILO Convention 182 hereafter the ILO Convention 182, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2002 A/RES/54/263 (2002) hereafter the Optional Protocol to the CRC, Rome Statute, and the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000 A/RES/55/25 (2000) hereafter the Palermo Protocol.

<sup>15</sup> International Committee of Red Cross 'Member States to the Following International Humanitarian Law and Other Related Treaties as of 26-Aug-2009' [http://www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf), ICRC 'International Humanitarian Law – Treaties & Documents' <http://www.icrc.org/ihl.nsf/Pays?ReadForm> accessed on 26 August 2009.

<sup>16</sup> Mezmur (see note 11 above) 209.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Article 43, article 44 and article 45.

Charter; if the Committee were prompt in their considerations of these complaints.<sup>20</sup> The issue of individual communications seems to be drawing less attention from the Committee.<sup>21</sup> The problem is that the Committee takes long to do the consideration of the communication; and the longer the Committee takes, the more it allows the perpetuation of the violation of children's rights.<sup>22</sup> Furthermore, article 44(2) states that every communication 'shall be treated in confidence'. As correctly pointed out by Chirwa, this principle has been cited as one of the causes that accounted for the ineffectiveness of the African Commission in the early years of its existence.<sup>23</sup> The transparency of the Committee cannot be monitored if the confidentiality principle were strictly adhered to.

The international criminal law mechanism of accountability is through the prosecution of those who recruit child soldiers. Recently, there have been a few prosecutions of military commanders for recruiting child soldiers; and in some cases there have been convictions.<sup>24</sup> The convictions are a positive aspect in the sense that it sends a clear message to the international community that perpetrators of war crimes will be prosecuted. However, the acquittals send the opposite message to the international community. Furthermore, the criminal law mechanism for accountability is usually hampered by the culture of impunity which is very common in Africa, especially during the peace agreement phase.

As suggested above, this research focuses on the protection against the recruitment of child soldiers. The issues raised by the situation of child soldiers are very wide. They include issues of criminal responsibility of the recruiters and the child soldiers, reintegration, terrorism and responsibility of non-state actors. Due to time and space constraints, this research will only focus on the protection against recruitment. The choice is also justified by the importance of recruitment for all other subsequent issues concerning child soldiers. Recruitment can be seen as the 'foundation' to some of the difficulties raised by the

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<sup>20</sup> The individual complaints give the Committee 'hands on' on the situation on the ground.

<sup>21</sup> Mezmur (see note 11 above) 208.

<sup>22</sup> J. Sloth-Nielsen & B.D. Mezmur 'Out of the starting blocks: the 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2009) 9(1) *African Human Rights Law Journal* 336, 346.

<sup>23</sup> D.M. Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 157, 170.

<sup>24</sup> *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santige Borbor Kanu* SCSL-04-16-T hereafter CDF judgment, *Prosecutor v Moinina Fofana & Allieu Kondewa* SCSL-04-14-T hereafter AFRC judgment and *Prosecutor v Thomas Lubango Dyilo* ICC-01/04-01/06

situation of the child soldiers, thus making it critical to understanding and eliminating the problem.

Treaties, governmental organisations, non-governmental organizations (NGOs), academic institutions, security institutes and the media have conducted extensive research on the phenomenon of child soldiers. However, although these researches and treaties cover a large spectrum of the problem of child soldiering, they merely address the signs, in the sense of the distinctiveness of a child soldier and often adequately fail to address the obstacles to the implementation of the relevant international law. Surprisingly, not much research has been conducted on the role of cultural beliefs in child recruitment.<sup>25</sup> Previous research does not attempt to understand the impact of the lived realities at the local level on child recruitment in Africa, which sometimes contrasts with the global humanitarian discourse.<sup>26</sup> Important to mention in relation to this is that the approach to understanding and addressing the issue of child soldiers at global level has been dominated by the rights-based approach, with no effort made to understand the local approach and experiences of young people's military recruitment.<sup>27</sup>

Debates between cultural beliefs and human rights have been put across over the years, but despite the seriousness of the scourge of child soldiers in Africa, the issue has not been directly addressed in these debates. In reality, the approach to understanding and addressing the issue of child soldiers has been dominated by the rights-based approach, without trying to integrate in this approach the cultural beliefs of the indigenous people.<sup>28</sup> The human-rights approach is simplistic and its effectiveness is hampered by some pervasive cultural practices and attitudes, which command even more legitimacy than the universal standards for protection of children.<sup>29</sup> Implementation depends to a large extent

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<sup>25</sup> "Cultural beliefs are the accepted customs, institutions, and achievements of a particular nation, group or society." *South African Concise Oxford Dictionary* (2002), Cape Town: Oxford University Press Southern Africa, 2002.

<sup>26</sup> Global humanitarian discourse refers to the way in which the subject of 'child soldiers' is generally depicted and discussed by international organisations, NGOs, governments, as well as popular media. A. Lee 'Understanding and Addressing the Phenomenon of 'Child Soldiers': The Gap between the Global Humanitarian Discourse and the Local Understandings and Experiences of Young People's Military Recruitment' *Refugee Studies Centre Working Paper Series* No. (2009) 52, 1 fn1.

<sup>27</sup> *Ibid* 1.

<sup>28</sup> *Ibid*.

<sup>29</sup> T Kaime 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflection' (2005) 5 (2) *African Human Rights Law Journal* 221, 226.

on the level of cultural legitimacy<sup>30</sup> accorded to children's rights norms in a society.<sup>31</sup> The fact that some pervasive cultural practices and attitudes command even more legitimacy than the universal standards for protection of children is the reason why cultural practices that are more detrimental to children, such as the one at hand, still exist.<sup>32</sup> The dilemma of child soldiers will not be salvaged if failure to identify and address the obstacles to the implementation of the relevant international law continues.

Furthermore, international treaties have not addressed the issue of cross-border recruitment, and not much research has been conducted on it. The issue of cross-border recruitment has become wide spread in Africa.<sup>33</sup> Some of the countries that encounter this practice in Africa are DRC, Liberia, Guinea, Burkina Faso and Sierra Leone.<sup>34</sup> The fact that this issue is not addressed in international treaties creates an obstacle to the implementation of the international law under the circumstances. This oversight is problematic in the sense that the existing international law provisions are difficult to apply in such situations. This makes it difficult to protect children from cross-border recruitment and to apply enforcement and monitoring mechanisms.

For example, the Palermo Protocol in article 3(c) is the only international document that mentions the recruitment across borders.<sup>35</sup> However, it is of limited use in addressing cross-border recruitment. This is because the lead in article 3(c) of the Palermo Protocol is not followed by any substantive provisions.<sup>36</sup> Thus, cross-border recruitment makes the applicability of the existing provision of the Palermo Protocol difficult.<sup>37</sup> Furthermore, the

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<sup>30</sup> "To inquire into the cultural legitimacy of human rights would be quite simply to inquire into the kinds and degrees of support for human rights standards and for their implementation in 'culture(s)'--be it 'micro-cultures' of villages or tribes, or 'subcultures' of professions and social classes, or 'national cultures,' or 'regional cultures'." B Ibhawoh 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State' (2000) 22.3 *Human Rights Quarterly* 838, 840.

<sup>31</sup> Kaime (note 29 above) 221.

<sup>32</sup> *Ibid.*

<sup>33</sup> Mezmur (see note 11 above) 209, Sloth-Nielsen 'Children's rights and the law in African context: An introduction' in J. Sloth-Nielsen (ed) *Children's Rights in Africa: A legal perspective* (2008), Burlington: Ashgate 53, 59 and Security Council, *Children and armed conflict - Report of the Secretary-General: DRC* (2007) UN Document A/62/609-S/2007/757.

<sup>34</sup> Human Rights Watch 'Child soldiers' <http://www.hrw.org/campaigns/crp/index.htm> accessed on 8 February 2009.

<sup>35</sup> Article 3(c) of the Palermo Protocol states that 'the recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons.'

<sup>36</sup> Mezmur (note 11 above) 208.

<sup>37</sup> *Ibid.*

Optional Protocol to the CRC in paragraph 11 of its preamble<sup>38</sup> also mentions cross-border recruitment, but just as with the Palermo Protocol, the lead in the preamble is not followed by any substantive provisions.<sup>39</sup> Unfortunately, the provisions of the preamble do not have the force of law, as the substantive provisions have.<sup>40</sup> A preamble is a clause at the beginning of a legislative statute explaining its purpose; and it neither confers or increases powers contained within it and is, therefore, not an essential element of it.<sup>41</sup>

The practical reason for this dissertation is to fill the gap in the research mentioned above, firstly, by attempting to understand the impact that the lived realities at the local level have on child recruitment in Africa and consequently on the implementation of international law in this field. The implementation of the relevant international law depends to a large extent on the level of cultural legitimacy accorded to children's rights norms in a society.<sup>42</sup> This requires an understanding of the impact that the lived realities at the local level have on child recruitment in Africa, together with solutions and adequate social support for those involved.<sup>43</sup> The failure to understand the impact that the lived realities at the local level has on child recruitment in Africa can serve as an obstacle to the implementation and effectiveness of the relevant international law.

Secondly, the practical reason for this dissertation is to fill the gap in the research mentioned above, by analysing the obstacle created by the omission of cross-border recruitment in international treaties. This omission makes the applicability of the relevant international law difficult, and has a negative impact on the effectiveness of international law in regards to the protection of children from being recruited across borders into armed forces.

## 1.2 OBJECTIVES

The research has two main objectives, as indicated below.

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<sup>38</sup> Paragraph 11 of the Preamble provides 'condemning with the gravest concern the recruitment, training, and use within and across national border children in hostilities by armed forces distinct from the armed forces of a State...'.  
<sup>39</sup> Mezmur (see note 11 above) 208.  
<sup>40</sup> *Ex parte Johannesburg City Council* 1975 (1) SA (W) 817A-818C.  
<sup>41</sup> *Union and Rock Insurance Co. Ltd. v Carmichael's Executor* 1917 AD 593, 597.  
<sup>42</sup> Kaime (see note 29 above) 221.  
<sup>43</sup> *Ibid.*

Firstly, Chapter 2 of this dissertation contains a critical analysis of the effectiveness of international law on the protection of children against recruitment in armed forces from the perspective of enforcement and monitoring mechanisms, with focus on Africa. The aim of this Chapter is to assess whether international law is effective in protecting children against being recruited into armed forces from the perspective of enforcement and monitoring mechanisms, in regards to Africa. The critical analysis will provide a good basis for understanding the ‘loopholes’, vagueness and inconsistencies in the treaties and the strengths and weaknesses of the enforcement and monitoring mechanisms. These have the potential of creating legal uncertainty, which will ultimately result in further injustice for the child.

Secondly, in Chapter 3, the researcher will investigate the obstacles to an effective protection of children against recruitment by international law, particularly two aspects less explored – the issue(s) of culture and cross-border recruitment, with focus on Africa. The objective of this chapter is to assess the impact that the above obstacles have on an effective implementation of the international law. The investigation will provide a good basis for understanding why the issue of child soldiers is more critical on this continent.

It is finally argued that, despite these shortcomings, the development of international law on the protection of children against recruitment can be viewed as a positive progress. International law has the potential to reduce the problem of child soldiers, if there is political support for the governments, adequate social support for those involved, and commitment from the international community.

### 1.3 METHODOLOGY

From a methodology point of view, this is a library-based research. A large variety of national and international sources have been used. These range from primary sources, such as international treaties, national legislation, reports, and international cases; to secondary sources, such as academic writings, media reports, NGO publications and internet sources.

The researcher submitted an ethical clearance form and got the approval to begin on the dissertation on the 23<sup>rd</sup> of July 2009.

Before discussing the specific issues on which this research focuses, the researcher briefly gives a historical overview of the recruitment of child soldiers, looks at the current recruitment of child soldiers, reviews reasons for joining the armed forces, as well as discusses the causes for recruitment of child soldiers. An understanding of the current recruitment issues, reasons for joining the armed forces and the causes for the recruitment of child soldiers is necessary in an analysis of the effectiveness of international law.

#### 1.4 CURRENT RECRUITMENT OF CHILD SOLDIERS AROUND THE WORLD

The involvement of children in conflict is not a recent phenomenon. The military use of children dates back to ancient times.<sup>44</sup> In medieval Europe, boys as young as 12 years of age were used as military aides. These children assisted the military in times of war. The Children's Crusade of 1212 recruited 30 000 children of which many were sold into slavery.<sup>45</sup> During the early days of modern warfare, young boys often took part in battles mainly as the ever-present 'drummer boys'.<sup>46</sup> The 20<sup>th</sup> century saw children being recruited as soldiers in both World War I and World War II. These children frequently participated in popular revolutions.<sup>47</sup> Similarly in Africa, throughout history, young men have played prominent roles in taking weapons to defend their villages.<sup>48</sup>

Reports from the Human Rights Watch indicate that more than 35 countries around the world are involved in the practice of recruiting children into armed forces.<sup>49</sup> An estimated 300, 000 children have been recruited as soldiers by both rebel groups and government forces in current armed forces and about 120,000 of them are in Africa.<sup>50</sup> However, the Coalition to Stop the Use of Child Soldiers has reported a number of more than 500,000

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<sup>44</sup> For example, in ancient civilization of the Spartans, boys were taken from their homes for military training at the age of seven. S. Stavrou *et al* 'The Reintegration of Child Soldiers and Adducted Children: A case study of Paloro and Pabbo Gala District Northern Uganda' in E. Bennett *et al* (eds) *ACT Against Child Soldiers in Africa* (2000) Pretoria: Institute for Security Studies, 25.

<sup>45</sup> A. Honwana 'Negotiating Post-War Identities: Child Soldiers in Mozambique and Angola' 1999(1) *CODESRIA Bulletin* (1999) 1, 4.

<sup>46</sup> For example, the French drummer boys who lead Napoleon's initial attack, only to be gunned down by Allied soldiers.

<sup>47</sup> For example, Warsaw Uprisings of 1944 and other anti-fascist movements across Nazi-occupied Europe during World War I.

<sup>48</sup> D. Zounmenou *The United Nations response to the phenomenon of child soldiers in Africa: case studies of Mozambique and Sierra Leone* (2001) University of the Witwatersrand, 1, 26.

<sup>49</sup> Human Rights Watch 'Stop the use of child soldiers: Facts about child soldiers' <http://www.hrw.org/campaigns/crp/index.htm> 1 accessed on 29 February 2009.

<sup>50</sup> Twun-Dauso (see note 7 above) 12.

children having been recruited in both, state and non-state armed forces in over 85 countries.<sup>51</sup>

As highlighted above, research has shown that this problem is critical on this continent.<sup>52</sup> Africa has the largest number of child soldiers. However, Mengestu argues that, ‘what attracts immediate and superficial attention to Africa’s child soldiers . . . is that the brutal existence of a child soldier dovetails neatly with depictions of Africa both as a place born of hell and misery and as a continent that, like a child, can be saved’.<sup>53</sup> Child soldiers are being recruited into armed forces in countries such as Burundi, Cote d’Ivoire, DRC, Rwanda, Sierra Leone, Somalia, Sudan, and Uganda.<sup>54</sup> The Ugandan Lord’s Resistance Army (LRA), which is a rebel group, is particularly notorious for its recruitment of child soldiers.<sup>55</sup> It is very disappointing that most of the countries that are involved in the recruitment of child soldiers are parties to the international law that prohibits the recruitment of child soldiers.<sup>56</sup> Some of the governments of these countries have even laid down the minimum age for recruitment<sup>57</sup> but at times, these legal limitations are defied at will and government forces recruit under-aged children.

In Asia thousands of children are recruited into armed forces.<sup>58</sup> Despite government denials, Myanmar is the only country where government armed forces forcibly recruit children between the ages of 12 and 18.<sup>59</sup> Furthermore, Myanmar is believed to have more child soldiers (70 000) than any other country in the world.<sup>60</sup> Child soldiers also exist in Afghanistan, India, Indonesia, Laos, Sri Lanka and Philippines, where they are mainly associated with armed opposition groups, factional or clan-based groups or groups

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<sup>51</sup> IRINnews.org ‘Too little to be fighting anyone’s wars’

<http://www.irinnews.org/webspecials/childsoldiers/default.asp> 1 accessed on 29 Feb 2009.

<sup>52</sup> Singh (see note 3 above) 206.

<sup>53</sup> A. Schultheis ‘African Child Soldiers and Humanitarian Consumption’ (20) *Peace Review: A Journal of Social Justice* 31, 33.

<sup>54</sup> F. Rialize ‘Child soldiers in African Wars’ 2009 7(1) *Commonwealth Youth and Development* 37, 39.

<sup>55</sup> Human Rights Watch Country Reports ‘Human Rights Children’s Rights Project, The Scars of Death: Children abducted by the Lord’s Resistance in Uganda’ (1997) trans HJ Steiner & P Alston, *International Human Rights in Context: Law, Politics, Morals* (2000) 2<sup>nd</sup> ed. Oxford: Oxford University Press 531.

<sup>56</sup> The African Charter, AP-I, AP-II, CRC, Rome Statute, Optional Protocol to the CRC, ILO Convention 182 and Palermo Protocol.

<sup>57</sup> Burundi (16), Angola & Sudan (17), Sierra Leone (17.5), Ethiopia, Uganda, Liberia & Rwanda all state that children under the age of 18 may not be recruited, the DRC & Somalia have no legal limitation on child recruitment. Coalition to Stop the Use of Child Soldiers ‘Africa Report’ 2001 [http://www.child-soldier.org/reports\\_africa/executive\\_summary.htm](http://www.child-soldier.org/reports_africa/executive_summary.htm) accessed on 14 February 2009.

<sup>58</sup> Rialize (see note 54 above) 37.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

composed of ethnic or religious minorities.<sup>61</sup> In Chechnya, under-18s are believed to have been recruited in a range of armed groups in the war against Russia.<sup>62</sup>

### 1.5 WHY DO CHILDREN JOIN MILITARY GROUPS?

Although war evidently impacts on the community as a whole; children suffer the most during conflicts. The socio-economic conditions in the States recruiting child soldiers create an excellent breeding ground for children to be abducted or to volunteer as soldiers - poverty is endemic, famine is widespread, medical and health conditions are deplorable, schools are closed or burnt down and thousands of people are displaced.<sup>63</sup> Brett argues that political, economic and social conditions - war, poverty, education, employment and family - are the primary factors as to why children 'volunteer' to join armed forces.<sup>64</sup> Children in such an environment are at risk of recruitment, or in their desperation, become receptive to ideological propaganda encouraging them to enlist, as a gun is often a meal ticket and a more attractive option than sitting at home being afraid and hopeless.<sup>65</sup>

Nevertheless, as highlighted above, there are situations where a large number of adolescents between the ages of 14 and 18 are not forced or coerced into participating in conflict, but 'volunteer' to join up. However, it is misleading to consider this as voluntary participation as it is often a response to pressure of more subtle nature.<sup>66</sup> Children sometimes feel compelled due to the political, social and economic conditions directing their lives.<sup>67</sup> Children who have grown up in war zones perceive this as a normal and permanent way of life. Being exposed to nothing other than war and fighting, it is almost impossible for the children to assume any other role than that of a soldier.<sup>68</sup> Furthermore, closely assessed, in

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<sup>61</sup> R. Brett & I. Specht *Young soldiers: Why they choose to fight* (2004), Boulder, Colo.: Lynne Rienner Publishers, 23-26.

<sup>62</sup> Rialize (see note 54 above) 37.

<sup>63</sup> Zounmenou (see note 48 above) 68.

<sup>64</sup> R. Brett & I. Specht (see note 61 above).

<sup>65</sup> N. Van Niekerk *Weak States and Child Soldiering in Africa: Contextual Factors* (2003) University of Stellenbosch 57.

<sup>66</sup> *Ibid.*, 65.

<sup>67</sup> Singh (see note 3) 211.

<sup>68</sup> For example, in the late 1990s in Uganda, girls were abducted, and became pregnant. They were taken to special camps in Sudan, where they were cared for by older LRA female commanders until they gave birth. Their children then became the next generation of the LRA fighters. D Mazurana & S McKay, 'Child soldiers: What About Girls?' (2001) 57(5) *Bulletin of the Atomic Scientists* 3.

a situation of total anarchy, it is difficult to dissociate the line that separates voluntary from coerced participation.<sup>69</sup>

Cohn and Goodwin-Gill<sup>70</sup> are of the opinion that young children do not have sufficient cognitive capacity to think rationally regarding concepts, such as ideology and nationality, and suggest that these children are indoctrinated into fighting for the causes. Machel in the UN Study on the Impact of Armed Conflict on Children Report, dismisses the idea of ‘volunteerism’ entirely in the context of Africa, disputing that when the only options are survival or poverty, the choices of the children can hardly be called free and fair.<sup>71</sup>

The concept of ‘voluntary’ participation by children is only found in the Optional Protocol to the CRC. However, to ensure that the recruitment is voluntary, the Optional Protocol lays down safeguards to be complied with when the member States permit voluntary recruitment into the armed forces by children below the age of 18.<sup>72</sup> In light of these safeguards, some children would not fall into the category of volunteers at all, especially in Africa. Firstly, some of these children are living in poverty, and often they are without parental care, or are refugees, displaced or orphans. Thus, it sounds impractical to expect them to sign up voluntarily with the consent of their parents or legal guardians.<sup>73</sup> In the same vein, the safeguard that requires reliable proof of age prior to recruitment is not of much practical help in Africa. Birth registration and identity documents in the continent are inadequate or non-existent and some children do not know their age.<sup>74</sup> UNICEF has reported that in Sub-Sahara Africa, 55% of children are not registered by their fifth birthday.<sup>75</sup> Since it is not easy to prove a child’s age when they volunteer for recruitment, armed forces might continue with recruitment in the face of lack of proof of age.<sup>76</sup>

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<sup>69</sup> Zounmenou (see note 48 above) 34.

<sup>70</sup> I. Cohn and G.S. Goodwin *Child Soldiers – The Role of Children in Armed Conflict* (1994) New York: Oxford University Press 35.

<sup>71</sup> G. Machel, *Report to the Secretary General on the Impact of Armed Conflicts on Children* (1996) New York: UNICEF 12.

<sup>72</sup> Article 3(3) ‘(a) such recruitment is genuinely voluntary; (b) such recruitment is carried out with the informed consent of the person’s parents or legal guardians; (c) such persons are fully informed of the duties involved in such military service; (d) such persons provide reliable proof of age prior to acceptance into armed military service.’

<sup>73</sup> Mezmur (see note 11 above) 205.

<sup>74</sup> G. Machel *The impact of war on children* (2001), London: Hurst & Company 16.

<sup>75</sup> UNICEF(2005) ‘The ‘Rights’ Start to Life: A Statistical Analysis of Birth Registration’ [http://www.unicef.org/publications/files/BirthReg10a\\_rev.pdf](http://www.unicef.org/publications/files/BirthReg10a_rev.pdf) accessed 14 February 2009.

<sup>76</sup> Mezmur (note 11 above) 206.

## 1.6 CAUSES FOR THE RECRUITMENT OF CHILD SOLDIERS

There are many reasons – domestic and national - for the recruitment of children, particularly in African nations, having continued to increase over the years.<sup>77</sup> Children are easy to recruit and retain as compared to their adult counterparts, since they are generally a cheap resource, less-demanding and more submissive. The shortage of manpower is another contributing factor to the recruitment of children into armed forces. Since rebel forces cannot conscript members of the general public, these rebel groups are the first to resort to forced recruitment of children.<sup>78</sup> Child recruitment is rare in the early stages of the war. As highlighted in part 1.1, because of the ongoing armed conflicts, the pool of recruits decreases, and children provide a convenient last resort of fresh recruits to fill the ranks.<sup>79</sup>

Technological developments and the proliferation of light, inexpensive weapons in many African countries in recent years have greatly contributed to the recruitment of child soldiers.<sup>80</sup> The mere fact that children are able to comfortably operate weapons is a factor that makes them very attractive as recruits. The consequent extensive availability of easy to use and maintain cheap weapons enables the recruitment of child soldiers on a much larger scale. Sadly, the advancement to curb the problem of small arms has been hampered by the fact that some great powers of the world are the suppliers of small arms and light weapons.<sup>81</sup>

The South African government should be applauded for withdrawing its opposition to the adjudication of the Khulumani lawsuit.<sup>82</sup> The lawsuit is against foreign corporations and banks,<sup>83</sup> which are alleged to have aided and abetted the Apartheid government in enabling the said government to commit acts of gross human rights violations.<sup>84</sup> This decision opens

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<sup>77</sup> A.M. Kalis, 'Child soldiers in Africa: solutions to a complex dilemma' (2002) 2 (2) *African Journal on Conflict Resolution*.

<sup>78</sup> Van Niekerk (see note 65 above) 58.

<sup>79</sup> *Ibid*.

<sup>80</sup> Kalis (see note 77 above).

<sup>81</sup> The United States is the largest supplier of small arms and light weapons. F. Berrigan 'Big battles over small arms: But progress at the United Nations is too slow' (2006) 15(2) *African Security Review* 116, 118.

<sup>82</sup> Khulumani Support Group 'Brief Overview of the Khulumani Lawsuit' [http://www.khulumani.net/attachments/343\\_Khulumani%20Joint%20Press%20Statement%20-%20Notice%20of%20Press%20Conference%203Sep09.pdf](http://www.khulumani.net/attachments/343_Khulumani%20Joint%20Press%20Statement%20-%20Notice%20of%20Press%20Conference%203Sep09.pdf) accessed on 3 September 2009.

<sup>83</sup> The corporations and banks are from the following countries - Switzerland, Germany, The Netherlands, the United Kingdom, France, and United States of America.

<sup>84</sup> Khulumani Support Group 'Brief Overview of the Khulumani Lawsuit' (see note 82 above).

the way for the lawsuit to proceed. Importantly, the impact of this matter is that it will set precedent to the international community not to aid or assist regimes that are violating human rights.

The most disturbing fact is that children are mainly recruited into armed forces because countries can.<sup>85</sup> Governmental unwillingness and inability to curb the recruitment of child soldiers is a major reason why armed forces recruit children. As argued by Ayissi,<sup>86</sup> compliance with the established norms remains essentially a dream. Although governments have established minimum recruitment ages,<sup>87</sup> at times, these legal restrictions are disobeyed at will and government forces when desperate to ‘refill’ their fighting forces, give way to the temptation of recruiting children into their forces. Also the poor record keeping and lack of birth registration systems throughout the continent contributes to the problem by allowing children well below the minimum age to be recruited.<sup>88</sup>

As highlighted in part 1.1, the fact that international treaties have not addressed the issue of cross-border recruitment has caused this problem to escalate because the existing international law provisions are difficult to apply in such situations. This makes it difficult to protect children from cross-border recruitment and to apply enforcement and monitoring mechanisms. Although concerns have risen about the practice, not much can be done for children in these situations, because this aspect has been overlooked by international law. Thus, countries like the DRC, Uganda, Liberia, and Sierra Leone continue to engage in this practice since legally, not much can be done about it.

Although it is not a cause for the recruitment of child soldiers, national service, in the case of a tension or strife breaking out, creates the opportunity for children to be recruited. National service is a compulsory service in the military during peacetime.<sup>89</sup> Compulsory military service is more often known as conscription, and the Rome Statute criminalizes conscription or enlisting children under 15 (whether this is forced or voluntary) into armed

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<sup>85</sup> Singh (note 3 above) 212.

<sup>86</sup> A. Ayissi ‘Protecting children in armed conflict: from commitment to compliance’ (2002) 3 *Children and Security* 5, 5.

<sup>87</sup> (see note 57 above).

<sup>88</sup> Kalis (see note 77 above).

<sup>89</sup> D.R. Gurnell ‘Briewe – ‘Community service - or conscription’’ (2003) 93(2) *South African Medical Journal* 84, 84.

forces or groups.<sup>90</sup> Although with national service, conscription is present in the form of compulsory military service, it is not into armed forces or hostilities. However, the national service programs should be viewed sceptically because this can be referred to as 'recruitment potential'.<sup>91</sup> This is due to the fact that if a conflict were to arise, this aspect will expose these children to being recruited into armed forces. For example, in Zimbabwe, the National Youth Service<sup>92</sup> has been used by the ZANU PF for their political agenda. Thus, national service programs can serve as a 'breeding ground' for recruitment of children during inter- or intra- State conflicts.

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<sup>90</sup> Article 8(2)(b)(xxvi) of the Rome Statute states that : '(2) For the purpose of this Statute, 'war crimes' means: (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities'.

<sup>91</sup> A. McIntyre, 'African children in armed conflict: bridging right and reality' (2003) 1(2) *Commonwealth Youth and Development* 5, 15.

<sup>92</sup> It is a programme by the Zimbabwean government for Zimbabweans for the youths.

## CHAPTER 2: INTERNATIONAL LAW AND CHILD SOLDIERS

### 2.1 INTRODUCTION

The recruitment of child soldiers is expressly prohibited by various international treaties under international human rights law, humanitarian law, criminal law and even labour law.<sup>93</sup> Despite these various international treaties regulating the practice, there is incontrovertible evidence that the problem is continuing on a large scale and new challenges keep emerging.<sup>94</sup> This chapter contains a critically analysis of the effectiveness of international law on the protection of children against recruitment in armed forces from the perspective of enforcement and monitoring mechanisms, with focus on Africa. The focus will therefore be on enforcement and monitoring mechanisms of the international treaties prohibiting the recruitment of child soldiers, especially in Africa. This critical analysis will provide a good basis for understanding ‘loopholes’, vagueness and inconsistencies in the treaties and the strengths and weaknesses of the enforcement and monitoring mechanisms, which have the potential of creating legal uncertainty and ultimately resulting in further injustice for the child.

Firstly, the researcher begins by discussing the legal framework for the protection of children against recruitment into armed forces. The relevant international treaties are discussed under the following categories: international humanitarian law, international human rights law, international criminal law and international labour law. Secondly, the researcher will analyse the enforcement and monitoring mechanisms embodied in these relevant international treaties. Thirdly, the researcher will critically analyse the limitations of the law relating to the protection of children against recruitment into armed forces.

In conclusion it is argued that the legal uncertainty is not per se the cause of recruitment continuing; the cause being more complex than ‘loopholes’, vagueness and inconsistencies in the treaties. Another reason why recruitment has continued is because, even though member States are incorporating the international law into municipal law, they are not being enforced; there is no political willingness to enforce these laws.<sup>95</sup> Furthermore,

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<sup>93</sup> Article 38(2) of the AP-I, article 4(3)(c) of the AP-II, article 22(2) of the African Charter, article 38(2) of the CRC, article 1 of the ILO Convention 182, article 1 of the Optional Protocol to the CRC and article 8(2)(b)(xxvi) of the Rome Statute.

<sup>94</sup> For example, the issue of cross-border recruitment.

<sup>95</sup> Mezmur (see note 11 above) 209.

although some of the enforcement and monitoring mechanisms have generated positive outcomes; overall, most of them are too ‘weak’ and this has led to the further prejudice for the child.

## 2.2 THE LEGAL FRAMEWORK FOR THE PROTECTION OF CHILDREN AGAINST RECRUITMENT INTO ARMED FORCES

### 2.2.1 International humanitarian law

International humanitarian law (IHL) is that branch of international law which governs situations of armed conflict.<sup>96</sup> IHL is the *lex specialis*,<sup>97</sup> which only applies in situations of armed conflict.<sup>98</sup> IHL has its origins in either international customary law or treaty law, and it is established with the intention of solving the humanitarian issues which rose directly from either international or non-international armed conflicts.<sup>99</sup> The role of IHL is to offer protection to persons and to property which may be affected by armed conflict.<sup>100</sup> IHL is therefore the body of law which *inter alia* regulates the law pertaining to child soldiers.<sup>101</sup> Thus, the goal of IHL is to limit the consequences of war on people and property and to protect particularly vulnerable persons.<sup>102</sup> The main IHL treaties are the four Geneva Conventions of 1949 and their Additional Protocols.<sup>103</sup> The Geneva Conventions and their Additional Protocols embody mainly the significant rules limiting the barbarity of war.<sup>104</sup>

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<sup>96</sup> K. Bell & D. Abrahams ‘The use of child soldiers in armed conflict’ (2008) *Obiter* 162, 170.

<sup>97</sup> The doctrine states that a law governing a specific subject matter (*lex specialis*) overrides a law which only governs general matters (*lex generalis*).

<sup>98</sup> D.R. Mekonnen & J.L. Pretorius ‘Prosecuting the main perpetrators of international crimes in Eritrea : possibilities under international law’ (2008) 33(2) *Journal for Juridical Science* 76, 81 fn21.

<sup>99</sup> F. Ang ‘Article 38 Children in armed conflict: A Commentary on the United Nations Convention on the Rights of a Child’ (2005) 1, 10.

<sup>100</sup> International Committee of Red Cross (ICRC) ‘International Humanitarian Law (IHL)’ <http://www.icrc.org/Eng/ihl> accessed on 20 August 2009.

<sup>101</sup> The two Additional Protocols were the first global treaties to deal with the issue of child soldiers.

<sup>102</sup> Hrea.org ‘International humanitarian law’ [http://www.hrea.org/index.php?doc\\_id=415](http://www.hrea.org/index.php?doc_id=415) accessed 31 July 2009.

<sup>103</sup> 1949 Geneva Convention I Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva: United Nations 75 UNTS 31 hereafter Geneva Convention (I), 1949 Geneva Convention II Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva: United Nations 75 UNTS 85 hereafter Geneva Convention (II), 1949 Geneva Convention III Relative to the Treatment of Prisoners of War. Geneva: United Nations 75 UNTS 135 hereafter Geneva Convention (III) and 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War. Geneva: United Nations 75 UNTS 287 (1949) hereafter Geneva Convention (IV).

<sup>104</sup> International Committee of Red Cross (ICRC) ‘International Humanitarian Law (IHL)’ (see note 100 above).

A number of provisions are included in the Geneva Conventions of 1949 and their two Additional Protocols of 1977 with a view of safeguarding the rights of children.<sup>105</sup> The two Additional Protocols referred to above were the first global treaties to deal with the issue of child soldiers; thus providing greater protection for children against the effects of hostilities and for the first time regulating their participation in armed conflicts.<sup>106</sup> The two Protocols establish 15 years as the minimum age for recruitment.<sup>107</sup> This standard has subsequently been reiterated in article 38(2) CRC and article 8(2)(b)(xxvi) of the Rome Statute. By virtue of the standard being reiterated in a number of treaties, it proves that it has been accepted and recognized by the international community; thus making it customary international law.<sup>108</sup> Since the standard has achieved the customary law status, the jus cogens principle applies to the standard and in accordance with this principle, derogation from the norm is not permitted.<sup>109</sup>

However, in terms of jurisdiction, the AP-I is only applicable to international armed conflicts; whereas the AP-II is only applicable to non-international armed conflicts. This aspect is significant to Africa because many of the conflicts within the continent are internal. There is no doubt that the internal nature of current armed conflicts has significantly increased the possibility that children will be recruited into armed forces.<sup>110</sup> Furthermore, whereas the AP-I prohibits only the recruitment for direct hostilities,<sup>111</sup> article 4(3)(c) of the AP-II specifically prohibits recruitment for both direct or indirect hostilities. Ironically, the rules pertaining to internal conflicts are far more stringent than the rules in respect of international conflicts.<sup>112</sup> This can be used as evidence to suggest that the States participating in the Diplomatic Conference during the finalization of the treaty intended to impose a stricter standard on parties involved in an internal armed conflict.<sup>113</sup> Taking into consideration the situation in Africa, this is a positive development. Unfortunately, this has

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<sup>105</sup> Article 3 of the Geneva Convention (I), article 3 of the Geneva Convention (II), article 3 of the Geneva Convention (III), article 3 of the Geneva Convention (IV), article 77 of the AP-I and article 4(3) of the AP-II.

<sup>106</sup> A. Baker & H. Ben-Ari 'The Use of Children in Armed Conflict' (2000) 26 *Justice* 7, 8.

<sup>107</sup> Article 77(2) of the AP-I and article 4(3)(c) of the AP-II.

<sup>108</sup> Customary international law are those aspects of international law that derive from custom and are applicable to every State. J. D. Muzuzi 'An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human Rights and People's Rights' (2006) 5(2) *African Human Rights Law Journal* 423, 425.

<sup>109</sup> *Ibid.*

<sup>110</sup> A. Shepherd 'Child soldiers: Is the Optional Protocol to the CRC evidence of an emerging "straight-18" consensus?' (2000) *International Journal of Children's Rights* 37, 37.

<sup>111</sup> Article 77(2).

<sup>112</sup> Singh (see note 3 above) 215.

<sup>113</sup> Mezmur (see note 11 above) 201.

not made any difference because in several countries in Africa the recruitment of child soldiers is on a rampage.<sup>114</sup>

### 2.2.2 International human rights law

International human rights law represents the concept of fundamental rights, which comprise civil, political, economic, social, cultural, environmental and other rights as belonging to every individual by virtue of them being human.<sup>115</sup> Obligations are generally laid down in international human rights treaties, which States are bound to respect. Thus, by becoming a member State, States assume obligations and duties under IHRL to respect, to protect and to fulfill human rights. The obligations to respect, protect and to fulfill human rights require the States to abstain from interfering with or limiting the enjoyment of human rights, to protect individuals and groups against human rights abuses and to take positive action to facilitate the enjoyment of basic human rights.<sup>116</sup> In this regard the treaties that fall under international human rights law and are relevant to the current discussion are: the CRC, Optional Protocol to the CRC and the African Charter.

Article 38(2) of the CRC states that ‘States parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities’. Thus, this article is inconsistent with the rest of the instrument in using a 15-year age minimum because in all other respects, the CRC's general definition of a child is any person under the age of 18. The CRC defines a child as any person ‘below the age of 18 years unless under the law applicable to the child, majority is attained earlier’.<sup>117</sup> Then later on in the document it provides 15 as the minimum age of recruitment for direct hostilities.<sup>118</sup> The article urges State parties ‘to take all feasible measures’ to ensure that persons who have not attained the age of 15 years are not recruited into armed forces.<sup>119</sup> Thus, article 38(2) does not apply to all children and therefore does not offer all children equal protection.

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<sup>114</sup> Singh (see note 3 above) 206.

<sup>115</sup> Mekonnen & Pretorius (see note 98 above) 81 fn21.

<sup>116</sup> J.C. Mubangizi ‘The protection of human rights in South Africa: A legal and practical Guide’ (2004) Juta, 2.

<sup>117</sup> Article 1 of the CRC.

<sup>118</sup> Article 38(2) *Ibid.*

<sup>119</sup> It is derived from article 77(2) of the AP-I. Y. Dinstein ‘The Conduct of Hostilities under Law of International Armed Conflict’ (2004) Cambridge University Press, 141.

Remarkably, the Optional Protocol to the CRC raises the minimum age of recruitment from 15 to 18.<sup>120</sup> Member States are obliged to take ‘all feasible measures’ to ensure that under-18s are not recruited into armed forces.<sup>121</sup> It has, nevertheless, retained 15 years as the minimum age of voluntary enlistment.<sup>122</sup> Article 3(3) allows for voluntary recruitment by government, but article 4(1) prohibits non-government armed forces from recruiting under-18s. It is clear that the Optional Protocol to the CRC provides a double standard as it provides different standards for armed forces to a Member State and non-State armed forces.<sup>123</sup> It is most probable that non-State armed forces will not feel obliged to abide by a standard which is different from that imposed on the State.

The African Charter creates a more stringent protection against recruitment of African children, as compared to the global treaties that prohibit the recruitment of children into armed forces.<sup>124</sup> The Charter is the only treaty at a regional level dealing with the issue of child soldiering and children in armed conflict. The Charter does not make the distinction between people younger than 18 years and those younger than 15 years.<sup>125</sup> Unlike the CRC, it adopts a ‘straight 18’ position, which is compliant with the overall definition of a child.<sup>126</sup> In relation to the recruitment of child soldiers, the Charter, by adopting the ‘straight 18’ position, prohibits the recruitment of under-18s into armed forces. In addition, under the Charter, State parties are obliged to take ‘all necessary measures’ to ensure that no children take direct part in hostilities and to refrain from recruiting children into armed forces.<sup>127</sup> Theoretically, this provision is supposed to send a clear message that the recruitment of children into armed forces is unacceptable and will not be tolerated on the continent.<sup>128</sup> Unfortunately, this is not the case because the recruitment of child soldiers does happen.

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<sup>120</sup> Article 1 of the Optional Protocol to the CRC.

<sup>121</sup> Article 1 *ibid.*

<sup>122</sup> Article 3(3) *ibid.*

<sup>123</sup> Bell & Abrahams (see note 96 above) 176; Singh (see note 3 above) 217; Mezmur (see note 11 above) 206-7.

<sup>124</sup> AP-I, AP-II, CRC, and the Rome Statute define a child as any person under the age of 15, and the other treaties, with the exception of the Rome Statute, do not address both the issues of age and nature of hostilities.

<sup>125</sup> Article 2 of the African Charter defines a child as ‘every human being below the age of 18 years’ for all purposes of the Charter.

<sup>126</sup> Mezmur (see note 11 above) 202.

<sup>127</sup> Article 22(2).

<sup>128</sup> Mezmur (see note 11 above) 202.

The CRC and the African Charter should be applauded for their coordinative nature; in the sense that the two treaties combine humanitarian law and human rights norms,<sup>129</sup> and in addition, the African Charter combines labour law and human rights norms.<sup>130</sup> Thus, State parties to the treaties are obliged to adhere to their IHL, IHRL and labour law obligations. The treaties furthermore give the Committee on the Rights of the Child (CRC Committee) and the Committee of Experts on the Rights and Welfare to the Child (African Charter Committee) the mandate to apply the norms contained in other treaties.<sup>131</sup> Article 46 of the African Charter states that the Committee can draw its inspiration from other sources. However, the CRC does not have a specific provision to this effect, but article 43(1) read together with article 38(1) states that Committee must ensure that that State parties undertake their obligations under the Convention; thus State parties are obliged to respect and to ensure respect the rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. Therefore, it can be argued that the combination of humanitarian law, labour law and human rights norms will ensure that the Committee on the Rights of the Child (CRC Committee) and the Committee of Experts on the Rights and Welfare to the Child (African Charter Committee) are able to address the gaps that exist between law and practice by having the relevant treaties compliment each other wherever necessary.<sup>132</sup>

Article 41 of the CRC states that if any provisions contained in the law of a Member State or international law in force for that State are more conducive to the realisation of the rights of the child, the provisions have to take precedence over the CRC. The purpose of this article is to guarantee that State parties provide the most favourable protection for the child in accordance with their respective international obligations.<sup>133</sup> In the context of the CRC and the African Charter, the Charter has a higher standard as compared to the CRC.<sup>134</sup> In light of this, the provisions of the Charter should take precedence over the CRC. The Charter offers better protection by adopting the ‘straight 18’ position and by requiring a

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<sup>129</sup> Article 38(1) of the CRC and article 22(1) of the African Charter.

<sup>130</sup> Article 15 of the African Charter.

<sup>131</sup> Article 43(1) of the CRC and article 46 of the African Charter.

<sup>132</sup> *Ibid.*

<sup>133</sup> Ang (see note 99 above) 64.

<sup>134</sup> B.D. Mezmur, ‘The African Children's Charter versus the UN Convention on the Rights of the Child: a zero-sum game?’ (2008) 23(1) *SA Publiekreg = SA Public Law* 1, 14.

lower degree of intensity for its application; as it applies to riots, isolated and sporadic acts of violence, which have not yet reached the level of internal armed conflicts.<sup>135</sup>

The adoption of the African Charter is in tandem with the United Nations' recognition of regional arrangements for the protection of human rights.<sup>136</sup> As highlighted above, in harmonising laws, State parties to the African Charter have an obligation to adhere to the higher normative standards that the African Charter offers over the CRC.<sup>137</sup> However, for human rights to be successfully implemented there ought to be a meaningful interplay between international human rights standards and municipal law.<sup>138</sup> The relationship between international law and municipal law is by no means clear-cut. There are those who believe that the two constitute distinct branches of law which never overlap (dualist theory).<sup>139</sup> Accordingly, the enforcement of international human rights into municipal law becomes problematic. Thus, although the Charter compositely addresses both the issues of age and nature of hostilities that appear to confound other treaties;<sup>140</sup> in practice, due to the relationship between international treaties and municipal law, the provisions of the Charter are not taking precedence. Some State parties, to both the CRC and the African Charter, hide themselves behind the lower international standards.<sup>141</sup>

There is incontrovertible evidence that the problem of child recruitment into armed forces is continuing on a large scale and new challenges keep emerging.<sup>142</sup> The research will focus on the issue of child cross-border recruitment which has become wide spread in Africa.<sup>143</sup> Cross-border recruitment arises whenever there is a conflict occurring in a different country within a region, and children are recruited from the territory of another country.<sup>144</sup> The Optional Protocol to the CRC in paragraph 11 of its preamble condemns

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<sup>135</sup> Article 22(3) of the African Charter.

<sup>136</sup> Regional arrangements for the promotion and protection of human rights were sanctioned by UN General Assembly Resolution A/RES/47/125.

<sup>137</sup> Article 41 of the CRC.

<sup>138</sup> Mubangizi (see note 116 above) 32.

<sup>139</sup> *Ibid.*

<sup>140</sup> CRC in relation to recruitment for direct hostilities defines a child as any person under the age of 15, and the other treaties and it does not address both the issues of age and nature of hostilities.

<sup>141</sup> For example, Burundi (16), Angola & Sudan (17), Sierra Leone (17.5), the DRC & Somalia have no legal limitation on child recruitment. Coalition to Stop the Use of Child Soldiers 'Africa Report' 2001 (see note 57 above).

<sup>142</sup> For example, the issue of cross-border recruitment.

<sup>143</sup> Mezmur (see note 11 above) 209.

<sup>144</sup> *Ibid.*

child cross-border recruitment.<sup>145</sup> Similarly, the Palermo Protocol in article 3(c) also prohibits child cross border recruitment. The Palermo Protocol prohibits ‘trafficking in persons’, and the recruitment of children into armed forces falls under the ambit of ‘trafficking in person’.<sup>146</sup> Thus, this creates a wider ambit for the protection of children from being recruited into armed forces since trafficking laws apply in relation to child cross-border recruitment.

The anti-trafficking conventions have contributed to the protection of children being recruited into armed forces by adding additional mechanisms to protect children from cross-border recruitment.<sup>147</sup> Under the UN anti-trafficking mechanisms, the Office of the Special Representative for Combating the Traffic of Human Beings has been established;<sup>148</sup> and the actions against human trafficking are carried out by the Organization for Security and Co-operation in Europe (OSCE) under the coordination of the Office of the Special Representative.<sup>149</sup> OSCE has established an anti-trafficking mechanism aimed at raising public awareness of the problem of child cross-border recruitment and building the political will within participating States to tackle it effectively. It is unfortunate; considering that the practice is wide spread in Africa, that the continent does not have a similar body similar to the OSCE. However, the anti-trafficking mechanism is not superior to the other enforcement mechanisms discussed above; as much as the enforcement mechanism has brought awareness of the problem, no change has been yielded.<sup>150</sup> This aspect is shown by the fact that the issue of child cross-border recruitment in Africa has become wide spread.<sup>151</sup> As will be highlighted in part 2.4, although the two treaties mentioned above are the only international treaties that mention child recruitment across borders they are both of limited use in addressing the issue.<sup>152</sup>

### 2.2.3 International criminal law

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<sup>145</sup> Paragraph 11 of the Preamble provides ‘condemning with the gravest concern the recruitment, training, and use within and across national border children in hostilities by armed forces distinct from the armed forces of a State...’.

<sup>146</sup> Article 3(a) of the Palermo Protocol *ibid* & Tiefenbrum (see note 2 above) 415.

<sup>147</sup> The Optional Protocol to the CRC and Palermo Protocol.

<sup>148</sup> UN, *Improving the coordination of efforts against trafficking in persons* (2008) A/63/90.

<sup>149</sup> *Ibid.*

<sup>150</sup> Mezmur (see note 11 above) 209, Sloth-Nielsen (see note 33 above) 59 and Security Council, *Report of the Secretary General: DRC* (2007) A/62/609-S/2007/757.

<sup>151</sup> *Ibid.*

<sup>152</sup> Mezmur (note 11 above) 208.

Child soldiers have also found protection within the discourse of international criminal law.<sup>153</sup> International criminal law deals with the most serious crimes of international concern.<sup>154</sup> Under international criminal law, the recruitment of children under the age 15 years is considered a ‘war crime’.<sup>155</sup> The Rome Statute criminalizes conscription or enlisting of children under the age of 15 years (whether this is forced or voluntary) into armed forces or groups.<sup>156</sup> Although the Rome Statute uses the terminology of ‘conscription’ or ‘enlistment’ of under-15s, this is accepted as meaning the same as ‘recruitment’ in the other treaties that prohibit the practice.<sup>157</sup> This prohibition applies to both the government armies and rebel groups. It provides that such an act during an internal armed conflict is a war crime.<sup>158</sup> This aspect is significant in Africa because many of the conflicts within the continent are internal. The Rome Statute established the International Criminal Court (ICC) which has the power to exercise its jurisdiction over any person guilty of committing an act that is considered a war crime under the instrument.<sup>159</sup> The Rome Statute imposes penal sanctions upon offenders to this Statute,<sup>160</sup> thereby imposing necessary sanctions upon offenders and increasing the protection afforded to child soldiers.<sup>161</sup>

#### 2.2.4 International labour law

International labour law is the body of legal rules concerning labour law that apply between sovereign States and entities that have been granted international personality by sovereign States.<sup>162</sup> Child soldiers have also found protection within the discourse of international law on child labour.<sup>163</sup> Children recruited as combatants fit the definition of ‘child labour’.<sup>164</sup> The term ‘child labour’ is defined as ‘work by children under 18 which is exploitative, hazardous or otherwise inappropriate for their age, detrimental to their

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<sup>153</sup> The Rome Statute.

<sup>154</sup> The crime of genocide, crimes against humanity, war crimes and the crime of aggression.

<sup>155</sup> Article 8(2)(b)(xxvi) of the Rome Statute.

<sup>156</sup> *Ibid.*

<sup>157</sup> Human Rights Watch Children’s Rights ‘Child Soldiers’ (note 34 above).

<sup>158</sup> Article 8(2)(e)(vii).

<sup>159</sup> Article 1.

<sup>160</sup> Article 77.

<sup>161</sup> Bell & Abraham (see note 96 above) 179.

<sup>162</sup> J. Dugard *International law: a South African perspective* (2005) Juta, 329.

<sup>163</sup> ILO Convention 182.

<sup>164</sup> R. Stohl ‘Children soldiering is the worst form of child labour’ Centre for Defense Information (2000) <http://www.cdi.org> accessed 1 October 2009.

schooling, or social, physical, mental, spiritual or moral development'.<sup>165</sup> The international community has argued that in order for children to enjoy their basic human rights, the life-threatening labor practices, including the use of child soldiers, must be eliminated.<sup>166</sup> The ILO Convention 182 has banned the worst forms of child labor.<sup>167</sup> Article 3(a) of the ILO Convention 182 in its definition of the worst forms of child labour includes 'forced and compulsory recruitment of children for use in armed forces'. It obligates State parties to take immediate and effective measures to secure the prohibition and elimination of forced and compulsory recruitment.<sup>168</sup>

Although this is a positive step, looking at the Convention's language it appears that children who are voluntary recruits will not be protected by the Convention, since the Convention only deals with forced and compulsory recruitment.<sup>169</sup> For example, the only children that will be protected by the Convention are those involved in forced abductions, such as those used by the rebel groups. For example, those used by the rebel groups from Uganda and Sierra Leone, namely, the LRA and Revolutionary United Front (RUF).<sup>170</sup> Therefore, those children who are involved in 'voluntary' recruitment are not accommodated for in the treaty. Children who volunteer to join-up should have been accommodated by the treaty since the definition of 'child labour' does not distinguish between 'voluntary' or 'forced' or 'compulsory' child labour. In relation to trafficking, inter alia, the Palermo Protocol states that the consent of children is immaterial.<sup>171</sup> The definition simply identifies conduct that has to be regarded as child labour and recruitment of children into armed forces; whether voluntary or forced or compulsory, fits the definition of 'child labour'. Considering that participation is often a response to pressure of more subtle nature,<sup>172</sup> the treaty should not have made such a distinction.

#### 2.2.5 Conclusion

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<sup>165</sup> N. Duncan & B. Bowman 'Educational aspirations, child labour imperatives and structural inequality in the South African agricultural sector: Research Article' (2008) 26(3) *Perspectives in Education* 29, 30.

<sup>166</sup> Stohl (see note 164 above).

<sup>167</sup> Article 1.

<sup>168</sup> *Ibid.*

<sup>169</sup> Mezmur (see note 11 above) 203.

<sup>170</sup> *Ibid.*

<sup>171</sup> Article 3(b) of the Palermo Protocol.

<sup>172</sup> Van Nierkerk (see note 65 above) 65.

In conclusion it can be argued that the recruitment of child soldiers is expressly prohibited by various international treaties under international human rights law, humanitarian law, criminal law and even labour law. Theoretically, the legal framework for the protection of children against recruitment into armed forces is supposed to send a clear message that the recruitment of children into armed forces is unacceptable and will not be tolerated on the continent. However, this is not the case because in several countries in Africa the recruitment of child soldiers is on a rampage. There is irrefutable evidence that the problem of child recruitment into armed forces is continuing on a large scale and new challenges keep emerging. As will be highlighted below, the weakness in enforcing and monitoring international law might have a role in the continuation of child recruitment.

## 2.3 ENFORCEMENT AND MONITORING MECHANISMS OF THE RELEVANT INTERNATIONAL TREATIES

### 2.3.1 Enforcement and monitoring mechanisms

#### (i) UN Mechanisms

In order to have a sound knowledge of the fate of children in armed conflict and to be more effective in combating this problem, the UN requested the Secretary General to appoint an expert to undertake a comprehensive study on the impact of armed conflict on children.<sup>173</sup> In response to this, the Secretary General appointed Graca Machel for this mission. In her report, one of her key recommendations was the appointment of a Special Representative for Children and Armed Conflict.<sup>174</sup> The fact that the problem of child soldiers has received attention at UN level illustrates how serious the problem is. It is unfortunate that considering that the practice is on a rampage in Africa, such attention is not replicated at African level. The reason for this is that many African States engage in the practice.<sup>175</sup>

The role of the Office of the Special Representative is mainly to advocate for the protection of children affected by armed conflict. Field visits have been a central element of her

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<sup>173</sup> Ayissi (see note 86 above) 7.

<sup>174</sup> In September 1999, the Secretary-General of the UN appointed Mr. Olara A. Otunnu as his Special Representative for Children and Armed Conflict. Ms. Radhika Coomaraswamy has assumed this position since April 2006 through the UN General Assembly Resolution A/RES/51/77 (1997).

<sup>175</sup> Musila (see note 6 above) 332.

advocacy strategy to bring high-level visibility to the situation and rights of children affected by armed conflict.<sup>176</sup> Such visits enable the Special Representative to bear witness first-hand to the situation of children, to increase dialogue with member States, to support more effectively the work of operational partners, to obtain commitments from parties to conflict and to unblock difficult political situations, as required.<sup>177</sup>

Thus far, these collaborative efforts between the UN entities and their partners have resulted in significant advances, actions and tangible results for children.<sup>178</sup> The collaborative efforts include working together to: systematically engage with member States, foster discussions to advance the agenda on how to combat the practice of child soldiers, advocate at critical moments in the development of the agenda, and to ensure clarity on division of labour on an issue that cuts across the mandates and responsibilities of multiple actors in the UN system.<sup>179</sup> Although collaborations are generally a good idea, at times it can mean that the campaigns move slowly because of the need to get consensus or check with other players regarding every decision.<sup>180</sup> However, on one hand, advocacy campaigns have been effective in part because they have taken the discourse on child and youth involvement in conflict out of the political and military context and placed it into one circumscribed by legal and moral concern.<sup>181</sup> On the other hand, they have been less effective in bringing about change because, as will be highlighted below in part 3, in several African countries the recruitment of child soldiers is on a rampage.

Among the main organs of the UN is the United Nations Security Council (UNSC), which has the mandate to maintain international peace and security. Its powers are outlined in the UN Charter,<sup>182</sup> and they are exercised through UN Security Council Resolutions. The

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<sup>176</sup> Office of the Special Representative for Children and Armed Conflict 'Field visits' <http://www.un.org/children/conflict/english/countryvisits.html> accessed on 29 June 2009.

<sup>177</sup> Office of the Special Representative for Children and Armed Conflict 'Advocacy' <http://www.un.org/children/conflict/english/countryvisits.html> accessed on 29 June 2009.

<sup>178</sup> Increased global awareness of the issues concerning children affected by armed conflict; development and strengthening of international norms and standards for the protection of children; consistent focus and prioritization of this issue by the General Assembly and the Human Rights Council; placing children and armed conflict on the international peace and security agenda through systematic engagement of the Security Council; and deeper mainstreaming of children and armed conflict in the United Nations system and concerted advocacy. *Ibid.*

<sup>179</sup> Office of the Special Representative for Children and Armed Conflict "Working with partners" <http://www.un.org/children/conflict/english/workingwithpartners.html> accessed on 29 June 2009.

<sup>180</sup> *Ibid.*

<sup>181</sup> McIntyre (see note 91 above) 10.

<sup>182</sup> Chapter V.

UNSC has passed a number of Resolutions condemning the recruitment of child soldiers.<sup>183</sup> Importantly, Resolution 1612 (2005) calls for a series of measures to be taken, including the establishment of a mechanism for monitoring and reporting violations.<sup>184</sup> Under these new mechanisms, UN-led task forces are established in phases, to monitor the conduct of all parties and transmit regular reports to a central task force in New York.<sup>185</sup> Through the established UN-led task forces, signs of some success are visible. For example, in the DRC, significant progress has been made by the government through the implementation of the disarmament, demobilization and reintegration programmes for children;<sup>186</sup> to ensure that children are not recruited into armed forces in pursuant to the conclusions and recommendations of the UN-led task forces.<sup>187</sup> The army has also changed its integration process, which has led to the decrease in the number of active fighting zones.<sup>188</sup>

A concrete follow up of the recommendation in UN Resolution 1261 that the welfare of children should be promoted throughout the peace process, was the appointment of the first Child Protection Adviser (CPA) attached to the Peace Keeping Operation in Sierra Leone in 2000, and thereafter in the DRC and Angola.<sup>189</sup> A CPA forms part of the central staff of the heads of the UN field missions, serving as their direct adviser on the protection of children.<sup>190</sup> This means that the CPA makes it a point that children are demobilised and are not recruited or re-recruited into armed forces. The CPA helps to ensure that the protection of children's rights is priority concerns right through the peace-keeping process.

The UNSC has the power to apply sanctions in respect of the perpetrators, in a bid to try and stop them from violating children's rights. Economic sanctions are restrictions upon international trade and finance that one country or countries impose on another country or

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<sup>183</sup> Resolution 1314 sets out, *inter alia*, specific action oriented measures such as tackling the illicit trade in conflict diamonds, ending impunity for war crimes against children. Resolution 1349 strengthens the measures provided for in Resolution 1314, and makes them more targeted. Resolution 1460 broadens the scope for monitoring and reporting, stipulating that all country-specific reports should include sections for children, and endorses an era of application. Resolution 1612 calls for a series of measures to be taken, including the establishment of a mechanism for monitoring and reporting violations.

<sup>184</sup> Article 2 of the UNSC Resolution 1612.

<sup>185</sup> Mezmur (see note 11 above) 209.

<sup>186</sup> Security Council, *Children and armed conflict - Report of the Secretary-General: DRC (2007)* UN Document A/62/609-S/2007/757.

<sup>187</sup> Amnesty International 'DRC: Children at war, creating hope for the future'

<http://www.reliefweb.int/rw/rwb.nsf/db900sid/YAOI-6UG58J?OpenDocument> accessed on 12 June 2009.

<sup>188</sup> *Ibid.*

<sup>189</sup> R. Harvey 'Section 1: Overview of international law and developments' in *Children and Armed Conflict: A guide to international humanitarian law and human rights* 5, 16.

<sup>190</sup> *Ibid.*

certain individuals for political reasons.<sup>191</sup> Thus far the UNSC has imposed a travel ban and froze the assets of Martin Kouakou Fofie, a commander of the Forces Nouvelles in Cote d'Ivoire, and expanded existing sanctions (including travel bans and asset freezes) to apply to individual child recruiters in the DRC.<sup>192</sup> As will be shown in part 3, the continuous recruitment is an indication of the failure of this mechanism.

At times the economical sanctions are imposed on a country as a whole, and this may sometimes have the greatest adverse effects on innocent families.<sup>193</sup> The unfortunate part is that in most African countries when sanctions are imposed, the countries are already in severe humanitarian crisis, and the sanctions have no exemptions to humanitarian supplies.<sup>194</sup> For example, in Burundi; although the sanctions were not applied *per se* because Burundi was recruiting child soldiers, the sanctions which were initially imposed where without exemptions for humanitarian supplies; and this affected the health and welfare of civilians, especially the children.<sup>195</sup>

Notably, the AU has an equivalent body to the UNSC - the Peace and Security Council of the AU. Its primary mandate is conflict prevention, management and resolution.<sup>196</sup> Thus, if the body is sufficiently utilized it will play a vital role in the prevention of the recruitment of child soldiers. It is the first body under international law to deal with preventative measures. The UNSC and international law deal with protection rather than prevention. Therefore, the body, through its mandate of conflict prevention can; instead of waiting for the problem of child soldiers to arise, establish preventative measures to avoid conflicts. This can mostly be done through arbitration. The researcher submits that since the body's primary mandate is conflict resolution, management and resolution, in relation to the issue of child soldiers the functions and the duties of the body are to prevent recruitment of child soldiers. Thus far, it is still proliferation on paper, rather than actual progress;<sup>197</sup> with financial issues hampering on the progress of the body.<sup>198</sup>

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<sup>191</sup> H.J.G. Zandman 'Economic sanctions: An ethical primer' (2008) 42(3) *In die Skriflig* 531, 533-4.

<sup>192</sup> Human Rights Watch 'UN: Security Council must punish users of child soldiers'  
<http://www.hrw.org/english/docs/2006/11/27> accessed on 7 February 2009.

<sup>193</sup> Zandman (see note 191 above) 532-3.

<sup>194</sup> E. Hoskins & S. Nutt 'The humanitarian impacts of economic sanctions on Burundi'  
<http://www.watsoninstitute.org/pub/OP29.pdf> accessed 1 October 2009.

<sup>195</sup> *Ibid.*

<sup>196</sup> Protocol Relating To The Establishment of the Peace and Security Council of the African Union (2002).

<sup>197</sup> Berrigan, (see note 81 above) 117.

However, neither the above bodies nor the international community can ‘assist’ children whilst the conflict is still on-going. It is unfortunate that when parties to a conflict violate international law, there is little action that can be taken by the international community to enforce compliance while the conflict is on-going.<sup>199</sup> For example, during the Rwandan genocide in 1994, the international-community let itself be a mere ‘eyewitness’ or ‘bystander’.<sup>200</sup> Commonly, prosecutions for violation of international law are only effected following the cessation of hostilities and the signing of a peace agreement.<sup>201</sup> This means that the international community is unable to protect children during armed conflict, thus in a way leaving them vulnerable to recruitment.<sup>202</sup> Even when the international community seeks prosecution after the end of the conflicts, this does not always ensure that justice is obtained. Often victors avoid prosecutions through amnesties agreed upon to bring an end to a conflict and allow those culpable to escape punishment. For example, in Nigeria, hundreds of rebel fighters gave up their weapons and accepted an amnesty deal.<sup>203</sup> However, some countries do not offer amnesty deals to rebels. For example, the DRC government has detained the rebel leader, Laurent Nkunda.<sup>204</sup>

The UNSC can authorise a ‘humanitarian intervention’ by the international community whilst the conflict is still on-going. Holzgrefe defines the term ‘humanitarian intervention’ as

‘the threat or use of force across state borders by a state (or group of States) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the State within whose territory force is applied’.<sup>205</sup>

In the case of the prevention of the recruitment of child soldiers, humanitarian intervention will be quite significant.<sup>206</sup> To some extent this will reduce the number of children being

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<sup>198</sup> J. Cilliers & K. Sturman ‘Challenges facing the AU’s Peace and Security Council’ (2004) 13(1) *African Security Review* 97, 97.

<sup>199</sup> Harvey (see note 189 above) 18.

<sup>200</sup> W. De Beer ‘When to intervene to save lives: International law’ (2008) 8(3) *Without Prejudice* 60, 60.

<sup>201</sup> This is when the International Tribunals for the former Yugoslavia and the Special Court for Sierra Leone were established.

<sup>202</sup> UNICEF ‘Special concerns’ <http://www.un.org/rights/concerns.htm> accessed 31 October 2009.

<sup>203</sup> Reuters AlertNet ‘Nigerian rebel leaders give up arms in amnesty deal’ <http://www.alertnet.org/thenews/newsdesk/L3428248.htm> accessed 31 October 2009.

<sup>204</sup> Security Council, *Children and armed conflict - Report of the Secretary-General: DRC* (2007) A/62/609–S/2007/757.

<sup>205</sup> J.L. Holzgrefe & R.O. Kedane *Humanitarian Intervention: Ethical, Legal, and political dilemma* (2003), Cambridge: Cambridge University Press, 1.

recruited into armed forces. Consequently, only a few interventions have provided a significant benefit.<sup>207</sup> For example, the 1999 NATO bombings in Kosovo and Serbia brought to a halt the ethnic cleansing and other clear violations of the Rome Statute; which prevented an escalation of atrocities and produced a positive result.<sup>208</sup> In Africa, there has been a lack of political will to support such interventions;<sup>209</sup> in the sense that the States that have intervened in order to provide humanitarian aid are not offered any assistance by the local government. Thus, children are still recruited and re-recruited into armed forces.

The international law currently in force contains no direct measure to intervene. The closest measure allowing for direct humanitarian intervention is Article 4(h) of the Constitutive Act of the African Union where intervention is allowed by the Peace and Security Council pursuant to a decision of the assembly.<sup>210</sup> The UN Charter, similarly, allows for action of many different forms in Chapters VII and VIII, but no specific provision for humanitarian intervention is made. Consequently, the lack of strict, direct and easily interpreted requirements have resulted in catastrophes. For example, the lack of humanitarian intervention in Rwanda was a contributing factor to the ultimate consequence; the death of approximately 800 000 people.<sup>211</sup> Furthermore, this aspect has also resulted to the failure of humanitarian interventions. For example, the humanitarian intervention in Somalia resulted in a failed intervention because of its mismanagement; the US became entangled in local politics.<sup>212</sup>

The UN can also deploy peacekeepers to post-conflict situations to offer protection for the populations under threat and to safeguard their rights.<sup>213</sup> The peacekeepers play an essential role in preventing armed forces from recruiting or re-recruiting child soldiers, since even during the post-conflict situation fighting might still be occurring. The irony is that in some situations peacekeepers themselves violate human rights.<sup>214</sup>

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<sup>206</sup> United Nations Association of Australian (Victorian Division) 'Humanitarian Intervention- Responsibility to Protect: Position Paper - The Republic of Liberia' RMIT University Model UN Conference 2006.

<sup>207</sup> De Beer (see note 200 above) 60.

<sup>208</sup> *Ibid.*

<sup>209</sup> Mezmur (see note 11 above) 209.

<sup>210</sup> Constitutive Act of the African Union, 2000 OAU Doc OAU/AEC.

<sup>211</sup> De Beer (see note 200 above) 60.

<sup>212</sup> R. Gueli 'Humanitarian intervention in Africa: towards a new posture' (2004) 32(1) *Scientia Militaria : South African Journal of Military Studies* 120, 131-132.

<sup>213</sup> D. Forte, 'From words to deeds: Addressing peacekeepers' violations of human rights' (2006) 3 *Conflict Trends* 44, 45.

<sup>214</sup> *Ibid.*

It is unfortunate that the UN reacts ‘at a snail’s pace’ to crucial matters. An example of their slowness is the situation in Liberia. The UN Peace Keeping Mission was aware of the problem of the recruitment of child soldiers and indicated that they were actively monitoring the situation on Liberia’s border, and yet recruitment persisted.<sup>215</sup> The reason why the UN peacekeepers were stationed on the borders of Liberia was because there was an already established regional peacekeeping effort within the borders of Liberia; the Economic Community of West Africa Cease-Fire Monitoring Group (ECOMOG).<sup>216</sup> However, considering the intensity of the situation, the UN should have worked in collaboration with the regional team within the borders of Liberia because there was not much they could do stationed on the borders of Liberia.

As was highlighted in part 1.6, technology developments and the proliferation of light, inexpensive weapons in many African countries in recent years has greatly contributed to the recruitment of child soldiers. In particular, small arms transfer is a major contributor to the problem of child soldiers in Africa. Although some agreements, such as the Maputo Declaration on Child Soldiers and the UN Resolution 1261, explicitly call for an end to small arms transfers to States that recruit child soldiers, many signatory and non-signatory nations do not comply with the tenets.<sup>217</sup> These nations, due to superseding economic and political interests, continue small arms transfers through private deals on the black market.<sup>218</sup>

In response to this, the UN has initiated the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons (POA).<sup>219</sup> The Programme contains a number of measures at national, regional and global levels, in the areas of legislation and destruction of small arms and light weapons that have been confiscated, seized, or collected in individual UN member States.<sup>220</sup> POA also includes

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<sup>215</sup> Singh (see note 3 above) 212.

<sup>216</sup> A. Adebajo *Liberia’s civil war: Nigeria, ECOMOG, and regional security in West Africa* (2002) Boudler, Colo: Lynne Rienner Publishers 107-8.

<sup>217</sup> Kalis (see note 77 above).

<sup>218</sup> *Ibid.*

<sup>219</sup> UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons 2001 UN Doc A/CONF.192/15 (2001) hereafter POA.

<sup>220</sup> I. Ndungu ‘Measuring the impact of arms control agreements in Africa: National reports on the United Nations programme of action on small arms and light weapons in Africa’ (2008) 1(4) *Arms Control: Africa* 9, 9.

international cooperation and assistance efforts to be undertaken in strengthening the ability of member States in identifying and tracing illicit small arms and light weapons.<sup>221</sup> In order to assess the degree of implementation of POA, the member States are obliged to provide national reports to an independent and impartial Registry of International Arms Transfers on their efforts.<sup>222</sup> Research done by Ndungu<sup>223</sup> indicates an inconsistency in reporting, and sadly, the countries that have significant challenges in the proliferation of illicit arms rarely make their submissions.<sup>224</sup> This reporting mechanism is very weak on the basis of the pattern of reporting, due to its voluntary nature and the fact that POA does not specify how frequently States should make their submissions.<sup>225</sup> Thus, due to these aspects it will be very difficult to curb the problem of small arms and light weapons.

As a response to the threat of small arms and light weapons in West Africa, the Economic Community of West Africa (ECOWAS) adopted a Convention on small arms and light weapons in 2006.<sup>226</sup> The Convention is an extensive instrument that seeks to address several key elements of POA.<sup>227</sup> Just-as with POA, the monitoring of the Convention is through reports from the member States. The Convention has suffered the same fate as POA because the reporting mechanism is very weak. The reporting on such matters in Africa is very limited.<sup>228</sup> Furthermore, there is an irregular implementation of regional agreements which leaves loopholes that arms traffickers can exploit.<sup>229</sup> Despite the challenges, Alusala argues that the Convention is a move in a positive direction.<sup>230</sup>

#### (ii) International humanitarian law

Children in war zones are excellent targets for recruitment into armed forces. In light of this, *inter alia*, article 14 of the Fourth Geneva Convention<sup>231</sup> and article 78 of the AP-II

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<sup>221</sup> *Ibid.*

<sup>222</sup> Para. II.33 of the POA.

<sup>223</sup> Ndungu (see note 220 above).

<sup>224</sup> For example, the DRC.

<sup>225</sup> Ndungu (see note 220 above).

<sup>226</sup> C.N. Okereke, 'Implementing the ECOWAS convention on small arms and light weapons: Challenges and prospects' (2008) 1(4) *Arms Control: Africa* 11, 11.

<sup>227</sup> N. Alusala, 'ECOWAS small arms and light weapons convention: Examining implementation' (2008) 1(4) *Arms Control: Africa* 14, 14.

<sup>228</sup> *Ibid.*

<sup>229</sup> Okereke (see note 226 above) 13.

<sup>230</sup> *Ibid.*, 15.

<sup>231</sup> 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War. Geneva: United Nations 75 UNTS 287 (1949).

require State parties to remove children from a war zone to a place of safety.<sup>232</sup> Unfortunately, there is no adherence to this rule, and these children are seen as easy targets for recruitment.<sup>233</sup> The task of removing children from war zones becomes even more complex because the children have nowhere else to go. Also at times the government is too focused on the war that it 'ignores' this obligation. However, some countries have adhered to this rule and have been able to some extent to protect children from recruitment into armed forces. For example, Uganda has created Internally Displaced Camps, called 'protected villages' which are protected by the local militias.<sup>234</sup>

Nonetheless, in times of conflict, the difficulties facing these States are not just internal.<sup>235</sup> The regional and defense organisations capable of helping the States at war can only come to their aid when the situation has neutralized.<sup>236</sup> This means that during the time when the conflict is at its 'prime' the States are in 'isolation'. There are however instances where State parties have actually taken up children from countries that are in armed conflict when they present themselves at their 'doorstep'.<sup>237</sup> Furthermore, in a bid to protect these children, international treaties require international collaboration in respect to children who are seeking refugee status or who are considered refugees.<sup>238</sup> Regrettably, there are also instances where State parties have taken advantage of these children and have deployed them into their armed forces.<sup>239</sup>

Although the two Additional Protocols to the 1949 Geneva Conventions were the first international treaties to address the protection of child soldiers specifically, they do not establish any monitoring or enforcement mechanisms.<sup>240</sup> It can be argued therefore that the two Protocols are futile as far as the protection of child soldiers is concerned because they have not established any measures of implementation or supervision to ensure

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<sup>232</sup> The children can be moved to a neutral country.

<sup>233</sup> Singh (see note 3 above) 209 fn9.

<sup>234</sup> K. A. Apuuli, 'Amnesty and International Law: the case of the Lord's Resistance Army insurgents in Northern Uganda' *African Journal on Conflict Resolution* (2005) 5(2) 33, 40.

<sup>235</sup> Holzgrefe & Kedane (see note 205 above) 23.

<sup>236</sup> *Ibid.*

<sup>237</sup> For example, the Sierra Leone government has set up camps for Liberian children in accordance with international law.

<sup>238</sup> Article 22 of the CRC & Article 33 of the African Charter.

<sup>239</sup> For example, in Uganda the children who escape, are captured, or released from the LRA usually pass through the Uganda People's Defense Force (UPDF) detachments or barracks before transfer to the Child Protection Unit (CPU) and finally, the rehabilitation centers. During this time, these children are 'asked' to join the UPDF. These children are often seasoned fighters, knowledgeable about LRA activities, and are understandably valuable to the UPDF in the fight against the LRA.

<sup>240</sup> Mezmur (see note 11 above) 207.

compliance with their provisions. On the other hand, as will be illustrated further on, although most of the treaties have monitoring and enforcement mechanisms, the provisions of the treaties are not complied with by the member States. Although the fact that the lack of monitoring and enforcement mechanisms is a major setback cannot be dismissed; in relation to treaties that have embodied monitoring and enforcement mechanisms, it can be argued that the problem is more complex than the issue of the establishment of implementation and supervision provisions. Thus, it can be presumed the reason for the continuation of the recruitment of child soldiers is caused by the ineffectiveness of the monitoring and enforcement mechanisms.

### (iii) International human rights law

The enforcement of the international law provisions relating to the recruitment of children lies firstly with the member States of the relevant international treaties. However, as highlighted above in part 2.2.2, the relationship between international law and municipal law is by no means clear-cut. For human rights to be successfully implemented there ought to be a meaningful interplay between international human rights standards and municipal law.<sup>241</sup> In respect to this aspect, there are two schools of thought in the respect; the dualist and the monist. Under the dualist approach, treaties are part of a separate legal system from that of municipal law.<sup>242</sup> Thus, the treaty only becomes applicable when national legislation has been enacted to give the treaty the force of law domestically.<sup>243</sup> On the contrary, under the monist approach, treaties which are ratified by a State are directly applicable in that State.<sup>244</sup>

However, the mere enactment of these laws into municipal law does not always provide for their effective enforcement. Some African States have drafted national legislation, but have failed to implement it.<sup>245</sup> The reluctance or failure of African governments to initiate measures that will help curb the problem is a major factor that encourages the recruitment of child soldiers.<sup>246</sup> Although member States have international obligations and national

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<sup>241</sup> Mubangizi (see note 116 above) 32.

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*

<sup>244</sup> *Ibid.*

<sup>245</sup> For example, some of the governments of these countries have laid down the minimum age for recruitment but at times, these legal limitations are defied at will and government forces recruit under-aged children.

<sup>246</sup> For example, in Sierra Leone, despite government promises and claims to the contrary, up to 30% of the government-sponsored Citizens Defence Forces (CDF) in some areas are between 7 and 14 years of age.

legislation which prohibit the recruitment of child soldiers, many African governments resort to recruiting child soldiers during armed conflicts and might therefore be reluctant to initiate measures to curb the problem. For example, the Uganda People's Defence Force (UPDF) and the Local Defense Unit (LDU) during the civil war in Uganda recruited children into their forces;<sup>247</sup> and the Citizens Defence Forces (CDF) in Sierra Leone and Forces armées de la République démocratique du Congo (FARDC) in the DRC recruit children into its forces.<sup>248</sup>

Many of these laws have incorporated stipulations that diminish their effectiveness. For example, despite the fact that Uganda and Chad have laid down 18 years as the minimum age for recruitment, these governments accept children who are younger than 18 with parental consent to be recruited into army.<sup>249</sup> In cases of prolonged internal conflict, as is the case in some of the African States, the governments may simply not have the resources or even the will to enforce these laws as they will be preoccupied with other considerations.<sup>250</sup>

It is important to note that during the negotiations of these treaties; which must be implemented into the municipal law, promises are made and decisions are generally taken by leaders meeting for a few days periodically, and usually eager to conclude the deliberations as soon as possible and return home.<sup>251</sup> Then the implementation of these decisions is left for the international community, which is unable to achieve this without the appropriate means and resources from the authors of these promises.<sup>252</sup> Thus, even though during the negotiations of treaties, States have committed to prevent the recruitment of child soldiers, this has not transpired due lack of commitment. For example, the African Charter Committee has not been able to function adequately due to lack of appropriate means and resources from the State parties.<sup>253</sup> This means that the Committee cannot

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<sup>247</sup> Human Rights Watch 'Uganda' <http://www.hrw.org/reports/2003/uganda0303/uganda0403-02.htm#TopOfPage> accessed on 1 October 2009.

<sup>248</sup> Security Council, *Children and armed conflict - Report of the Secretary-General* (2009) UN Document A/63/785-S/2009/158.

<sup>249</sup> Coalition to Stop the Use of Child Soldiers 'Africa Report' 2001 (see note 57 above).

<sup>250</sup> Kalis (see note 77 above).

<sup>251</sup> Ayissi (see note 86 above) 6.

<sup>252</sup> *Ibid.*

<sup>253</sup> A. Llyod, 'How to guarantee credence; Recommendations and proposals for the African Committee of Experts on the Rights and Welfare of the Child' (2004) 12 *International Journal of Children's Rights* 21, 28.

address the issue of child soldiers without the appropriate means and resources for it to function adequately.

As highlighted above in part 1.1, the main enforcement mechanism of both the CRC and the Optional Protocol to the CRC is the 'reporting' system to the CRC Committee. The major problem is that this enforcement mechanism is very weak,<sup>254</sup> and the seriousness with which the States treat the reporting process varies widely.<sup>255</sup> In addition, some of the member States do not submit their reports on time; and at times they do not submit their reports at all. Important to note is that particularly in Africa, although there have certainly been developments,<sup>256</sup> both the political willingness to adhere to already existing obligations, as well as the readiness to think along new lines in terms of more effective enforcement mechanisms, which are necessary prerequisites for improved enforcement are lacking.<sup>257</sup>

In theory, the enforcement mechanisms in the African Charter are much stronger than those found in the CRC.<sup>258</sup> Not only do the enforcement mechanisms include the reporting procedure, they also include individual complaints and investigations.<sup>259</sup> These additional enforcement mechanisms are beneficial to child soldiers because they present other means by which the problem can be brought to the attention of the Committee. The reporting system, as highlighted above in the cases of the CRC and the Optional Protocol to the CRC, is a very weak enforcement mechanism. The latter mechanisms, although they are found in the Charter, have been developed by the Committee by way of draft guidelines.<sup>260</sup> The respective draft guidelines were, inter alia, the Draft Guidelines for the Consideration of Communications (Guidelines for Communications) and the Draft Guidelines for the Conducting of Investigations (Guidelines for Investigations).<sup>261</sup>

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<sup>254</sup> Mezmur (note 11 above) 209.

<sup>255</sup> *Ibid.*

<sup>256</sup> For example, there has been an improvement in relation to submitting reports by some State parties to the African Charter. Mezmur (see note 134 above) 16.

<sup>257</sup> *Ibid.*

<sup>258</sup> Chirwa (see note 23 above) 169.

<sup>259</sup> Article 43, article 44 & article 45.

<sup>260</sup> The various guidelines were presented by the Committee members during the 8<sup>th</sup> session and were subsequently adopted at the end of the meeting.

<sup>261</sup> B.D. Mezmur 'Still an infant or now a toddler? The work of the African Committee of Experts on the Rights and Welfare of the Child and its 8<sup>th</sup> ordinary session' (2007) 7 *African Human Rights Law Journal* 258, 259.

The Guidelines for Communications define ‘communications’ as ‘any correspondence or any complaint from a State, individual or NGO denouncing acts that are prejudicial to the right or rights of the child.’<sup>262</sup> The African Charter Committee may admit a communication from a State non-signatory to the Charter in the overall best interest of the child.<sup>263</sup> The Guidelines for Communications also addresses the issue of admissibility;<sup>264</sup> which was not dealt with previously in the Charter.<sup>265</sup> Interestingly, the possibility for the complainant requesting that the Committee reconsider its decision by providing additional documents or facts is also provided for.<sup>266</sup> The Committee can consider provisional or interim measures, the purpose of which is to avoid irreparable damage to victims or complainants, during the course of the consideration of the communication.<sup>267</sup> However, the considerations of the communications are of a confidential nature; the communications are considered in a session held in camera.<sup>268</sup> Positively, the Guidelines embed one of the four cardinal principles of the African Charter, namely ‘child participation’, into the communication procedure.<sup>269</sup> Furthermore, the Committee has established a follow-up mechanism to its on communications, by designating one of its members to be responsible for the monitoring of its decision.<sup>270</sup>

In relation to ‘investigations’ the investigation missions can be initiated either by the Committee or at the invitation of a member State.<sup>271</sup> Article 14 deals with publicizing the mission and inviting the public and all individuals likely to contribute to the mission’s success. At the end of the mission the mission delegation must to prepare two reports. Firstly, the delegation, before leaving the country, must prepare a report presenting the preliminary results of its investigation which is to be communicated to the government and the media.<sup>272</sup> Later the mission’s final report must be prepared. The mission report is expected to make recommendations.<sup>273</sup> Positively, the Committee has also established follow-up mechanisms in this regard. The Member State visited in the mission could be

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<sup>262</sup> Chapter 1, article 2(1) of the Guidelines for Communications.

<sup>263</sup> Chapter 2, article 1(II)(2) *ibid.*

<sup>264</sup> Chapter 2, article 1(III)(b)-(c) *ibid.*

<sup>265</sup> Mezmur (see note 261) 264.

<sup>266</sup> Chapter 2, article 2(II)(3) of the Guidelines for Communications.

<sup>267</sup> Chapter 2, article 2(IV)(1) *ibid.*

<sup>268</sup> Chapter 3, article 1 *ibid.*

<sup>269</sup> Chapter 3, article 3(3) *ibid.*

<sup>270</sup> Chapter 3, article 4(1) *ibid.*

<sup>271</sup> Article 4(1) & (2) *ibid.*

<sup>272</sup> Article 12 *ibid.*

<sup>273</sup> Article 23 *ibid.*

requested, within six months after the mission or adoption of a decision by the Committee, to present a written reply on any measures taken in light of the recommendations made in the mission report.<sup>274</sup> Civil society could also be requested to furnish information on the situation on the ground.<sup>275</sup>

Although, an individual complaint has not yet been brought before the Committee nor has an investigation mission been carried out in relation to the recruitment of child soldiers; these mechanism would be significant in addressing the problem of child soldiers. As highlighted above, in respect of ‘communications’, the scope of individuals that can present a communication before the Committee is quite wide.<sup>276</sup> Furthermore, the Committee has wide jurisdiction in respect of this mechanism because it is applicable to non-signatories to the Charter provided it is in the overall best interest of the child.<sup>277</sup> The Committee also has the power to issue provisional or interim measures; which will help to avoid irreparable damage to victims or complainants, during the course of the consideration of the communication.<sup>278</sup> Interestingly, the complaint can request that the Committee reconsider its decision by providing additional documents or facts.<sup>279</sup> More importantly, the Committee has established a follow-up mechanism to both, communications and investigation missions; which means that the Committee has the power to monitor its decision. On the other hand, the confidentiality nature of communications can account to the ineffectiveness of the Committee in the early years of its existence, just as it was with the African Commission.<sup>280</sup> The transparency of the Committee procedure will also not be monitored if the confidentiality principle were strictly adhered to.

However, despite their potential contributions, the mechanisms seem to be drawing less attention from the Committee.<sup>281</sup> When it comes to communications, the Committee takes long to consider them; and the longer it takes the more it allows the perpetuation of the

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<sup>274</sup> Article 26(1) *ibid.*

<sup>275</sup> Article 27(2) *ibid.*

<sup>276</sup> A communication may be presented by individuals, including the child victim and/or his parents or legal representatives, a group of individuals or NGOs recognized by the OAU, by a member State or by any other institution of the UN. Mezmur (see note 261 above) 262.

<sup>277</sup> Chapter 2, article 1(II)(2) *ibid.*

<sup>278</sup> Chapter 2, article 2(IV)(1) of the Guidelines for Communications.

<sup>279</sup> Chapter 2, article 2(II)(3) *ibid.*

<sup>280</sup> Chirwa (see note 23 above) 170.

<sup>281</sup> Mezmur (see note 11 above) 208.

violation of children's rights.<sup>282</sup> For example, the Committee received a communication that was prepared by the Centre for Human Rights of the University of Pretoria in 2005, and it only appeared on the Committee agenda during the 13<sup>th</sup> session which was held in 2009.<sup>283</sup> Consequently, at the end of the session, the communication had still not been dealt with.<sup>284</sup> The complaints mechanism is a powerful mechanism, if only the Committee were prompt in their considerations.<sup>285</sup> Furthermore, the Committee is reluctant in initiating investigative missions that look into the problem of child soldiers,<sup>286</sup> despite the fact that the problem is on a rampage in Africa.<sup>287</sup> The failure of the Committee to initiate the additional enforcement mechanisms can be attributed to the various problems it faces, such as, financial problems, overdue reports and more recently, backlogs.<sup>288</sup>

Besides, the African Charter, the African regional human rights system, created under the auspices of the OAU,<sup>289</sup> is also comprised of, inter alia, the Banjul Charter; which created the African Commission on Human and Peoples Rights (African Commission).<sup>290</sup> The African Commission monitors compliance by member States with the Banjul Charter, inter alia, in terms of their Rules of Procedure<sup>291</sup> and in terms of the Reporting Guidelines for State Reports.<sup>292</sup> Furthermore, as part of its protective mandate, the Commission is competent to entertain applications from individuals and NGOs alleging violations of the Charter.<sup>293</sup> However, the Commission has been criticised as being generally unable to 'act as a forceful guardian of rights'.<sup>294</sup> Naldi argues that a literal reading of the Charter certainly suggests that the Commission possesses relatively weak powers of investigation

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<sup>282</sup> Sloth-Nielsen & Mezmur (see note 22 above) 346.

<sup>283</sup> *Ibid.*

<sup>284</sup> *Ibid.*

<sup>285</sup> The individual complaints give the Committee 'hands on' on the situation on the ground.

<sup>286</sup> Mezmur (see note 11 above) 208.

<sup>287</sup> Singh (see note 3 above) 206.

<sup>288</sup> For example, during the second ordinary session of the African Charter Committee, 36 reports were overdue. However, during the 10<sup>th</sup> ordinary session, there was some improvement because at least a few reports were submitted. Unfortunately, during the 11<sup>th</sup> and 12<sup>th</sup> ordinary sessions the problem was not with the non-submissions of reports. The concern was that with a number of additional member State reports already clamoring for attention, there is was a real danger that backlogs would arise.

<sup>289</sup> Which has now been replaced by the African Union.

<sup>290</sup> C. Heyns 'The African regional human rights system: In need of reform?' (2000) 1(2) *African Human Rights Law Journal* 155, 155.

<sup>291</sup> Rules of Procedure ACHPR/RP/XIX.

<sup>292</sup> Reporting Guidelines for State Reports AFR/COM/HPR.5(IV)

<sup>293</sup> Articles 55-9 of the Banjul Charter and chp. XVII of the Rules of Procedure.

<sup>294</sup> G.J. Naldi 'Interim measures of protection in the African system for the protection of human and peoples rights' (2002) 2(1) *African Human Rights Law Journal* 1,3.

and enforcement.<sup>295</sup> Although the African Charter does not provide for interim measures, rule 111 of the Rules of Procedure does. The purpose of interim measures is to avoid irreversible damage being caused to the victim and/or to protect the interests of the parties or to ensure the proper conduct of the proceedings.<sup>296</sup> Although the matters were not linked to the issue of child soldiers, the Commission has indicated interim measures in a number of cases.<sup>297</sup> Unfortunately, Africa has often been criticised on account of its human rights record, and the African Charter system in particular has been subjected to stringent criticism due to its apparent inability to improve the situation.<sup>298</sup>

However, the creation of an African Court on Human and Peoples Rights (the African Court)<sup>299</sup> with the specific task of reinforcing the role of the Commission would appear to enhance in theory the prospects of promoting the protection of human rights in Africa.<sup>300</sup> Once in force, the African Court will create an African regional human rights court. Most critics believe that if the African Commission is complemented by an African Court, then the latter may be just what is needed to ‘give teeth’ to the African human rights system.<sup>301</sup> Thus, just maybe the rights of the children in armed conflicts might be protected.

#### (iv) International criminal law

The current model of international criminal law is largely based on retributive justice, as it focuses on the criminal responsibility of perpetrators, rather than the concerns for victims.<sup>302</sup> Thus, the international criminal law mechanism of accountability is through the prosecution of those who recruit child soldiers. As highlighted above in part 2.2.3, the Rome Statute states that the recruitment of child soldiers into armed forces is a war crime. The ICC, established through the Rome Statute, has the power to exercise its jurisdiction over any person guilty of committing an act that is considered a war crime under the above instrument.<sup>303</sup>

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<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid* 5.

<sup>297</sup> *Ibid* 6.

<sup>298</sup> Heyns (see note 290 above) 156.

<sup>299</sup> Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights OAU/LEG/MIN/AFCHPR/PROT (III).

<sup>300</sup> Heyns (see note 290 above) 156.

<sup>301</sup> K. Hopkins ‘The effect of an African Court on the domestic legal orders of African States’ (2002) 2(2)

*African Human Rights Law Journal* 234, 234.

<sup>302</sup> Musila (see note 6 above) 323.

<sup>303</sup> Article 1 of the Rome Statute.

When prosecutions are sought after the cessation of hostilities and the signing of a national or bilateral peace agreement, special courts are established.<sup>304</sup> At times, because of the terms of the peace agreements, perpetrators are not prosecuted.<sup>305</sup> The international community has criticised this culture of impunity.<sup>306</sup> In relation to this aspect, the UN Resolution 1379 states that member States should put an end to impunity, and prosecute perpetrators for war crimes.<sup>307</sup> Critically analysing the situation, the member States have to choose the lesser of two evils: either to prosecute the perpetrators, and face the possibility of the continuation of the armed conflict and the recruitment of child soldiers, or to offer the perpetrators amnesty, and hope that the fighting and recruitment will cease.<sup>308</sup> In accordance with their international commitment, member States are required to fulfill their State obligation of protecting child soldiers against recruitment. It can be argued that the member States are fulfilling their State obligation when they offer the perpetrators amnesty instead of prosecuting them. This is because when an amnesty 'deal' is concluded, the armed conflict ceases; thus resulting in the end to child recruitment into armed forces.

In June and August of 2007, the Special Court of Sierra Leone (SCSL) released its first two judgements,<sup>309</sup> which were the first judgments at international level to address the recruitment of child soldiers.<sup>310</sup> Currently it is trying, in the Hague, the case against Liberia's Charles Ghankay Taylor, who is being charged, *inter alia*, for the recruitment of child soldiers.<sup>311</sup> The civil war in Sierra Leone brought the CDF into conflict with the AFRC. The CDF was a security force which supported the official government of Sierra Leone while the AFRC, which was backed by the then Liberian president, Charles Taylor, had taken power by means of a coup. During the conflict, both forces committed a series of human rights violations which were classified as war crimes under the Rome Statute. *Inter alia*, they were charged with the enlisting of children under 15 into armed forces. The importance of AFRC and CDF judgments is the fact that they were the first at the

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<sup>304</sup>For example, the International Tribunals for the former Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL) and the International Criminal Tribunal of Rwanda (ICTR).

<sup>305</sup>Tiefenbrunn (see note 2 above) 482.

<sup>306</sup>Article 9(4) of the UN Security Council Resolution 1379.

<sup>307</sup>*Ibid.*

<sup>308</sup>The action of the State can be justified by the defence of 'necessity' which is found under Criminal law.

<sup>309</sup>The AFRC judgment and the CDF judgment.

<sup>310</sup>D. Bodansky 'Special Court of Sierra Leone-International criminal law-Crimes against humanity-War crimes-Recruitment and use of child soldiers' (2007) 101 *American Journal of International Law* 848, 849.

<sup>311</sup>*Prosecutor v Charles Taylor* SCSL-03-01-PT.

international level to address the recruitment of child soldiers.<sup>312</sup> Both judgments resulted in a number of convictions and also acquittals. Inter alia, the three leaders of the AFRC were found guilty of recruitment of under-15s. In the CDF judgment, the two militia leaders were not found guilty for recruitment of under-15s because there was insufficient evidence to prove the charges beyond a reasonable doubt.<sup>313</sup> However, the convictions are a positive aspect in the sense that it sends a clear message to the international community that perpetrators of child soldiers related war crimes will be prosecuted.

The AFRC judgment represented the first legal analysis by an international tribunal of the war crime of recruiting under-15s into armed forces. The tribunal held that the recruitment of child soldiers had attained the status of customary international law.<sup>314</sup> In support of this, the CDF judgment clarified this ruling by finding that the recruitment of child soldiers had since been proscribed under customary international law.<sup>315</sup> This was a very significant recognition because it means that the rule is applicable to every State and no ratification is needed to occur in order for it to be effective. Thus, the perpetrators cannot base their argument on the principle of criminal legality;<sup>316</sup> and this standard is binding on both State and non-State actors.

Importantly, the ICC's first trial focuses on child soldiers.<sup>317</sup> This first ICC trial makes it clear that the recruitment of children in armed combat is a war crime that will result in prosecution at international level.<sup>318</sup> The ICC trial marks a significant step in efforts to establish responsibility for the recruitment of children into armed forces.<sup>319</sup> However, these efforts are hampered by States which decide to 'harbour fugitives' rather than arrest and surrender them to the ICC.<sup>320</sup> For example, when the SCSL issued a warrant of arrest for Charles Taylor for charges of war crimes, he was guaranteed safe exile in Nigeria. The Nigerian government acted on the basis that Charles Taylor was protected by refugee

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<sup>312</sup> A. Marlowe & V. Oosterveld 'International Decision: Special Court for Sierra Leone-International Criminal Law-Crimes Against Humanity-War Crimes-Recruitment and Use of Child Soldiers' (2007) 101 *American Journal of Law* 848, 849.

<sup>313</sup> CDF judgment para 692-3.

<sup>314</sup> *Ibid* para 731.

<sup>315</sup> AFRC judgment para 197.

<sup>316</sup> The basis of the principle of legality is that there is no retrospective criminalisation.

<sup>317</sup> *Prosecutor v Thomas Lubango Dyllo ICC-01/04-01/06*.

<sup>318</sup> Human Rights Tribune 'DRC: ICC's First Trial Focuses on Child Soldiers' <http://www.humanrights-geneva.info/DRC-ICC-s-First-Trial-Focuses-on,4048> accessed on 1 October 2009.

<sup>319</sup> *Ibid*.

<sup>320</sup> Khulumani Support Group 'Ignoring ICC warrant is 'unconstitutional'' <http://www.khulumani.net/in-the-media/news/news-2009/341-ignoring-icc-warrant-is-unconstitutional.html> accessed on 3 September 2009.

status.<sup>321</sup> He was later on arrested whilst trying to cross the border into Cameroon. More recently, on the 4<sup>th</sup> of July 2009, the ICC issued a warrant of arrest against the Sudanese President, Omar Hassan Ahmad al-Bashir, for charges of war crimes; inter alia, the recruitment of child soldiers, and delivered the warrant to the Sudanese government, but up to now no action was taken. From the comments by the government, it is not likely that it will execute the warrant of arrest.

The most distressing aspect is that the African Union has opposed the decision of the Court, and yet the member States are parties to international law that prohibits this practice of recruiting child soldiers; but they candidly refuse to allow justice to prevail.<sup>322</sup> However, non-governmental organisations have opposed the decision of the African Union not to co-operate with the International Criminal Court over the arrest of Sudanese president Omar al-Bashir.<sup>323</sup> Most of these African States that have shielded Omar al-Bashir have ratified the Rome Statute – making it binding on them to arrest him should he enter their respective countries.<sup>324</sup> Thus, ignoring the ICC warrant is contrary to their obligation under international law.<sup>325</sup> However, this aspect shows the weakness of international law because there are no provisions that address the issue of compelling member States to fulfil their international obligations, and the measures that can be taken for non-compliance.

One of the most controversial concerns surrounding child soldiers is the issue of criminal responsibility of child soldiers for atrocities they themselves have committed in armed conflicts. Child soldiers are responsible for some of the most horrific atrocities and breaches of human rights committed in armed conflicts and therefore under international law.<sup>326</sup> Different views are held about the question of accountability after the war.<sup>327</sup> McIntyre argues that the notion of children themselves perpetrating atrocities has been met

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<sup>321</sup> Amnesty International 'Nigeria: Amicus Curiae brief submitted to the Federal High Court reviewing refugee status granted to Charles Taylor' (2004) AI Index: AFR 44/030/2004 1, 3.

<sup>322</sup> Khulumani Support Group (see note 319 above).

<sup>323</sup> *Ibid.*

<sup>324</sup> Article 59 of the Rome Statute.

<sup>325</sup> In accordance with article 87(7) of the Rome Statute, if a member State ignores its obligation 'the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'.

<sup>326</sup> Musila (see note 6 above) 321.

<sup>327</sup> Some, hold the view that children should be tried and punished, while others argue that since they are children efforts should focus on rehabilitation.

with scepticism, antagonism and hasty dismissals of responsibility.<sup>328</sup> On the other hand, Musila argues that ‘one cannot take an absolutist stance on this, as child soldiers, though guilty of crimes, are themselves victims’.<sup>329</sup> Happold argues that children should be accountable for the atrocities they commit; he poses a very controversial and complex question as to how far it should be taken into account that child soldiers are forcefully recruited into armed forces and are then abused by being forced to commit atrocities.<sup>330</sup>

Under international law, the prosecution of children is not prohibited.<sup>331</sup> Although not necessarily addressed, both the CRC and the African Charter do not exclude the prosecution of children at international level.<sup>332</sup> In international criminal law, neither the ICC, International Tribunal for the former Yugoslavia (ICTY) nor International Tribunal of Rwanda ICTR) has explicitly given jurisdiction to tribunals to try juveniles. The Rome Statute expressly prohibits the prosecution of children.<sup>333</sup> However, the Statute of the SCSL is the first international document that expressly provides for the prosecution of children for international crimes.<sup>334</sup> It has been argued that if prosecution is to be considered as an option for holding child soldiers accountable, in both international and national courts, certain minimum standards should be met to cater for their vulnerable positions.<sup>335</sup> More disturbing is that, as highlighted in part 1.5, children join armed forces due to distress, but the ICTY has denied the defence of duress for war crimes involving killing.<sup>336</sup> Nevertheless, there have been positive developments from the ICC, which appears to overrule the case law of the ICTY which denies the defence of duress for war crimes involving killing.<sup>337</sup> Thus children who are forcefully recruited into armed forces and are then abused by being forced to commit atrocities can now raise the defence of duress. This aspect caters for the vulnerable position of children.

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<sup>328</sup> McIntyre (see note 91 above) 7.

<sup>329</sup> Musila (see note 6 above) 322.

<sup>330</sup> M. Happold *Child Soldiers in International Law*, Manchester: Manchester University Press, 2005, 183.

<sup>331</sup> Mezmur (see note 11 above) 211.

<sup>332</sup> They do not preclude the prosecution of children of whatever age, but it is recognised that children can be tried in accordance with domestic law, and they provide special protection for children within such process. Article 40 of the CRC and article 17 of the African Charter.

<sup>333</sup> Article 26 of the Rome Statute.

<sup>334</sup> Article 7 of the Statute to the SCSL.

<sup>335</sup> Mezmur (see note 11 above) 212.

<sup>336</sup> *The Prosecutor v. Drazen Erdemovic* Case No. IT-96-22-T.

<sup>337</sup> Article 31(1)(d) of the Rome Statute allows for the defence of duress for war crimes involving killings.

It is asserted that the retributive paradigm of international criminal law is narrow in perspective, since it does not make a distinction of the different kinds of perpetrators that may require special attention.<sup>338</sup> In support of this contention, Musila argues that international criminal law, as currently structured, is not suited for the child perpetrator.<sup>339</sup> A number of international human rights organisations have objected to children being held criminally accountable for their actions because they view prosecution as being detrimental to the rehabilitation of the child.<sup>340</sup> Instead of ordering imprisonment, the Statute of the SCSL can order a limited number of rehabilitative measures.<sup>341</sup> Although the ICTY supports the retributive program of international law, it should move away from this mindset and incorporate rehabilitative measures. In regards to the Rome Statute, it is commendable as it prohibits the prosecution of children,<sup>342</sup> and the only inference that can be drawn from this is that it thus favours rehabilitative measures. Recently, the international responses to atrocities committed by children have seen favour for 'hybrid' tribunals, which facilitates the employment of domestic options of restorative justice mechanisms, hand in hand with the rehabilitative justice mechanisms.<sup>343</sup>

#### (iv) International labour law

Article 7(1) of the ILO Convention 182, states that member States are obliged to provide for the effective enforcement and implementation of the provisions contained in the instrument by imposing penal sanctions for breaches and non-compliance. As has been seen over the years, the agents of the States do not comply with these provisions.<sup>344</sup> For example, the government-sponsored militia forces recruit child soldiers.<sup>345</sup> What is more disturbing is that at times, governments of the member States do not impose penal sanctions on their agents.<sup>346</sup> For example, both the Ugandan and Sierra Leonean governments were aware of the fact that their government-sponsored militia forces, respectively, the LDU and CDF were recruiting child soldiers into their forces, but no penal

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<sup>338</sup> D Van Bueren 'The international law on rights of the child' cited in Musila (see note 6 above) 325.

<sup>339</sup> Musila (see note 6 above) 324.

<sup>340</sup> Bell & Abrahams (see note 96 above) 180.

<sup>341</sup> Article 7(2) of the Statute of the Special Court of Sierra Leone (2002).

<sup>342</sup> Article 26 of the Rome Statute.

<sup>343</sup> For example, in Sierra Leone, the operation of the TRC side by side with the SCSL. Musila (see note 6 above) 324.

<sup>344</sup> Human Rights Watch 'More than 120 000 children fighting in Africa' <http://www.hrw.org.press/1999/aps/cs0419.htm> accessed 8 February 2009.

<sup>345</sup> *Ibid.*

<sup>346</sup> Article 1 of the ILO Convention 182.

sanctions were issued against the forces.<sup>347</sup> It will be unfair for the government to impose sanctions for non-compliance on non-state agents, if it is not going to impose sanctions for non-compliance to its own agencies. This was an oversight on the part of the drafters of the ILO Convention 182.

#### (v) Conclusion

In conclusion it can be argued that the reason for the continuation of the recruitment of child soldiers is caused by the ineffectiveness of the monitoring and enforcement mechanisms. Important to note is that particularly in Africa, both the political willingness to adhere to already existing obligations, as well as the readiness to think along new lines in terms of more effective enforcement mechanisms, which are necessary prerequisites for improved enforcement are lacking. Furthermore, the relationship between international law and municipal law is by no means clear-cut. In respect to this aspect, there are two schools of thought in the respect; the dualist and the monist. However, some of the African States, who believe in the dualist theory, have implemented international law prohibiting the recruitment of child soldiers into armed forces into their municipal law, but have failed to implement it. Many of these laws have incorporated stipulations that diminish their effectiveness. Thus, the reluctance or failure of African governments to initiate measures that will help curb the problem is a major factor that encourages the recruitment of child soldiers.

#### 2.4 LIMITATIONS OF THE INTERNATIONAL LAW RELATING TO THE RECRUITMENT OF CHILD SOLDIERS

The recruitment of child soldiers is paradoxical, in that international law relating to the recruitment of child soldiers is contradictory.<sup>348</sup> It is therefore not surprising that the law relating to the recruitment of child soldiers is vague and often unclear. Thus, after considering all the relevant treaties, the provisions that relate to child soldiers are conflicting with each other and this causes a fair amount of legal ambiguity.<sup>349</sup> For example, AP-I, AP-II, CRC, and the Rome Statute set 15 years as benchmark for recruitment, whilst the African Charter, Optional Protocol to the CRC and the ILO

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<sup>347</sup> Human Rights Watch 'Uganda' (see note 247 above) and CDF judgment.

<sup>348</sup> Bell & Abrahams (see note 96 above) 162.

<sup>349</sup> *Ibid* 188.

Convention 182 take the straight-18 approach.<sup>350</sup> Furthermore, the treaties defer in relation to the nature of the hostilities. The AP-I, CRC, African Charter, Optional Protocol to the CRC all prohibit children from taking ‘direct part’ in hostilities, whilst the AP-II and the Rome Statute refer to both ‘direct’ and ‘indirect’ hostilities.<sup>351</sup>

As highlighted above in part 2.2.1, the AP-II focuses on internal conflicts. The AP-II requires a higher degree of intensity for its application, as it does not apply to riots or to isolated and sporadic acts of violence, which have not reached the level of internal armed conflicts.<sup>352</sup> Unfortunately, its application in the African context will be close to non-existent because most current conflicts involving child soldiers in Africa will be below the AP-II threshold since they will not have reached the so-called ‘level of internal armed conflicts’.<sup>353</sup> On a positive note, article 22(3) of the African Charter provides that it applies to children caught up in lower levels of violence described as ‘tension and strife’. With regards to this aspect, the African Charter breaks new ground by expanding the scope of international humanitarian law. The provisions of the Charter apply to children in situations of internal tension and strife which were ordinarily regulated by domestic law.<sup>354</sup> Thus, children involved in riots, isolated and sporadic acts will be protected by the African Charter.

The two Additional Protocols to the Geneva Convention, CRC and Rome Statute state that a child soldier is any person under the age of eighteen, but above the age of 15. Surprisingly, as mentioned above, the CRC defines a child as any person ‘below the age of 18 years unless under the law applicable to the child, majority is attained earlier’,<sup>355</sup> but later on in the document it provides 15 as the minimum age of recruitment.<sup>356</sup> The reason behind this contradiction is that the ‘straight 18’ position could not be adopted as it faced serious challenges from countries like the US.<sup>357</sup> The ‘straight 18’ position was challenged due to the fact that some of the countries involved during the finalizing of the instrument

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<sup>350</sup> Article 77(2) of the AP-I, article 4(3)(c), article 38(2) of the CRC, article 8(2)(b)(xxvi) of the Rome Statute, article 22(2) of the African Charter, article 1 of the Optional Protocol to the CRC and article 1 of the ILO Convention 182.

<sup>351</sup> *Ibid.*

<sup>352</sup> Mezmur (see note 11 above) 201.

<sup>353</sup> *Ibid.*

<sup>354</sup> G. Van Bueren ‘The international law on rights of the child’ cited in Musila (see note 6 above) 327.

<sup>355</sup> Article 1 of the CRC.

<sup>356</sup> Article 38 *ibid.*

<sup>357</sup> Mezmur (see note 11 above) 202.

permitted recruitment of under-18s, and they did not want to move away from that practice.<sup>358</sup> For example, 17 year olds have been a major part of US military recruitment.<sup>359</sup>

Ironically, in a number of countries the age of majority is deemed to be twenty-one,<sup>360</sup> and a number of international and regional treaties regard 18 as the minimum age for recruitment into armed forces.<sup>361</sup> Thus, there is already some indication of contradicting provisions between the age of majority in a number of countries and the minimum age of recruitment into armed forces. The failure of the CRC to adopt the 'straight 18' position is what led to the drafting and subsequent adoption of the Optional Protocol to the CRC.<sup>362</sup> The conflicting provisions contained in the various legal treaties dealing with child soldiers create legal uncertainty and at the end of the day result in further injustice for the child.<sup>363</sup>

The issue of age is a complex one. The two Additional Protocols of 1977, the CRC and the Rome Statute prohibit recruitment of under-15s into armed forces. The AP-I is only applicable to international armed conflict, and the AP-II is applicable to non-international conflicts. The Optional Protocol to the CRC, African Charter and the ILO Convention 182 raise the minimum age of recruitment from 15 to 18. The Optional Protocol to the CRC has, nevertheless, retained 15 years as the minimum age of voluntary enlistment. The discrepancy in the ages illustrates how international law is inconsistent.

The two Additional Protocols of 1977, the CRC, the Rome Statute and the Optional Protocol to the CRC urge the State parties to take 'all feasible measures' to ensure that persons who have not attained the age of 15 years are not recruited into armed forces.<sup>364</sup> The nature of the State obligation is vague. The employment of the expression 'all feasible measures' could be considered as a lesser and more imprecise obligation on the part of the

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<sup>358</sup> 'The International Save the Children Alliance position on an Optional Protocol to the Convention on the Rights of the Child regarding the use and the recruitment of children in hostilities' <http://www.scslat.org> accessed 1 October 2009.

<sup>359</sup> B. Yarchyk 'Compliance decisions with regards to the UN Convention on the Rights of the Child and the two Optional Protocols: Reflections on the theories of international law' (2008) Honours Thesis, Ohio State University 1, 26.

<sup>360</sup> In South Africa, the Age of Majority Act 57 of 1972 has recently been amended by the Children's Act 38 of 2005 to reduce the age of majority to eighteen.

<sup>361</sup> The African Charter and Optional Protocol to the CRC.

<sup>362</sup> Mezmur (see note 11 above) 202.

<sup>363</sup> Bell & Abrahams (see note 96 above) 164.

<sup>364</sup> Article 77(2) of the AP-I, article 4(3)(c) of the AP-II, article 38(2) of the CRC, article 1 of the Optional Protocol to the CRC and article 8(2)(b)(xxvi) of the Rome Statute.

State,<sup>365</sup> as compared to ‘all necessary measures’ which has been adopted by the African Charter; thus obviously according a better standard of protection for children. Simply requiring that State parties in international armed conflict take all ‘feasible measures’ provides a claw-back, causing the rule to be emasculated.<sup>366</sup> The scope of the obligation contained in it is one of conduct rather than results.<sup>367</sup>

The CRC, Optional Protocol to the CRC and the African Charter all prohibit children taking a ‘direct part’ in hostilities. ‘Direct’ participation implies a combatant position and excludes supplementary roles (serving as scouts, porters, and the like).<sup>368</sup> Reference to only ‘direct’ hostilities creates a serious limitation of the rule as it fails to refer to and specifically make illegal indirect engagements which are equally damaging for children.<sup>369</sup> Thus, according to the above treaties, this might be taken to mean that children can be recruited into armed forces, as long as they do not take part in direct hostilities. This will however defeat the purpose of international law, which is to protect the children because their mere presence within the vicinity of the war zone is a risk imperilling life, survival and development.

The wording of the above treaties actually lowers the minimum standard set down for internal armed conflicts in the AP-II, which refers to both, ‘direct’ and ‘indirect’ hostilities.<sup>370</sup> More recently the concept of ‘participation in hostilities’ in relation to the provisions in the Rome Statute has been extended 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 check points.<sup>371</sup> This extension is significant for the protection of child soldiers because there is now specific reference to the illegality of recruitment of child soldiers for indirect engagements. Thus, recruitment for both direct and indirect engagements is now prohibited by international law.<sup>372</sup> Consequently, this will only be applicable to State parties to the Rome Statute. Importantly, human rights norms do not have the same status

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<sup>365</sup> Mezmur (see note 11 above) 204.

<sup>366</sup> Singh (note 3 above) 216.

<sup>367</sup> Mezmur (see note 11 above) 204.

<sup>368</sup> *Ibid* 205.

<sup>369</sup> *Ibid*.

<sup>370</sup> Bell & Abrahams (see note 96 above) 172.

<sup>371</sup> Mezmur (see note 11 above) 202.

<sup>372</sup> The Rome Statute.

under international law; some of the norms having achieved the status of customary international law.<sup>373</sup> As highlighted above in part 2.2.1, the norm of the prohibition of recruitment for both direct and indirect hostilities has achieved customary law status. Thus, even if the States are not parties to the Rome Statute, the norm is applicable to them. The norm applies to non-international conflicts,<sup>374</sup> and the significance of this to the African situation is the fact that most of the conflicts in Africa are internal.

The Optional Protocol to the CRC, whilst being an effectual landmark in the plight against the recruitment of child soldiers, does not offer children adequate protection.<sup>375</sup> By allowing voluntary recruitment into a State's armed forces of 15 years olds under article 3(3), it lowers the level of protection for children who volunteer to join governmental armed forces.<sup>376</sup> The idea of voluntarism among child recruits has been fiercely debated, particularly in the context of the notorious forced recruitment methods of groups such as Uganda's LRA, Mozambique's RENAMO and Sierra Leone's RUF.<sup>377</sup> The voluntary participation of these children is often a response to pressure of some subtle nature.<sup>378</sup> For example, the children are coerced into joining the armed forces by being forced to kill those they know, thus making them feel guilty to return to society. Also, a recent study of child soldiers in Central Africa found that two-thirds of the children were recruited 'voluntarily';<sup>379</sup> and in this case as well the issue of volunteerism can be debated. Children sometimes feel compelled due to the political, social and economic conditions directing their lives to 'voluntarily' join the armed forces.<sup>380</sup>

This provision of voluntary recruitment establishes that upon ratification, governments must deposit a binding declaration with the UN General Secretary stating their minimum recruiting age.<sup>381</sup> As shown above in part 1.5, some of the governments of the State parties

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<sup>373</sup> R. Howse & M. Mutua 'Protecting human rights in a global economy: Challenges for the World Trade Organisation' (2000) International Centre for Human Rights and Democratic Development 1, 5. <http://www.ichradd.ca> accessed 1 October 2009.

<sup>374</sup> Article 4(3)(c) of AP-II.

<sup>375</sup> Bell & Abrahams (see note 96 above) 175.

<sup>376</sup> *Ibid.*

<sup>377</sup> McIntyre (see note 91 above) 15.

<sup>378</sup> Van Niekerk (see note 65 above) 65.

<sup>379</sup> N. Cahn 'Poor children: child "witches" and child soldiers in sub-Saharan Africa' (2006) *Ohio State Journal of Criminal Law*, 413, 419.

<sup>380</sup> P.W. Singer & J.J. Myers 'Children at war' <http://www.cccia.org/resources/transcripts/5098.html> accessed on 7 February 2009.

<sup>381</sup> Article 3(2).

have laid down the minimum age for recruitment,<sup>382</sup> but sometimes, these legal limitations are defied at will and government forces recruit under-aged children. For example, despite the fact that Uganda has laid down 18 years as the minimum age for recruitment, the UPDF recruited children under the age of 18 years old.<sup>383</sup> Also Sierra Leone has laid down 17 and a half years as the minimum age for recruitment, but the CDF, a government-sponsored militia force, recruits children under this age into its forces.<sup>384</sup>

Nevertheless, to ensure that recruitment is voluntary, the Optional Protocol to the CRC mandates four safeguards.<sup>385</sup> For reasons discussed above in part 1.5, although the safeguards can play an imperative role in screening out children who do not fulfil the minimum requirements, their practicality in the African context is questionable. For example, the safeguard that requires reliable proof of age prior recruitment is not helpful in Africa. In some parts of Africa, birth registration and identity registration and identity documents are inadequate or not existent and some of the children do not know their age.<sup>386</sup> Many of these children are living in poverty, and often they are without parental care, or live as refugees, displaced or orphans. Thus, it sounds impractical to expect them to sign up voluntarily with the consent of their parents or legal guardians.<sup>387</sup>

However, the possibility of genuine volunteerism, at least in exceptional cases cannot be ruled out.<sup>388</sup> For example, in Sierra Leone, young combatants have a remarkable understanding of the political causes for the war they are fighting and are not coerced by adults to join the armed forces.<sup>389</sup> Therefore, a tension is created between the right to participation,<sup>390</sup> and the right to protection.<sup>391</sup> Nonetheless, this tension is solved by the 'best interests of the child' principle.<sup>392</sup> However, it is important for the international

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<sup>382</sup> Burundi (16), Angola & Sudan (17), Sierra Leone (17.5), Ethiopia, Uganda, Liberia & Rwanda all state that children under the age of 18 may not be recruited, the DRC & Somalia have no legal limitation on child recruitment. Coalition to Stop the Use of Child Soldiers 'Africa Report' 2001 (see note 57 above).

<sup>383</sup> Human Rights Watch 'Uganda' (see note 247 above).

<sup>384</sup> Human Rights Watch 'More than 120 000 children fighting in Africa' (see note 331 above).

<sup>385</sup> Article 3(3) '(a) such recruitment is genuinely voluntary; (b) such recruitment is carried out with the informed consent of the person's parents or legal guardians; (c) such persons are fully informed of the duties involved in such military service; (d) such persons provide reliable proof of age prior to acceptance into armed military service.'

<sup>386</sup> Machel (see note 74 above) 16.

<sup>387</sup> Mezmur (note 11 above) 205.

<sup>388</sup> Lee (see note 26 above) 17.

<sup>389</sup> *Ibid* 13&28.

<sup>390</sup> Article 12 of the CRC.

<sup>391</sup> Mezmur (see note 11 above) 206.

<sup>392</sup> Article 3 of the CRC & article 4 of the African Charter.

community not to disregard the concept of agency which ‘refers to one’s active engagement with the world and their own efforts to cope with adversity’.<sup>393</sup> Children do not live in an abstract world; they are part of the world, and whatever happens in the world has a direct impact on them. Thus, during war time, young people should be given the right to participate in the matters that directly affect them; even if it means them participating directly or indirectly in the conflict.<sup>394</sup>

As mentioned above, the consequence of article 3(3) of the Optional Protocol to the CRC is that it allows voluntary recruitment by the government, while article 4(1) prohibits the same from being exercised by non-governmental armed forces. This is a creditable step since the recruitment of child soldiers is more extensive among non-governmental armed forces than government forces. For example, in the LRA it is reported that children make up 80 percent of its armies,<sup>395</sup> and the Democratic Forces of the Liberation of Rwanda (FDLR) and its sub-groups, Coalition des patriotes résistants congolais (PARECO), Forces démocratiques de libération du Rwanda (FDLR) and the Armed Forces of the DRC (AFRC) continue to recruit children into their forces.<sup>396</sup> The Optional Protocol to the CRC has double standards as it provides different standards for armed forces to a Member State and non-State armed forces.<sup>397</sup> It is most probable that non-State armed forces will not feel obliged to abide by a standard which is different from that imposed on the State.

This aspect also puts in question the issue of impartiality of the whole instrument from the point of view of rebel forces; in the sense that the rebels might deem it irrational and thus, its general application can be undermined.<sup>398</sup> The different standards for State armed forces and the non-State parties were also prescribed in the two Additional Protocols;<sup>399</sup> but considering the difficulties that might result from this, the Optional Protocol to the CRC re-iterated them. The CRC’s travaux préparatoires reveal that some delegations were concerned that specific provisions would derogate from obligations undertaken by State

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<sup>393</sup> Lee (see note 26 above) 25.

<sup>394</sup> *Ibid.*

<sup>395</sup> S. Brownback and R.E. Stearns ‘Africa’s Forgotten War’ *Washington Times* (2005) <http://washingtontimes.com/op-ed/20050308-094129-9853r.htm> accessed 19 June 2009.

<sup>396</sup> Security Council, *Children and armed conflict - Report of the Secretary-General: Uganda and the DRC* (2208) S/2008/693 and Security Council, *Children and armed conflict - Report of the Secretary-General* (2009) A/63/785-S/2009/158.

<sup>397</sup> Bell & Abrahams (see note 96 above) 176; Singh (see note 3 above) 217; Mezmur (see note 11 above) 206-7.

<sup>398</sup> Mezmur (see note 11 above) 207.

<sup>399</sup> AP-I applies to international armed conflicts and AP-II applies to non-international armed conflicts.

parties pursuant to other international treaties.<sup>400</sup> Thus they maintained the *status quo* in respect to some of the provisions that would result in derogations.

As highlighted in part 1.1, the Optional Protocol to the CRC in paragraph 11 of its preamble condemns ‘with the gravest concern the recruitment, training, and use within and across national border children in hostilities by armed forces distinct from the armed forces of a State.’ Unfortunately, a preamble only helps with the interpretation of a treaty in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,<sup>401</sup> and has no enacting force. In the same line, the Palermo Protocol in article 3(c) provides that ‘the recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’’. This lead is not substantiated any further or anywhere else in the respective treaties;<sup>402</sup> thus it has limited use in addressing the issue since it has no substantive provision to regulate the practice. Also, the lead in the preamble of the Optional Protocol of the Convention on the Rights of the Child is not followed in any substantive provision.<sup>403</sup>

Although the two treaties are the only international documents that mention child recruitment across borders they are both of limited use in addressing the issue. Child cross-border recruitment makes the applicability of the existing provisions of the Optional Protocol to the CRC and the Palermo Protocol difficult.<sup>404</sup> The Committee on the CRC has supported the recommendations made by the Secretary General in the report of February 2005 to call upon States to combat illicit cross-border activities harmful to children through the development of bilateral, multilateral and regional arrangements.<sup>405</sup> However, experience has shown that States are reluctant in enforcing obligations especially if they are involved in the practice that has to be prohibited.<sup>406</sup> The international community should

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<sup>400</sup> S. Detrick *The United Nations Convention on the Rights of the Child: A guide to the “Travaux préparatoires”* (1992) Dordrecht: Martinus Nijhoff Publishers 713.

<sup>401</sup> Article 31(1)Vienna Convention on the Law of Treaties 1969.

<sup>402</sup> Mezmur (note 11 above) 208.

<sup>403</sup> *Ibid.*

<sup>404</sup> *Ibid.*

<sup>405</sup> Committee on the Rights of the Child ‘CRC 41th session: Committee considers initial report of Bangladesh on involvement of children in armed conflict’ <http://www.hrea.org/lists/child-rights/markup/msg00377.html> accessed on 5 October 2009.

<sup>406</sup> An example of this is the situation with the Ugandan government.

specifically provide a treaty that has substantive provisions on the child cross-border recruitment because this issue has become wide spread, particularly to Africa.

Thus, the recruitment of child soldiers is paradoxical, in that international law relating to the recruitment of child soldiers is contradictory. It is therefore not surprising that the law relating to the recruitment of child soldiers is vague and often unclear. The conflicting provisions contained in the various legal treaties dealing with child soldiers create legal uncertainty and at the end of the day result in further injustice for the child. As a result, after considering all the relevant treaties, the provisions that relate to child soldiers are conflicting with each other and this causes a fair amount of legal ambiguity.

## CONCLUSION

Despite the various international treaties prohibiting the practice of child recruitment, there is incontrovertible evidence that the problem is continuing on a large scale and new challenges keep emerging.<sup>407</sup> Furthermore, even regardless of the fact that the norm on the prohibition of recruitment of children into armed forces has acquired customary law status, recruitment has still continued. The 'loopholes', vagueness and inconsistencies have the potential of creating legal uncertainty which will ultimately result in further injustice for the child. Due to such a complex and contradictory international law framework, State parties hide themselves behind the lower international standards.

However, article 41 of the CRC states that if any provisions contained in the law of a Member State or international law in force for that State are more conducive to the realisation of the rights of the child, the provisions have to take precedence over the CRC. Although this provision is only applicable to member States of the CRC - the only exceptions are the US and Somalia who are not parties to the CRC - such a standard should be used in respect to all the international treaties that prohibit the recruitment of child soldiers. With the very diverse standards set in the different international treaties, this standard will offer better protection to children involved in the practice. However, the relationship between international law and municipal law is by no means clear-cut. There are two schools of thoughts in this respect; the dualist and the monist. Thus, the enforcement of international human rights into municipal law becomes problematic.

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<sup>407</sup> For example, the issue of cross-border recruitment.

In addition, most of the treaties do not offer equal protection to children who are recruited into armed forces. The issue of age is a complex one. The two Additional Protocols of 1977, the CRC and the Rome Statute prohibit recruitment of under-15s into armed forces. Whilst, the Optional Protocol to the CRC, African Charter and the ILO Convention 182 raise the minimum age of recruitment from 15 to 18. Ironically, in a number of countries the age of majority is deemed to be twenty-one.<sup>408</sup> Thus, there is already some indication of contradicting provisions between the age of majority in a number of countries and the minimum age of recruitment into armed forces. The overall definition of a child under international law is 18 years, thus in order to offer equal protection to children all treaties should have maintained the age of 18, or even increased the age.

It can be argued that the legal uncertainty is not *per se* the cause of recruitment continuing. The cause is more complex than legal uncertainty. Even though the some member States are incorporating the international law into municipal law, they are not being enforced. There is simply no political willingness to enforce these laws. Furthermore, the enforcement and monitoring mechanisms embodied in the treaties are not as effective as was anticipated. The main problem is that there is simply no political willingness to enforce these laws. Although some of the enforcement and monitoring mechanisms have generated positive outcomes; overall, most of them are simply too 'weak' and this has led to the further prejudice for the child. What is needed to curb the problem of child soldiers is a positive attitude from the member States and also support in relation to the enforcement and monitoring mechanisms.

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<sup>408</sup> In South Africa, the Age of Majority Act 57 of 1972 has recently been amended by the Children's Act 38 of 2005 to reduce the age of majority to eighteen.

## CHAPTER 3: THE RECRUITMENT OF CHILD SOLDIERS IN AFRICA: SELECTED ASPECTS

### 3.1 THE RECRUITMENT OF CHILD SOLDIERS IN AFRICA: AN OVERVIEW

Although the issue of ‘child soldiers’ is not peculiar to Africa, research has shown that this problem is critical on this continent. An astonishing part of the continent has been at war, both inter- and intra- State conflicts, for the past decades.<sup>409</sup> A prevalent feature of these conflicts is the widespread recruitment of child soldiers. The recruitment of child soldiers has been prohibited by the international community because it violates the rights of the children.<sup>410</sup> Children who are recruited into armed forces face abusive treatment,<sup>411</sup> their lives are placed in danger, and they are deprived of educational opportunities and livelihoods.<sup>412</sup>

The involvement of children in conflict is not a recent phenomenon. The military use of children dates back to ancient times.<sup>413</sup> This shows that our views regarding the legitimacy and morality of children’s military participation is a historical construct, shaped by particular social and political forces.<sup>414</sup> The fact that the discourse of ‘child soldiers’ exists as a historical construct, there is bound to be possible gaps between the global discourse and local realities.<sup>415</sup> Thus, due to the ‘moral panics and the new wars’;<sup>416</sup> which have changed the global assumptions and images of children,<sup>417</sup> the discourse of ‘child soldiers’ will not be perceived the same way as it was before. The change of warfare and the advocating of the protection of children’s rights within the global discourse context has

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<sup>409</sup> Uganda, Sierra Leone, the DRC, Burundi, Sudan, Guinea, Burkina Faso, Côte d’Ivoire, Somalia, Liberia, Central Africa, Rwanda, Nigeria, Angola, Algeria, Libya, Niger and Chad. Rialize (see note 54 above) 39.

<sup>410</sup> A. McIntyre ‘Rights, root causes and recruitment: The youth factor in Africa’s armed conflicts’ (2003) 12 *African Security Review*, 93, 93.

<sup>411</sup> For example, the children are brutalized in order to harden them into more ruthless soldiers and the recruitment for girls may lead to sex slavery.

<sup>412</sup> UNICEF ‘Children at both ends of the gun’ <http://www.unicef.org/graca/kidsoldi.htm> accessed 5 October 2009.

<sup>413</sup> For example, in ancient civilization of the Spartans, boys were taken from their homes for military training at the age of seven. S. Stavrou *et al* ‘The Reintegration of Child Soldiers and Adducted Children: A case study of Paloro and Pabbo Gala District Northern Uganda’ in E. Bennett (see note 44 above) 25.

<sup>414</sup> Lee (see note 26 above) 2.

<sup>415</sup> *Ibid*.

<sup>416</sup> Moral panic refers to ‘the reaction of social groups to the false or (more often) exaggerated perception that some kind of behaviour or a group is dangerously deviant and poses a menace to the very basis of social order’. E. Ben-Ari ‘Facing child soldiers, moral issues, and ‘real soldiering’: anthropological perspectives on professional armed forces’ (2009) 37(1) *Scientia Militaria: South African Journal of Military Studies* 1, 13.

<sup>417</sup> *Ibid* 12.

taken the discourse on child and youth involvement in conflict out of the political and military context and placed it into one circumscribed by legal and moral concern.<sup>418</sup>

It has been estimated that there are around 300,000 child soldiers worldwide, of which half are in Africa.<sup>419</sup> However, the Coalition to Stop the Use of Child Soldiers has reported a number of more than 500,000 children having been recruited in both, State and non-State armed forces in over 85 countries.<sup>420</sup> Boyden cautions that it is quite ‘ludicrous to talk about child soldiering as an ‘epidemic’ on the basis of speculative UN figures’.<sup>421</sup> Ben-Ari argues that, ‘in an environment pervaded by fears of world disorder, research centres, think tanks, security experts, and researchers in various disciplines linked to policymakers and decision-makers, journalists and the general public have propagated a view of young soldiers as a veritable scourge’.<sup>422</sup> These responses are usually fuelled by media reporting around the issue of the recruitment of child soldiers; such as the speculative figures of children being recruited into armed forces. On a positive note, a recent UN (2009) report indicates that the number of children being recruited into armed forces in Africa is declining.<sup>423</sup>

Since the late 1970s, a number of international instruments have been promulgated to limit the recruitment of child soldiers, but even though the numbers of children being recruited into armed forces has decreased, children continue to be deployed into armed forces, particularly in Africa.<sup>424</sup> One would have thought that with the promulgation of these international instruments that prohibit the recruitment of child soldiers into armed forces, the practice would have been ‘extinct’. The continuous enactment of international instruments that prohibit the recruitment of child soldiers, although it has limited the practice of recruitment of child soldiers, has not stopped the practice in its totality. There are obstacles to an effective protection of children against recruitment by international law. Thus, in order to ‘extinguish’ the practice, it is important to assess the obstacles that have

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<sup>418</sup> McIntyre (see note 91 above) 10.

<sup>419</sup> Musila (see note 6 above) 332.

<sup>420</sup> IRINnews.org ‘Too little to be fighting anyone’s wars’ (see note 51 above).

<sup>421</sup> J. Boyden, ‘Children, War and World Disorder in the 21st Century: A Review of the Theories and the Literature on Children’s Contributions to Armed Violence’ (2006) 138 *Working Paper Series* 1, 3.

<sup>422</sup> Ben-Ari (see note 416 above) 12.

<sup>423</sup> Security Council, *Children and armed conflict - Report of the Secretary-General* (2009) UN Document A/63/785-S/2009/158.

<sup>424</sup> Tiefenbrum (see note 2 above) 434.

‘stood’ in the way of an effective protection of children against recruitment by international law; only then can the practice of recruitment of child soldiers be eradicated.

In Chapter 3, the researcher investigates the obstacles to an effective protection of children against recruitment by international law. The research focuses particularly on two aspects less explored – the issues of culture and cross-border recruitment, with focus on Africa. The objective of this chapter is to assess the impact that the above obstacles have on an effective implementation of international law. The investigation will provide a good basis for understanding why the issue of child soldiers is more critical on this continent. When discussing the situation on the African continent, the research will make repeated referrals to three countries, namely Uganda, Sierra Leone and the DRC.

The reason why the research will repeatedly be on the above-mentioned three countries is because in Uganda, Sierra Leone and the DRC the issue of the recruitment of child soldiers is relatively widespread, and they are also parties to the relevant conventions.<sup>425</sup> Uganda is the most well-known case involving the forceful recruitment of child soldiers, where the LRA is made up almost entirely of 12 000 children abducted from their families, and has achieved global infamy in this regard.<sup>426</sup> The referral to the DRC is useful because of the cross-border recruitment, which has become wide spread in Africa.<sup>427</sup> Lastly, by referring to Sierra Leone, the researcher attempts to understand the impact of the lived realities at the local level on child recruitment in Africa which sometimes contrast with the global humanitarian discourse.<sup>428</sup> Thus, the repeated referral to these countries allows a practical analysis of the problem of child soldiers based on contemporary examples.

Clearly, international law has not been able to eradicate the practice of the recruitment of child soldiers into armed forces. Research has shown that there are aspects of children’s recruitment into armed forces that are not acknowledged in the global humanitarian discourse.<sup>429</sup> Lee argues that it is insufficient to talk about the recruitment of child soldiers

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<sup>425</sup> International Committee of Red Cross ‘Member States to the Following International Humanitarian Law and Other Related Treaties as of 26-Aug-2009’ and ICRC ‘International Humanitarian Law – Treaties & Documents’ (see note 15 above).

<sup>426</sup> P. W. Singer ‘Talk is cheap: Getting serious about preventing child soldiers’ (2004) 37 *Cornell International Law Journal* 561, 572.

<sup>427</sup> Other countries that are involved the issue of cross-border recruitment are Liberia, Guinea, Burkina Faso and Sierra Leone.

<sup>428</sup> Lee (see note 26 above) 1, fn1.

<sup>429</sup> *Ibid* 19.

simply as a clear case of barbarity and abuse of children.<sup>430</sup> On the contrary, he further argues that to say that child soldiering may be ‘meaningful’ does not necessarily mean that it is a legitimate or ‘good’ practice for children.<sup>431</sup> Thus, in this study, it is finally argued that, when addressing the issue of child soldiers in Africa, there is a need to look beyond a set of laws in understanding and addressing the phenomenon. Relying on global discourse on the aspect of the recruitment of child soldiers and failing to employ this kind of engagement in the local context of their recruitment may lead to negative consequences for the intended beneficiaries.<sup>432</sup>

The issue of child cross-border recruitment has become wide spread in Africa. Cross-border recruitment arises whenever there is a conflict occurring in a different country within a region, and children are recruited from the territory of another country.<sup>433</sup> International documents have not substantially addressed the issue of cross-border recruitment, and not much research has been conducted on it. This omission creates an obstacle to the implementation of the international law under the circumstances. As highlighted above in part 2.4, the existing international law provisions found in the Optional Protocol to the CRC and the Palermo Protocol are difficult to apply in such situations, thus making it difficult to protect children against cross-border recruitment and to apply enforcement and monitoring mechanisms. As long as the issue of child cross-border recruitment is not adequately addressed within international law, children will continue to be recruited across borders. On the other hand, it can be argued that substantiating the provisions that relate to child cross-border will not do much to help the children involved. This is because, although there are substantiated provisions that relate to the general recruitment of child soldiers, the practice still persists. Thus, the issues of child cross-border recruitment and culture can objectively be viewed as obstacles to an effective protection of children against recruitment by international law.

### 3.2 CULTURE

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<sup>430</sup> *Ibid.*

<sup>431</sup> *Ibid.*

<sup>432</sup> M. Bourdillon ‘How bad is ‘child labour’?: Viewpoint’ (2008) 4(3) *Quest* 48, 48.

<sup>433</sup> Mezmur (note 11 above) 209.

Culture is ‘an amorphous concept denoting anything that contributes to the unique character of a social group, thereby distinguishing it from other groups’.<sup>434</sup> Thus, societies conserve their cultures as to ensure that they keep their distinct characteristics, and their cultures continue to serve the interests of the practitioners.<sup>435</sup> It follows that culture may include artifacts, language, laws, customs and moral codes, or in fact, a people’s entire intellectual and material heritage.<sup>436</sup> Tradition, which is the process of transmitting knowledge and beliefs to future generations, is part and parcel of culture.<sup>437</sup> Not only is tradition the means for keeping a culture alive but it is also the means whereby items of culture gain moral authority.<sup>438</sup> It has been argued that cultural identity is one of the most important parts of a person's identity; and a person’s identity will be seriously undermined if they are not permitted to follow their culture.<sup>439</sup> However, culture is not static and harmful practices can be overcome.<sup>440</sup>

It is important to note that, in the past, African societies were governed by customs; thus through tradition, some customs have gained moral authority. Therefore, with the drafting of international treaties it was important to ‘marry’ the two wherever possible.<sup>441</sup> However, contradictions between children’s rights and the culture are inevitable, in particularly when practices which are considered to be in ‘cultural’ conflict with the standards set by international human rights norms.<sup>442</sup> Despite the fact that the practice of child recruitment is both detrimental to children, and is also prohibited under international law, in certain countries it has become a socially accepted practice that children get recruited into armed forces.<sup>443</sup>

As suggested above, when addressing the issue of culture, due to time and space constraints, the researcher will only focus on Sierra Leone. By referring to Sierra Leone, the researcher attempts to understand the impact of the lived realities at the local level on child recruitment in Africa which sometimes contrast with the global humanitarian

<sup>434</sup> Bennett (see note 44 above) 2.

<sup>435</sup> L. Price ‘Conserving (not preserving) culture: Avoiding the damage to culture of veiled moralism in HIV education’ (2009) *The Southern African Journal of HIV Medicine* 12, 16.

<sup>436</sup> *Ibid.*

<sup>437</sup> *Ibid.*

<sup>438</sup> *Ibid.*

<sup>439</sup> *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 (1) SA 474 (CC) 493E.

<sup>440</sup> Kaime (see note 29 above) 227.

<sup>441</sup> Ibhawoh (see note 30 above) 843.

<sup>442</sup> Kaime (see note 29 above) 226.

<sup>443</sup> Sierra Leone, Liberia, Afghanistan, Sudan, Nigeria and Cote d’Ivoire.

discourse.<sup>444</sup> Thus, the referral to this country allows a practical analysis of the problem of child soldiers based on contemporary examples. However, based on research done, lived realities at the local level on child recruitment in Africa sometimes contrasts with the global humanitarian discourse.

### 3.2.1 Background to the situation in Sierra Leone

In 1991, war erupted in the diamond-rich West African country, Sierra Leone.<sup>445</sup> The country's recourse to warfare represented the massive betrayal of the hopes and expectations of various groups.<sup>446</sup> RUF, led by Corporal Foday Sankoh, launched a devastating attack on Sierra Leone from Liberia in May 1991, with the support of the then Liberian leader, Charles Taylor. Sierra Leone was a country notorious for its recruitment of child soldiers in its 10-year civil war.<sup>447</sup> Both the government forces and rebels recruited children. Sierra Leone had one of the world's worst records for recruiting children as soldiers.<sup>448</sup> Children served as combatants or as cooks, informants, porters, bodyguards, sentries, and spies. Graphic media images of traumatised youth with amputated limbs brought much international attention to the problem of child soldiers in Sierra Leone.<sup>449</sup>

Between 1992 and 1996, the period of the worst fighting between the government forces and the RUF, an estimated 4,500 children were recruited by both sides.<sup>450</sup> However, according to the UN Works for Kids, during the 10-year civil war in Sierra Leone, 10000 children were recruited into armed forces.<sup>451</sup> On 7 July 1999, a peace agreement was signed between the government and the rebel force (RUF), but contrary to popular expectations, the 1999 peace accord failed to restore lasting peace in Sierra Leone. Omotolo argues that attempts to explain the complicated dynamics of the Sierra Leone civil

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<sup>444</sup> Lee (see note 26 above) 1.

<sup>445</sup> J. Omotola 'The Sierra Leone Lomé Peace Accord' (2007) 3 *Conflict Trends* 38, 38-39.

<sup>446</sup> *Ibid* 39.

<sup>447</sup> BCC News 'AK-47: the Sierra Leone child soldier' <http://news.bbc.co.uk/2/hi/europe/4500358.stm> accessed on 5 October 2009.

<sup>448</sup> Kalis (see note 77 above).

<sup>449</sup> *Ibid*.

<sup>450</sup> ReliefWeb 'The use of child soldiers in Africa: An overview. United Nations Office for the Coordination of Humanitarian Affairs (OCHA)' (2001) <http://www.reliefweb.int/library/documents/chilsold.html> accessed 5 October 2009.

<sup>451</sup> The UN Works for Kids 'Child Soldiers in Sierra Leone' [http://www.un.org/works/goingon/soldiers/goingon\\_soldiers.html](http://www.un.org/works/goingon/soldiers/goingon_soldiers.html) accessed 5 October 2009.

war suggest that the civil war was largely economically determined, and precipitated by the competition for scarce natural resources such as timber, gold and diamonds.<sup>452</sup>

In Sierra Leone, the practice of 'child soldiering' is understood differently in the local socio-economic contexts.<sup>453</sup> The Western conception of childhood is seen as a period when children belong in schools and in their family, and furthermore as the responsibility of the community to protect them from the horrors of warfare;<sup>454</sup> whereas childhood in Sierra Leone is almost defined by various types of labour.<sup>455</sup> Children are expected to perform domestic labour from an early age and to help adults with whatever work they are doing. In addition to the socio-economic practicality, child labour is also based on cultural norms regarding children's development.<sup>456</sup> During the war, this socio-economic context of child labour most likely influenced the way people understood military recruitment; children were regarded as necessary 'peripheral participants' who perform various 'domestic' labour for the military community.<sup>457</sup> For example, since work such as fetching water or doing laundry has been locally established as 'children's work' the armed forces recruited children to undertake these tasks.<sup>458</sup> Even though some did participate in military activities, they did so 'within a system in which it made sense for children to be part of adult activity'.<sup>459</sup>

In Sierra Leone most children do not leave with their families.<sup>460</sup> In West Africa, there is a practice of fosterage, which is governed by the predominant norms which stipulate that 'everyone must be accounted for by someone else.'<sup>461</sup> Such a prevalent practice of fosterage and norms of patronage shaped the understandings and dynamics of children's military recruitment during the war.<sup>462</sup> Many communities and children understood

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<sup>452</sup> Omotola (see note 445 above) 39.

<sup>453</sup> Lee (see note 26 above) 16.

<sup>454</sup> OCHA 'Special Report: Child Soldiers' (2003)

<http://www.irinnews.org/pdf/in-depth/Child-Soldiers-IRINIn-Depth.pdf> accessed on 5 October 2009.

<sup>455</sup> L. Stovel 'Long road home: Building reconciliation and trust in post-war Sierra Leone' (2006) Thesis (Ph.D.), Department of Sociology and Anthropology, Simon Fraser University 1, 47.

<sup>456</sup> S. Shepler 'Conflicted Childhoods: Fighting Over Child Soldiers in Sierra Leone' Thesis (Ph.D.), Department of Social and Cultural Studies in Education, University of California Berkeley 1, 86.

<sup>457</sup> D. Francis 'Paper protection mechanisms: child soldiers and the international protection of children in Africa's conflict zones' (2007) 45(2) *Journal of Modern African Studies* 207, 225.

<sup>458</sup> Lee (see note 26 above) 17.

<sup>459</sup> Shepler (see note 456 above) 88.

<sup>460</sup> M. Utas 'Sweet Battlefields: Youth and the Liberian Civil War' (2003) Thesis (Ph.D.), Department of Cultural Anthropology and Ethnology, Uppsala University, Uppsala, Sweden 1, 134.

<sup>461</sup> Lee (see note 26 above) 18.

<sup>462</sup> *Ibid.*

military recruitment as a type of fosterage and patronage.<sup>463</sup> For example, when the armed forces abducted children, they did so through the motions of ‘asking’ for the child, even if at gunpoint, and thereby upheld locally accepted forms of fosterage arrangements.<sup>464</sup> It also made sense for orphaned and displaced children to find a patron during the war for basic necessities as well as social protection.<sup>465</sup>

### 3.2.1 (a) Right to culture

Most human rights instruments guarantee both individual rights and a right to culture.<sup>466</sup> Contradictions between the two are bound to arise. The concept of culture has been caught in a considerable confusion within the human rights discourse because of diversity of its use.<sup>467</sup> The right to culture can be interpreted to mean either an individual’s entitlement to participate in a culture of choice or a group’s entitlement to demand recognition of its culture (and thus preservation of its cultural identity).<sup>468</sup> Another interpretation of the right to culture would be to allow a group to insist that its members remain true to their cultural tradition whatever the predilection of particular individuals.<sup>469</sup> The researcher submits that in Sierra Leone, the right to culture in relation to child soldering has been interpreted to mean a group’s entitlement to demand recognition of its culture. As highlighted above, childhood in the country is almost defined by various types of labour; and child labour, besides the socio-economic practicability, is also based on cultural norms regarding children’s development.<sup>470</sup> Children are expected to perform domestic labour from an early age and to help adults with whatever work they are doing. Thus during war time, children were regarded as necessary ‘peripheral participants’ who perform various ‘domestic’ labour for the military community.<sup>471</sup>

However, the conflict between individual and group rights is especially sensitive where children are concerned.<sup>472</sup> For example, harmful cultural practices, such as the practice of

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<sup>463</sup> Stovel (see note 455 above) 94.

<sup>464</sup> *Ibid.*

<sup>465</sup> *Ibid.*

<sup>466</sup> Article 5 of the CRC, article 18 of the African Charter and article 18(1)&(2) of the African Charter on Human and Peoples' Rights 1981 OAU Doc. CAB/LEG/67/3 (1981) hereafter the Banjul Charter.

<sup>467</sup> Ibhawoh (see note 30 above) 839.

<sup>468</sup> Bennett (see note 44 above) 4.

<sup>469</sup> *Ibid.*

<sup>470</sup> Shepler (see note 456 above) 86.

<sup>471</sup> Francis (see note 457 above) 225.

<sup>472</sup> *Ibid.*

child recruitment, are in conflict with the children's individual rights which make emphasis on non-discrimination, participation, survival and development and the best interest of the child.<sup>473</sup> As highlighted above, the Western conception of childhood differs from that of Africa.<sup>474</sup> Most of the countries in Africa, being third world countries, cannot guarantee the children some of the rights in the human rights treaties. For example, in Africa there is a very high percentage of children that do not attend school because of either poverty or war.<sup>475</sup> Thus based on the socio-economic practicability and cultural norms regarding children's development, their childhood is almost defined by various types of labour.<sup>476</sup> In Sierra Leone, during the war, this socio-economic context of child labour most likely influenced the way people understood military recruitment.<sup>477</sup>

Under international law, children's rights, family and culture are related in a dynamic and symbiotic relationship intended to achieve the rounded growth and development of the child.<sup>478</sup> However, the 'happy relationship' is endangered when practices which are considered 'cultural' conflict with the standards set by international human rights norms.<sup>479</sup> The CRC, African Charter and Banjul Charter recognize the rights and duties of the family to nurture, socialise and develop their children in a manner consistent with local values, customs and traditions.<sup>480</sup> In addition, State parties to the above instruments are required to respect and protect the rights, duties and responsibilities of parents or members of the extended family or community, as may be regulated by local custom, in ensuring the proper socialization of the child in the exercise or enjoyment of his or her rights.<sup>481</sup> Furthermore, the African Charter affirms that 'the African approach to children's rights takes cognisance of the virtues of African cultural heritage and the values of African civilisation which should inspire and characterise the content of the rights of the African child'.<sup>482</sup> Thus, the content of human rights, though founded on universal principles, have to bear the 'African

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<sup>473</sup> CRC and African Charter.

<sup>474</sup> OCHA 'Special Report: Child Soldiers' (2003) (see note 454 above) and Stovel (see note 455 above) 47.

<sup>475</sup> Lee (see note 22 above) 22.

<sup>476</sup> Stovel (see note 455 above) 47.

<sup>477</sup> Francis (see note 457 above) 225.

<sup>478</sup> Kaime (note 29 above) 227.

<sup>479</sup> *Ibid.*

<sup>480</sup> *Ibid* 226.

<sup>481</sup> *Ibid* 227.

<sup>482</sup> Article 18 of the African Charter.

cultural fingerprint' that emphasizes group, duties, social cohesion and communal solidarity as opposed to regard individualism.<sup>483</sup>

The approach to international law is to favour the cultural practices that which advance the promotion and protection of children's rights and override those cultural practices which are considered deleterious to the protection of children's rights.<sup>484</sup> It is intended that such an approach upholds children's rights whilst at the same time maintaining the cultural integrity of the societies involved in such practices.<sup>485</sup> In actual fact, culture does not have a privileged status.<sup>486</sup> International law has characterized a child's 'culture' as first being universalized according to developmental assumptions and particularized in 'special cases'.<sup>487</sup> Thus, international law argues that the child has foremost a right to international modernist culture, then to identity, and finally, in special cases, to minority and indigenous cultures.<sup>488</sup>

Consequently, practices inconsistent with the human rights treaties, such as the recruiting of child soldiers, are often invoked under the pretext of proper cultural upbringing.<sup>489</sup> For example, in Sierra Leone, child labour is based on cultural norms regarding children's development,<sup>490</sup> and the socio-economic context of child labour has influenced the way people understood military recruitment.<sup>491</sup> Thus, this has led to the practice of child soldiers being invoked under the norm of proper cultural upbringing. Considering the harmful nature of the practice, it is obvious that the recruitment of child soldiers is beneficial to the recruiters. It can be argued that the practice cannot be based on cultural norms regarding children's development. Development of a child is defined as an 'act of improving';<sup>492</sup> thus, it cannot be argued that the practice of recruitment of child soldiers is for child development because of the consequences of the practice. For example, in the context of traumatised youth with amputated limbs in Sierra Leone; it cannot be argued that

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<sup>483</sup> Ibhawoh (see note 30 above) 843.

<sup>484</sup> Kaime (note 29 above) 228.

<sup>485</sup> Ibhawoh (see note 30 above) 842-3.

<sup>486</sup> J. Amoah & T. Bennett 'The freedoms of religion and culture under the South African Constitution: Do traditional African religions enjoy equal treatment?' (2008) 8(2) *African Human Rights Law Journal* 357, 368.

<sup>487</sup> Schultheis (see note 53 above) 32.

<sup>488</sup> *Ibid.*

<sup>489</sup> Kaime (see note 29 above) 226.

<sup>490</sup> Shepler (see note 456 above) 86.

<sup>491</sup> Francis (see note 457 above) 207.

<sup>492</sup> *South African Concise Oxford Dictionary* (2002) (see note 25 above).

the practice of recruitment of child soldiers is based on cultural norms regarding children's development. In support of this contention, Bennett argues that to create what might be called an 'Africanist' argument in support of using children for military purposes is a demoralizing view,<sup>493</sup> because there is no culturally justification for this.

Conversely, the most important tenet of the human rights law on children is that a child's interests are to be given paramount consideration.<sup>494</sup> Hence, whenever the right to preserve a culture comes into conflict with a child's interests, the latter prevail.<sup>495</sup> Cultural practices that might be prejudicial to a child's health or life are prohibited under human rights law.<sup>496</sup> However, as highlighted above, the practice of child recruitment; despite the fact that it is prohibited under international law, has gained moral authority in certain societies. Neither international bodies nor the international community can 'assist' children whilst the conflict is still on-going. It is unfortunate that when parties to a conflict violate international law, there is little action that can be taken by the international community to enforce compliance while the conflict is on-going.<sup>497</sup> In Sierra Leone, during the war, most children got separated from their families or were orphaned, and thus it made sense for orphaned and displaced children to find a patron during the war for basic necessities as well as social protection.<sup>498</sup> The prevalent practice of fosterage and norms of patronage shaped the understandings and dynamics of children's military recruitment during the war.<sup>499</sup> Many communities and children understood military recruitment as a type of fosterage and patronage.<sup>500</sup>

As highlighted above, whenever the right to conserve a culture comes into conflict with a child's interests, the latter takes precedence.<sup>501</sup> However, 'the child's best interests' principle is vague, and it can be argued that it can be an open invitation to apply whatever cultural norms on upbringing that happen to be current.<sup>502</sup> Furthermore, the reality of the application of the 'child's best interests' principle is not quite as simple as it looks on

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<sup>493</sup> Bennett (see note 44 above) 5.

<sup>494</sup> Article 3 of the CRC and article 4 African Charter.

<sup>495</sup> Article 21 of the African Charter and article 24(3) of the CRC.

<sup>496</sup> *Ibid.*

<sup>497</sup> Harvey (see note 167 above) 18.

<sup>498</sup> Stovel (see note 455 above) 94.

<sup>499</sup> *Ibid.*

<sup>500</sup> *Ibid.*

<sup>501</sup> Article 21 of the African Charter and article 24(3) of the CRC.

<sup>502</sup> Bennett (see note 44 above) 5.

paper.<sup>503</sup> At times when the international treaties are incorporated into municipal law, the municipal law does not give any indication of whether fundamental rights, like the ‘best interest of the child’ principle, supersede customary law or vice versa.<sup>504</sup> For example, the constitutions of Zimbabwe, Swaziland and Botswana provide that the application of African customary law is not subject to the prohibition on discrimination contained in the constitution.<sup>505</sup> Thus, ambiguities remain over how to uphold human rights standards in practice against the background of the dominance of customary practices which clash with these standards.<sup>506</sup> This is one of the reasons why the practice of recruitment of child soldiers into armed forces which is contrary to principle of ‘best interests of the child’ has been accepted and legitimised within the various communities in which it is practised.<sup>507</sup>

It has been accepted that international human rights represent universal values.<sup>508</sup> Thus, by implication, these values are culturally neutral.<sup>509</sup> However, the universal nature of human rights has not barred attempts to temper with the modern content of ‘universal’ rights with the specific cultural experiences of various societies.<sup>510</sup> The argument that the fact that human rights originated in western systems of law and philosophy has created problems among African societies in relation to the acceptance of the universalism claim is unjustifiable.<sup>511</sup> This is because African nations have been eager to accede to international human rights instruments, especially the CRC. In addition, the treaty (CRC), ‘with its decidedly western slant’, provided the inspiration for African Charter.<sup>512</sup> Furthermore, although Africans are entitled to preserve their cultural heritage, the welfare of children takes priority over cultural.<sup>513</sup>

Some African societies have defied human rights based on the presumption of securing

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<sup>503</sup> Ibhawoh (see note 30 above) 844.

<sup>504</sup> *Ibid.*

<sup>505</sup> Constitution of the Republic of Zimbabwe, 1980 s23(3)(b), Constitution of Republic of Zambia, 1991 s23(4)(d), Constitution of Swaziland, 2005 s15(4)(b), Constitution of the Republic of South Africa, 1996 s31(2) and the Constitution of the Republic of Botswana, 1966.

<sup>506</sup> E. Grant ‘Human rights, cultural diversity and customary law in South Africa’ (2006) 50(1) *Journal of African Law* 2, 7-8.

<sup>507</sup> Kaime (see note 29 above) 223.

<sup>508</sup> *Ibid.* 4.

<sup>509</sup> Bennett (see note 44 above) 4.

<sup>510</sup> Ibhawoh (see note 30 above) 839.

<sup>511</sup> Bennett (see note 44 above) 4.

<sup>512</sup> Statement made by Olara A Otunnu, Special Representative of the Secretary-General of the UN for Children and Armed Conflict, at an open debate in the Security Council on Children Affected by Armed Conflict, 29 June 1998, New York.

<sup>513</sup> Article 21 of the African Charter.

human dignity within the bounds of African culture.<sup>514</sup> However, since human dignity is also the value underlying all human rights, this argument has an immediate plausibility.<sup>515</sup> Nonetheless, although according to the human rights norms, the recruitment of child soldiers into armed forces is a violation of human dignity; this is not so in accordance with the African culture because African societies continue with the practice. This contention is problematic because the provisions of the African Charter; which is a 'local' product, state that the recruitment of child soldiers into armed forces is a violation of human dignity. It can be argued the reason for this discrepancy is that, although the inspiration of the African Charter came from the CRC, the African community did not fully contemplate on the possibility that some of the African societies would remain 'conservative'; and thus conflicts could arise due to their actions. In addition, the implementation of international/regional law into municipal law is by no means clear-cut. In the case of those who believe that the two constitute distinct branches of law which never overlap (dualist theory);<sup>516</sup> the enforcement of international human rights into municipal law becomes problematic.

Furthermore, a crucial question is why then have many African States ratified the intentional treaties including those that protect children against recruitment into armed forces. It has been argued that at times States feel pressured into signing human rights documents because they do not want to 'look bad' in the eyes of the Western countries whom they economically dependent on.<sup>517</sup> Although many of the African States have ratified these human rights documents, due to the fact that they feel that the human rights have in a way been imposed on them, they do not see the reason why they should abide by them,<sup>518</sup> especially, when they feel that they have their own culturally distinctive way of securing human dignity.<sup>519</sup> Thus, while the harm done to children personally is at first sight ethically indefensible, the practice of conscripting child soldiers is being justified as an African cultural tradition.<sup>520</sup>

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<sup>514</sup> Bennett (see note 44 above) 4.

<sup>515</sup> *Ibid.*

<sup>516</sup> *Ibid.*

<sup>517</sup> International Centre for Trade and Sustainable Development 'More African countries sign EPAs with EU, as leaders quarrel at Lisbon summit' <http://ictsd.net/i/news/bridgesweekly/6603/> accessed 5 October 2009.

<sup>518</sup> Mail & Guardian online 'The trouble with human rights in Africa'

<http://www.thoughtleader.co.za/bryanmukandi/2008/12/09/the-trouble-with-human-right-in-africa/> accessed on 5 October 2009.

<sup>519</sup> Bennett (see note 44 above) 4.

<sup>520</sup> *Ibid* 1.

The well intentioned attempts to protect children from abusive practices can often leave the disadvantaged children even worse off than before.<sup>521</sup> The international treaties put in place to help people can sometimes turn out not to be in their best interests after all. In the physical sciences, it is believed that, in the long term, what's based on evidence will prevail.<sup>522</sup> Nevertheless – in an ideal world – international treaties are expected to be based on the findings obtained from research.<sup>523</sup> Sensational accounts of abused children draw attention to the urgent need for intervention, but they rarely provide enough information about the backgrounds of the children and their families to make sure that their situation is thereby improved.<sup>524</sup>

Concerns have been raised about the fact that cultures might be forced or 'created' to achieve ulterior means.<sup>525</sup> What is essential is the debate that even if such a tradition did exist, it is carried on in modern times or it is recreated to serve new and contemporary purposes.<sup>526</sup> Evidence has shown that the purpose for which the recruitment of child soldiers was done in early times has been lost along the way, due to ulterior motives which are not culturally justified.<sup>527</sup> For example, in Sierra Leone, the socio-economic context of child labour and the practice of fosterage most likely influenced the way people understood military recruitment.<sup>528</sup> However, during the 10-year civil war, the recruitment of child soldiers in Sierra Leone was largely economically determined, and precipitated by the competition for scarce natural resources such as timber, gold and diamonds.<sup>529</sup> Similarly, the same can be said about the US. As highlighted above in part 2.4, the US allows for 17-year-olds to be recruited into the military, but these children are not permitted to go into active combat outside the US territory.<sup>530</sup> Bennett argues that culture can include, *inter alia*, laws.<sup>531</sup> thus it can be argued that the recruitment of child soldiers by the US is a

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<sup>521</sup> Lee (see note 26 above) 19.

<sup>522</sup> Bourdillon (see note 432 above) 48.

<sup>523</sup> *Ibid.*

<sup>524</sup> Ben-Ari (see note 416 above) 4.

<sup>525</sup> Bennett (see note 44 above) 4.

<sup>526</sup> *Ibid.* 5.

<sup>527</sup> See part 1.6 above.

<sup>528</sup> Francis (see note 457 above) 207 & Lee (see note 26 above) 18.

<sup>529</sup> Omotola (see note 445 above) 39.

<sup>530</sup> Yarchyk (see note 359 above) 26.

<sup>531</sup> Bennett (see note 44 above) 2.

culture. However, recent evidence has shown that the US has been recruiting children under the age of 17 years in order to fill their quotas in the war in Iraq.<sup>532</sup>

However, it is not enough to identify the cultural barriers and limitations to human rights standards; the challenge is how to achieve a balance of values.<sup>533</sup> The articulation of cultural rights in international treaties and the prohibition of customary practices that conflict with human rights standards have not been successful in resolving the inherent conflicts between human rights objectives and some dominant cultural traditions.<sup>534</sup> Many African States have demonstrated a willingness to introduce legislation holding national human rights above customs and cultural traditions where conflicts arise.<sup>535</sup> However, experiences have shown that formal legislative enactments alone cannot change pervasive cultural attitudes. For example, although there are international treaties that prohibit the recruitment of child soldiers, the practice has continued in some African States.<sup>536</sup>

The balance can be achieved by maintaining human rights standards while resolving the obvious conflict between them and the dominant cultural traditions.<sup>537</sup> Furthermore, it is even more important to appreciate the social basis of these cultural traditions and how they may be adapted to or integrated with national legislation to promote human rights.<sup>538</sup> In the case of detrimental cultural practices, solutions need to be found in consultation with practicing communities and adequate social support should be given to individuals who choose to abandon the practice.<sup>539</sup> In addition, African societies are constantly in the process of change which is shaped by a variety of cultural, social, and economic factors.<sup>540</sup> Dominant cultural traditions can in fact be changed in response to different internal and external pressures.<sup>541</sup>

### 3.2.1(b) Cultural legitimacy

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<sup>532</sup> Yarchyk (see note 359 above) 30.

<sup>533</sup> Grant (see note 506 above) 9.

<sup>534</sup> Ibhawoh (see note 30 above) 847.

<sup>535</sup> Grant (see note 506 above) 9.

<sup>536</sup> Singh (see note 3 above) 206.

<sup>537</sup> Bourdillon (see note 432 above) 48.

<sup>538</sup> Ibhawoh (see note 30 above) 839.

<sup>539</sup> Kaime (see note 29 above) 221.

<sup>540</sup> *Ibid* 233.

<sup>541</sup> Ibhawoh (see note 30 above) 841.

The pursuit for consensus between cultural traditions and modern international legal standards is a theme of growing interest.<sup>542</sup> However, the crucial question in the case of Africa is how ‘this marriage of universal rights and culture can be achieved’.<sup>543</sup> International treaties have tried to compromise between two competing rights, namely, the rights of the child and cultural rights.<sup>544</sup> Attempts by African States to assert the supremacy of human rights over cultural traditions where conflicts arise have been unsuccessful.<sup>545</sup> For example, even though the practice of recruitment of child soldiers into armed forces is prohibited under international law, the practice still prevails in certain African States.<sup>546</sup> The failure has been attributed to the fact the enactment of human rights as universal laws alone cannot change pervasive cultural attitudes.<sup>547</sup>

Certain traditional cultures have been revived to combat certain social pandemics and to promote and maintain cultural identity.<sup>548</sup> Thus, one of the main reasons advanced for the cultural practices is that it allows societies and communities to preserve their culture and tradition.<sup>549</sup> For example in Sierra Leone, childhood is defined by various forms of labour;<sup>550</sup> which is based on cultural norms of regarding children’s development.<sup>551</sup> As a result, during the war, this socio-economic context of child labour most likely influenced the way people understood military recruitment;<sup>552</sup> they participate in military activities ‘within a system which made sense for children to be part of the adult activity’.<sup>553</sup> However, as highlighted above in 3.2.1 (a) this particular practice can not be based on cultural norms of regarding children’s development because of the consequences of the practice.

African societies have argued that Africa has its own culturally distinctive way of securing human dignity, and thus have rejected the supremacy given to international human rights<sup>554</sup>

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<sup>542</sup> *Ibid* 842.

<sup>543</sup> *Ibid* 843.

<sup>544</sup> I. Moodley ‘Customary initiation rites and the Children’s Act 38 of 2005’ (2008) 23(1) *SA Publiekreg = SA Public Law* 65, 73.

<sup>545</sup> Ibhawoh (see note 30 above) 857.

<sup>546</sup> Singh (see note 3 above) 206.

<sup>547</sup> Ibhawoh (see note 30 above) 857.

<sup>548</sup> Moodley (see note 544 above) 65.

<sup>549</sup> *Ibid* 65.

<sup>550</sup> Stovel (see note 455 above) 47.

<sup>551</sup> Shepler (see note 456 above) 86.

<sup>552</sup> Francis (see note 457 above) 225.

<sup>553</sup> Shepler (see note 456 above) 88.

<sup>554</sup> Bennett (see note 44 above) 4.

It has also been argued that the adoption of Africa's heritage and values, which are rooted in her traditional past, is more practical in order to resolve Africa's own kind of peculiar problems.<sup>555</sup> Therefore, the success of implementing children's rights in Africa depends to a large extent on the level of cultural legitimacy accorded to children's rights norms.<sup>556</sup> To inquire into the cultural legitimacy of human rights would be quite simply to inquire into the kinds and degrees of support for human rights standards and for their implementation in culture(s).<sup>557</sup> One of the main reasons advanced for the cultural practices; such as the recruitment of child soldiers into armed forces and female genital mutilation (FMG), even though they are detrimental to children, is that it allows societies and communities to preserve their culture and tradition.<sup>558</sup> Thus, it is clear that the legitimacy and acceptability of the modern universal human rights regime needs to be harmonized and strengthened with the specific cultural experience of various societies.<sup>559</sup>

Many African political scholars, politicians and indeed contemporary African States seem to have resolved that aping alien theoretical models and practices are the most appealing option for Africa.<sup>560</sup> However, the fact that human rights are considered 'alien' within some African societies has led to many societies failing to accept the universalism claim.<sup>561</sup> This aspect exposes the conceptual errors implicit in the conflation of 'human rights' as a concept and as practiced in different political systems.<sup>562</sup> Hence, the practices such as the recruitment of child soldiers into armed forces have prevailed.

'Outsiders', furthermore, perceive traditional cultures in a negative way; indigenous African belief systems are constantly being devalued.<sup>563</sup> In response to this, African societies have argued that cultural liberty is an important right.<sup>564</sup> Traditional cultural practices like the recruitment of child soldiers into armed forces reflect values and beliefs held by members of a community for periods often spanning generations. It is a fact that

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<sup>555</sup> A. Fayemi 'Towards an African theory of democracy' (2009) *Research Review* 1, 1.

<sup>556</sup> Kaime (see note 29 above) 223.

<sup>557</sup> *Ibid* 840.

<sup>558</sup> Moodley (see note 544 above) 69.

<sup>559</sup> Ibhawoh (see note 30 above) 843.

<sup>560</sup> Fayemi (see note 555 above) 1.

<sup>561</sup> Bennett (see note 44 above) 4.

<sup>562</sup> Fayemi (see note 555 above) 1.

<sup>563</sup> J. Amoah & T. Bennett 'The freedoms of religion and culture under the South African Constitution: Do traditional African religions enjoy equal treatment?' (2008) 8(2) *African Human Rights Law Journal* 357, 358.

<sup>564</sup> *Ibid*.

every social grouping in the world has specific traditional cultural practices and beliefs; African communities are no different in this respect.<sup>565</sup> Thus, tradition should be preserved and protected as an important element of African culture. However, it is illogical to preserve a culture that has detrimental effects for a child's development. The CRC, African Charter and Banjul Charter recognize the rights and duties of the family to nurture, socialise and develop their children in a manner consistent with local values, customs and traditions.<sup>566</sup> Thus, as highlighted above, the recruitment of child soldiers into armed forces cannot be based on cultural norms regarding children's development.

However, the implementation of universal norms respecting children's rights within African cultures will in some cases be hindered by practices or values which enjoy cultural legitimacy but are contrary to children's rights.<sup>567</sup> For example, in Sierra Leone, the cultural practice of recruitment of children into armed forces enjoys cultural legitimacy unlike the human rights norms that prohibit the practice. Significantly, international human rights cannot derive their legitimacy only from international authority but also from the force of cultural traditions.<sup>568</sup> Therefore, the challenge is how to implement children's rights in a culturally appropriate manner, whilst on the other hand ensuring that harmful practices are not protected under the pretext of cultural propriety.<sup>569</sup> Ideally, since respect for human rights is promoted by reason as well as by experience, a constructive approach to promoting human rights is ideal.<sup>570</sup> International human rights standards must be promoted against the background of the dominant cultural and social traditions in the State; and this should be done with due respect to meritorious cultural values and traditions of local communities.<sup>571</sup>

Consequently, certain invasive cultural practices have been granted implicit approval in the legislation, despite their obvious violation of fundamental human rights.<sup>572</sup> For example,

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<sup>565</sup> C. Twala 'The African tradition of initiation and circumcision: A curse or cure in South Africa? (2007) 21(1) *S.A. Tydskrif vir Kultuurgeskiedenis* 22, 22.

<sup>566</sup> Article 5 of the CRC, article 18 of the African Charter and article 18(1)&(2) of the African Charter on Human and Peoples' Rights 1981 OAU Doc. CAB/LEG/67/3 (1981) hereafter the Banjul Charter.

<sup>567</sup> *Ibid.*

<sup>568</sup> *Ibid.* 842.

<sup>569</sup> Kaime (see note 29 above) 223.

<sup>570</sup> Ibhawoh (see note 30 above) 853.

<sup>571</sup> *Ibid.* 360.

<sup>572</sup> Moodley (see note 544 above) 78.

virginity testing and FGM is permitted in certain countries.<sup>573</sup> World Health Organization (WHO) opposed the practice of FGM by raising concerns regarding the consent (or lack thereof, in most cases) of the patient, and subsequently the safety and long-term consequences of the procedures.<sup>574</sup> In the same vein, the practice of recruitment of children into armed conflicts has been granted implicit approval in certain international treaties. For example, as highlighted in part 2, certain international treaties allow for the recruitment of children above the age of 15 years into armed forces.

Thus, cultural practices that are detrimental to children exist due to the fact that children's rights norms that prohibit the practices do not enjoy cultural legitimacy. A popular justification for the cultural practices that are detrimental to children is the need to fulfill cultural obligations.<sup>575</sup> For example in Sierra Leone, with the socio-economic practicality, child labour is also based on cultural norms regarding children's development.<sup>576</sup> Thus, the practice of 'child soldiering' is understood differently in the local socio-economic contexts.<sup>577</sup> The prevalence of cultural practices over international human rights has been justified in terms of the economic, social, cultural and political diversity that characterizes the African societies.<sup>578</sup>

Kaime argues that for children's rights to enjoy sufficient observance and support they have to command adequate legitimacy.<sup>579</sup> Significantly, cultural legitimacy derives its authority from internal validity.<sup>580</sup> Thus, if a rule or norm does not command adequate legitimacy it will not enjoy sufficient observance or support.<sup>581</sup> However, to allow detrimental cultural practices, as the recruitment of child soldiers into armed forces, to prevail due to the cultural legitimacy is absurd. Price argues that a 'weak (realist) moral relativism as an alternative' maybe the ideal, as compared to 'the positivist-based, absolutist morality that threatens to destroy traditional culture'.<sup>582</sup> As highlighted above in part 3(a), the enactment of international human rights alone cannot change cultural

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<sup>573</sup> FGM is practised in more than 28 countries in Africa and in some countries in the Middle East and Asia.

<sup>574</sup> World Health Organisation (WHO) 'Female genital mutilation' <http://www.who.int/mediacentre/factsheets/fs241/en/> accessed 5 October 2009.

<sup>575</sup> Moodley (see note 544 above) 70.

<sup>576</sup> Shepler (see note 456 above) 86.

<sup>577</sup> Lee (see note 26 above) 16.

<sup>578</sup> Kaime (see note 29 above) 222.

<sup>579</sup> *Ibid.*

<sup>580</sup> *Ibid.*

<sup>581</sup> *Ibid.*

<sup>582</sup> Price (see note 535 above) 13.

practices. Reasons for the existence of a practice have to be taken into account, and a compromise has to be ascertained in order to protect children's rights.

### 3.2.1 (c) Humanitarian discourse and understanding lived realities on experiences of young people's military recruitment

The global human rights discourse has failed to focus on specific empirical studies on the role of culture in the development of human rights.<sup>583</sup> There are some culturally debatable issues pertaining to child recruitment into armed forces which the researcher will shortly discuss below. The cultural issues are age, child labour, fosterage, political and social agency of children and loyalty towards family and the community. All these issues have been used by some African societies to justify the recruitment of child soldiers as a cultural component. The argument raised by the some African States is the fact that the practice of recruitment of child soldiers has been revived to promote and maintain cultural identity.<sup>584</sup> Thus, since cultural identity is one of the most important parts of a person's identity; a person's identity will be seriously undermined if they are not permitted to follow their culture.<sup>585</sup>

The global humanitarian and human rights discourse adopts a 'straight-18' position, which defines a 'child' and a 'child soldier' in terms of the chronological age of 18.<sup>586</sup> However, the legal rationale behind the 'straight-18' position does not actually address the reasons for the cut-off.<sup>587</sup> There is, however, the debate between the issue of whether in lived realities of the experiences of young people, the age 18 indeed 'marks the formal transition from childhood to adulthood', and what people actually regard as an appropriate age for military participation at the local level.<sup>588</sup>

Significantly, many African societies do not define the boundaries of childhood and adulthood in terms of chronological age;<sup>589</sup> the boundaries of childhood and adulthood are defined in social terms which take place progressively through rites and practices that mark

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<sup>583</sup> Ibhawoh (see note 30 above) 840.

<sup>584</sup> Moodley (see note 544 above) 65.

<sup>585</sup> *MEC for Education, KwaZulu-Natal, and others v Pillay* (see note 439 above) 493E.

<sup>586</sup> Lee (see note 26 above) 7.

<sup>587</sup> *Ibid* 8.

<sup>588</sup> *Ibid*.

<sup>589</sup> *Ibid* 14.

and confirm an individual's social status.<sup>590</sup> The social definition mostly comes from practical circumstances in many societies.<sup>591</sup> For example, since many Sierra Leoneans are not registered at birth, they might not know their exact age, and so the idea of a child suddenly reaching adulthood at the age of 18 would not make sense for most of them.<sup>592</sup> However, even though the local definitions of a 'child' differ from the global one; the local definitions must conform to the global one.<sup>593</sup>

In relation to the 'straight 18' approach, the global humanitarian discourse defines childhood as a period of innocence, dependency, and immaturity and places military recruitment outside the realm of children.<sup>594</sup> On the contrary, in African societies adolescence can be a period of responsibility, since having responsibilities is culturally regarded as beneficial to children's moral and social development.<sup>595</sup> Many of these societies regard military participation as a part of becoming an adult and therefore encourage many under-18-year-olds to participate in military activities.<sup>596</sup> Hence, this explains why many societies may consider military recruitment of adolescent boys as reasonable and even normal in the context of war.<sup>597</sup> For example, in Sierra Leone, the socio-economic context of child labour most likely influenced the way people understood military recruitment,<sup>598</sup> since child labour is based on cultural norms regarding children's development.<sup>599</sup> In this case, the global humanitarian discourse which depicts the recruitment of under-18-year olds 'as a barbaric and universal violation of human rights' is likely to be in conflict with the local perceptions of adolescents and their responsibilities.<sup>600</sup>

In many African societies children are expected to carry out 'chores' from an early age and to help adults with whatever work they are doing. However, in addition to the socio-economic realism, child labour is also based on cultural norms regarding children's

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<sup>590</sup> *Ibid.*

<sup>591</sup> *Ibid.*

<sup>592</sup> Stovel (see note 455 above) 65.

<sup>593</sup> Lee (see note 26 above) 8.

<sup>594</sup> *Ibid* 14.

<sup>595</sup> *Ibid* 15.

<sup>596</sup> H, Tefferi 'Reconstructing Adolescence after displacement: Experience from East Africa'(2007) 21 *Children & Society*, 297, 315.

<sup>597</sup> Lee (see note 26 above) 16.

<sup>598</sup> Francis (see note 457 above) 221.

<sup>599</sup> Shepler (see note 456 above) 86.

<sup>600</sup> Lee (see note 26 above) 16.

development.<sup>601</sup> Thus, during the war, this socio-cultural context of child labour most likely influences the way people understood military recruitment.<sup>602</sup> Therefore, even though during war time, the context has changed, the duties of the child in respect to the community still remain the same.<sup>603</sup> For example, the majority of the younger ‘child soldier’ population in Sierra Leone spent their war years performing their ‘normal duties’ in respect to the military community, such as, cooks, porters, cleaners, messengers, spies.<sup>604</sup> In this regard, the local meanings of what is identified as ‘child soldiering’ are different from the meanings attributed in the global discourse.<sup>605</sup>

The global humanitarian discourse fails to take into account children’s political and social agency.<sup>606</sup> The concept of agency ‘refers to one’s active engagement with the world and their own efforts to cope with adversity’.<sup>607</sup> Thus, the concept of agency is a critical one in understanding the phenomenon of ‘child soldiers’.<sup>608</sup> Children do not live in an abstract world; they are part of the world, and what ever happens in the world has a direct impact on them. Thus, during war time, young people often intentionally and effectively devise ways to make the best of their unfavourable life situations.<sup>609</sup> Thus, failure by the global humanitarian discourse to acknowledge the concept of agency has created a gap between itself and the complex local contexts and dynamics of ‘child soldiering’.<sup>610</sup> Lee argues that such a gap would appear to open up the risk of programmes based on the universal discourse which are unsuitable when implemented at the local level.<sup>611</sup> For example, demobilised ex-child soldiers chose military re-recruitment primarily for socio-economic reasons, arising from their ongoing unemployment and destitution after the war and demobilisation.<sup>612</sup> According to a report by Human Rights Watch, around 2,000 of 72,490 combatants disarmed in Sierra Leone are believed to have joined armed groups in other countries.<sup>613</sup>

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<sup>601</sup> *Ibid* 17.

<sup>602</sup> *Ibid*.

<sup>603</sup> Francis (see note 457 above) 222.

<sup>604</sup> Lee (see note 26 above)17.

<sup>605</sup> *Ibid*.

<sup>606</sup> Lee (see note 26 above) 19.

<sup>607</sup> *Ibid* 25.

<sup>608</sup> *Ibid* 25.

<sup>609</sup> *Ibid*.

<sup>610</sup> *Ibid* 26.

<sup>611</sup> *Ibid*.

<sup>612</sup> Human Rights Watch ‘Youth, Poverty, and Blood: The lethal legacy of West Africa’s regional Warriors’ (2005) <http://hrw.org/reports/2005/westafrika0405> accessed on 26 April 2009.

<sup>613</sup> *Ibid*.

The above argument shows that there are two sides to the story in recruitment issues. There is a conflict between the humanitarian discourse and the lived realities understandings on experiences of young people's military recruitment. Thus, there is an inconsistency between the international commitments undertaken by some African States and beliefs of their population. The States have not done enough to deal with the societal attitudes; they have not tried to find adequate solutions and social support for those involved. For example, in Sierra Leone, the government has not successfully resolved the issue of ongoing unemployment in the country. This has resulted in around 2,000 of 72,490 combatants disarmed in Sierra Leone joining armed groups in other countries.<sup>614</sup>

The issue of 'child soldiers' in the humanitarian discourse has created a situation where the lived realities that challenge the humanitarian discourse do not actually translate into changes in international treaties.<sup>615</sup> The well-intentioned humanitarian discourse on child soldiers has disregarded the complex local understandings and experiences of military recruitment.<sup>616</sup> It is not intention of the researcher to argue that the recruitment of child soldiers into armed forces is a desirable and positive practice. However, the failure to understand the impact that the lived realities at the local level has on child recruitment in Africa can serve as an obstacle to the implementation and effectiveness of the relevant international law. It is not enough to identify the conflicts between the humanitarian discourse and the lived realities understandings on experiences of young people's military recruitment; the challenge is how to achieve a balance.<sup>617</sup> This requires an understanding of the impact that the lived realities at the local level has on child recruitment in Africa, together with solutions and adequate social support for those involved.<sup>618</sup>

### 3.2.1 (d) Conclusion

In conclusion it can be argued that, although the recruitment of child soldiers is prohibited by international law, in certain countries it has become a socially accepted practice that children get recruited into armed forces. This has been caused by the conflict between the

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<sup>614</sup> Lee (see note 26 above) 25.

<sup>615</sup> *Ibid* 4.

<sup>616</sup> *Ibid*.

<sup>617</sup> Grant (see note 506 above) 9.

<sup>618</sup> *Ibid*.

humanitarian discourse and the lived realities understandings on experiences of young people's military recruitment. The failure to understand the impact that the lived realities at the local level has on child recruitment in Africa has served as an obstacle to the implementation and effectiveness of the relevant international law. The success of implementing children's rights in Africa depends to a large extent on the level of cultural legitimacy accorded to children's rights norms. Attempts by African States to assert the supremacy of human rights over cultural traditions where conflicts arise have been unsuccessful. However, it is not enough to identify the cultural barriers and limitations to human rights standards; the challenge is how to achieve a balance of values.

### 3.3 CHILD CROSS-BORDER RECRUITMENT

Child cross-border recruitment arises whenever there is a conflict occurring in a different country within a region, and children are recruited from the territory of another country, with the purpose of conscripting them into armed forces.<sup>619</sup> According to the Special Representative of the Secretary-General for children and armed conflict

'cross-border recruitment of children and their recycling in regional conflicts are significant challenges in which significant numbers of children and young people are being compelled to join armed groups and take up lives as fighters because this may provide them and their families with a measure of protection in highly volatile and insecure settings, or in environments where war may represent the most viable livelihood.'<sup>620</sup>

Although the practice of child cross-border recruitment is not more serious than the general child soldier recruitment; the justification of the focus of this study on this type of recruitment, as will be shown below, is that cross-border recruitment has not been adequately addressed by international documents. The Optional Protocol to the CRC in paragraph 11 of its preamble<sup>621</sup> and Palermo Protocol, in article 3(c), are the only international documents that mention the recruitment across borders, and they are of limited use in addressing cross-border recruitment. This aspect is problematic in the sense that the existing international law provisions are difficult to apply in such situations, thus

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<sup>619</sup> Mezmur (note 11 above) 209.

<sup>620</sup> Security Council, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (2007) UN Document A/62/228.

<sup>621</sup> Paragraph 11 of the Preamble provides 'condemning with the gravest concern the recruitment, training, and use within and across national border children in hostilities by armed forces distinct from the armed forces of a State...'

making it difficult to protect children against cross-border recruitment and to apply enforcement and monitoring mechanisms. The transportation of vulnerable children by both the government and rebel groups across borders during armed conflict constitutes one of the worst forms of child trafficking.<sup>622</sup>

The Optional Protocol to the CRC in paragraph 11 of its Preamble condemns ‘with the gravest concern the recruitment, training, and use within and across national border of children in hostilities by armed forces distinct from the armed forces of a State.’ However, a preamble is not a source of positive law, in contrast to the provisions that follow it.<sup>623</sup> A preamble only helps with the interpretation of a treaty in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,<sup>624</sup> and it has no enacting forces.

In the same line, the Palermo Protocol in article 3(c) provides that ‘the recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’’: Although the two treaties are the only international documents that mention child recruitment across borders, as highlighted above, they are of limited use in addressing the issue. Child cross-border recruitment makes the applicability of the existing provisions of the Optional Protocol to the CRC and the Palermo Protocol difficult because the leads in the two treaties are not followed in any substantive provisions.<sup>625</sup>

In relation to the issue of child cross-border recruitment, the Committee on the CRC has supported the recommendations made by the Secretary General in the report of February 2005 to call upon States to combat illicit cross-border activities harmful to children through the development of bilateral, multilateral and regional arrangements.<sup>626</sup> In the same light, the European Union (EU) set the EU Guidelines on Children and Armed Conflict in

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<sup>622</sup> Article 3 *Ibid.*

<sup>623</sup> F. L. Morton *Law, politics, and the judicial process in Canada* (2001), Canada: University of Calgary Press 223.

<sup>624</sup> Article 31(1) Vienna Convention on the Law of Treaties 1969.

<sup>625</sup> Mezmur (note 11 above) 208.

<sup>626</sup> Committee on the Rights of the Child ‘CRC 41th session: Committee considers initial report of Bangladesh on involvement of children in armed conflict’ <http://www.hrea.org/lists/child-rights/markup/msg00377.html> accessed on 5 October 2009.

October 2003.<sup>627</sup> It put initiatives in place to tackle the security of boundaries and borders. Among a range of other suggestions, including collective action to control small arms and light weaponry (SALW), it suggested at the field level the use of joint security patrols, common border management in sensitive areas, and human rights monitoring where appropriate.<sup>628</sup>

Recruitment of children in cross-border conflicts is of growing concern. Based on the UN Reports,<sup>629</sup> child cross-border recruitment is becoming quite wide spread in Africa. Some of the countries in which this practice is encountered are the DRC, Liberia, Rwanda, Republic of Central Africa, Guinea, Burkina Faso, Uganda, Sudan and Sierra Leone.<sup>630</sup> Although other countries in Asia and South America engage in the practice of child soldier recruitment, the issue of cross-border child recruitment is more prevalent in Africa.<sup>631</sup> The reason for this is that armed conflicts in the continent have reverberated across each country's porous borders and have thus left children vulnerable to cross-border recruitment. Moreover, in the case of rebel-held territories, the practice is all too common.<sup>632</sup> For example, the movement of armed groups across borders to recruit children from refugee camps continues to be alarming. Since January 2007, there has also been a surge in the recruitment and use of Ugandan, Congolese and Rwandan children in the DRC by forces loyal to the now-captured rebel leader, Laurent Nkunda.<sup>633</sup> Furthermore, along the Sudan-Chad border, both Sudanese and Chadian armed groups are recruiting children from Sudanese refugee camps in eastern Chad, while Chadian refugee children are being recruited by Sudanese rebel groups in Darfur.<sup>634</sup>

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<sup>627</sup> United Nations Institute for Disarmament Research 'Children and Armed Conflict: The Response of the EU' [http://www.unidir.org/pdf/EU\\_background\\_papers/EU\\_BGP\\_02.pdf](http://www.unidir.org/pdf/EU_background_papers/EU_BGP_02.pdf) 1, 1 accessed on 5 October 2009.

<sup>628</sup> Security Council, *Children and armed conflict - Report of the Secretary-General on Ways to Combat Subregional and Cross-border Problems in West Africa* (2004) UN Document S/2004/200.

<sup>629</sup> Security Council, *Children and armed conflict - Report of the Secretary-General on children and armed conflict in Uganda* (2008) UN Document S/AC.51/2008/13, Security Council, *Children and armed conflict - Report of the Secretary-General* (2009) UN Document A/63/785-S/2009/158 and Security Council, *Children and armed conflict - Report of the Secretary-General: DRC* (2007) UN Document A/62/609-S/2007/757.

<sup>630</sup> Human Rights Watch 'Child soldiers' (see note 34 above).

<sup>631</sup> Coalition to Stop the Use of Child Soldiers *Child soldiers and Disarmament. Demobilization, Rehabilitation and Reintegration in West Africa* [http://www.child-soldiers.org/library/Nov\\_2006\\_-\\_WestAfrica\\_Surveydoc\\_-\\_FINAL.pdf](http://www.child-soldiers.org/library/Nov_2006_-_WestAfrica_Surveydoc_-_FINAL.pdf) accessed on 5 October 2009 and Coalition to Stop the Use of Child Soldiers *Global Report on Child Soldiers 2001*.

<sup>632</sup> Sloth-Neilsen (see note 128 above) 64.

<sup>633</sup> Security Council, *Children and armed conflict - Report of the Secretary-General: DRC* (2007) UN Document A/62/609-S/2007/757.

<sup>634</sup> *Ibid.*

In the DRC there are numerous actors involved in the conflict, including the armed forces of several State parties to the CRC, rebel forces and numerous private companies.<sup>635</sup> The continuous conflict in DRC reflects an ‘economic war’; the continuation of the conflict having been fuelled by the illegal exploitation of natural resources, and other forms of wealth in the DRC.<sup>636</sup> Despite the general trend of the decrease in the number of cases of child cross-border recruitment; the recruitment of child soldiers into armed forces and child cross-border recruitment is still continuing in the DRC.<sup>637</sup> The decrease can be attributed to several factors including ‘the progress made in the implementation of the disarmament, demobilization and reintegration programme for children, the army integration process, the decrease in the number of active fighting zones and persistent lobbying by child protection networks against the recruitment of children’.<sup>638</sup> Although the DRC government has also been involved in this practice, it has denied this, and has shifted the blame on rebel groups.<sup>639</sup> For example, some of the recruitments have been blamed on the LRA. In November 2008, 154 cases were documented following the LRA attacks in the DRC.<sup>640</sup>

The movement of armed groups across borders to recruit children from refugee and internally displaced person camps continues to be alarming.<sup>641</sup> For example, since the late 1980s, the armed conflicts in Liberia, Sierra Leone, Guinea and Côte d’Ivoire have reverberated across each country’s porous borders.<sup>642</sup> Evidence has shown that children have been recruited from refugee and internally displaced person camps. Ironically, these camps were meant to be the only solution for families in certain areas to avoid their children’s recruitment by armed forces.<sup>643</sup> However, it is clear that refugee and internally

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<sup>635</sup> C.P. Cohen *Jurisprudence on the Rights of the Child* Vol III (2005), Ardsley, N.Y.: Transnational Publishers 2915.

<sup>636</sup> Van Niekerk (see note 65 above) iv.

<sup>637</sup> Security Council, *Children and armed conflict - Report of the Secretary-General: Uganda and the DRC* (2008) UN Document S/2008/693.

<sup>638</sup> Security Council, *Children and armed conflict - Report of the Secretary-General: DRC* (2007) UN Document A/62/609-S/2007/757.

<sup>639</sup> *Ibid.*

<sup>640</sup> *Ibid.*

<sup>641</sup> *Ibid.*

<sup>642</sup> Human Rights Report ‘Youth, Poverty and Blood: The Lethal Legacy of West Africa Regional Warriors’ (2005) (see note 612 above) and A. Quee ‘Regional Child Warriors in West Africa’ (2008) *Conflict Trends* 3, 3.

<sup>643</sup> *Ibid.*

displaced person camps are now the primary recruiting grounds for child soldiers owing to the convenient concentration of vulnerable children.<sup>644</sup>

The lack of security around these camps is said to be an important factor that increases the likelihood of child recruitment.<sup>645</sup> For example, since January 2007, there has been a surge in the recruitment of Congolese and Rwandan children in north Kivu from refugee camps and communities in Rwanda by forces loyal to detained rebel leader, Laurent Nkunda, during the upsurge in violence, as well as Ugandan children from the DRC-Uganda border areas.<sup>646</sup> Furthermore, the detention of Laurent Nkunda has had a significant implication for children, in terms of increased recruitment of child soldiers into armed forces, since the rebel group has retaliated by increasing the fighting; thus in the process recruiting more children.<sup>647</sup>

Some resident countries have tried to eliminate the practice by deploying their troops in areas where cross-border recruitment is intensive, but this has just escalated more violence.<sup>648</sup> In addition, the resident countries have initiated agreements to stop the conflicts in a bid to try and stop child cross-border recruitment. For example, in early November 2008, stakeholders in the peace process, including representatives from the Governments of Uganda and Southern Sudan, LRA, the United Nations, the African Union, donor countries and civil society, met in Kampala and called upon LRA leader, Joseph Kony, to sign the Comprehensive Peace Agreement.<sup>649</sup> Unfortunately, those efforts failed and the Comprehensive Peace Agreement remains unsigned.

The LRA is made up almost entirely of 12 000 children abducted from their families, and has recently achieved global infamy in regards to cross-border recruitments.<sup>650</sup> In Uganda, as of late, no cases have been attributed to the LRA because the group has not been

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<sup>644</sup> *Ibid.*

<sup>645</sup> *Ibid.*

<sup>646</sup> Security Council, *Children and armed conflict - Report of the Secretary-General* (2009) UN Document A/63/785-S/2009/158.

<sup>647</sup> Security Council, *Children and armed conflict - Report of the Secretary-General: Uganda and the DRC* (2008) UN Document S/2008/693.

<sup>648</sup> Since April 2008, escalating violence initially struck Haut-Uélé District, including the town of Dungu, and has spread into Bas-Uélé District since April 2009, following the deployment of troops reinforced by MONUC and Armed Forces of the Democratic Republic of the Congo in Haut-Uélé. Security Council, *Children and armed conflict - Report of the Secretary-General 'Children and armed conflict in Uganda* (2009) UN Document S/2009/462.

<sup>649</sup> *Ibid.*

<sup>650</sup> Singer (see note 426 above) 572.

operating in Ugandan territory.<sup>651</sup> However, disturbing new anecdotal evidence suggests that children are being recruited from Uganda into conflicts in neighboring DRC and Sudan.<sup>652</sup> The presence of the LRA has been reported in eastern DRC, southern Sudan and the Central African Republic.<sup>653</sup> The LRA have recruited children from the DRC, Sudan and Central Africa.<sup>654</sup> For example, it has been reported that the LRA has abducted 159 children in the DRC.<sup>655</sup> Thus, the LRA recruits children from the territory of another country into conflicts in different country within a region. For example, during their attack in the DRC, the rebel group consisted of children from Uganda, Sudan and Central Africa.<sup>656</sup>

In February 2008, the LRA signed the Agreement on Disarmament, Demobilization and Reintegration, but this has been of no avail since they still continue to recruit child soldiers.<sup>657</sup> In regards to cross-border recruitment, the agreement stated that the LRA should recognise and appreciate the fact that child-cross border recruitment is a violation of children's rights.<sup>658</sup> Furthermore, these children were to be demobilised from the rebel group. Unfortunately, on 10 April of the same year, the leader of the LRA, Joseph Kony, refused to sign the final peace agreement with the Ugandan government.<sup>659</sup>

Thus on one hand, it can be argued that since the issue of child cross-border recruitment has not been substantively addressed by international documents, this creates an obstacle in the implementation of international law. Unlike the municipal legislation which has regulations to add 'flesh' to the legislation, this is not the same with the international treaties. The provisions in international law that 'try' and address the issue of child-cross border recruitment are limited.<sup>660</sup> Although at times precedent from the international courts

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<sup>651</sup> Security Council, *Children and armed conflict - Report of the Secretary-General on children and armed conflict in Uganda* (2008) UN Document S/AC.51/2008/13.

<sup>652</sup> Coalition to stop the use of Child Soldiers 'Resisting War, Promoting Children's Rights in Africa: Getting Kids out of the Crossfire' <http://www.culturesofresistance.org/education-not-war/campaigns/child-soldiers> accessed 16 August 2009.

<sup>653</sup> Security Council, *Children and armed conflict - Report of the Secretary-General on children and armed conflict in Uganda* (2008) UN Document S/AC.51/2008/13.

<sup>654</sup> *Ibid.*

<sup>655</sup> *Ibid.*

<sup>656</sup> UN News Service 'Ugandan rebel group allegedly still recruiting children – UN report' <http://www.un.org/apps/news/story.asp?NewsID=27152&Cr=uganda&Cr1> accessed 10 October 2009.

<sup>657</sup> Security Council, *Children and armed conflict - Report of the Secretary-General on children and armed conflict in Uganda* (2008) UN Document S/AC.51/2008/13.

<sup>658</sup> Article 2 (2.6) of the Agreement on Disarmament, Demobilization and Reintegration, Juba, Sudan.

<sup>659</sup> *Ibid.*

<sup>660</sup> Optional Protocol to the CRC and the Palermo Protocol.

is used to clarify or add ‘flesh’ to the international treaties,<sup>661</sup> thus far, it has not happened in relation to the issue of child cross-border recruitment.

Furthermore, States parties to the applicable international treaties that are accountable for this practice have denied responsibility and have blamed it on rebel groups; yet they are also engaging in this practice.<sup>662</sup> Thus, the fact that international law is limiting in this aspect makes it difficult to protect children in these situations, since they do not have the full protection of the law. This omission by the international treaties has left these children vulnerable to abuse. In response to the issue, the UN Working Group on Children and Armed Conflict has requested the development of a strategy for increased regional joint monitoring capability to monitor and report cross-border recruitment by LRA.<sup>663</sup>

However, the widespread of the problem cannot per se be blamed on the fact that the issue of child cross-border recruitment has not been addressed by international documents; the prohibition of general child recruitment has been in international treaties, and yet recruitment continues. Thus, although Mezmur argues that the fact that the issue of child cross-border recruitment is not addressed ‘adequately’ in international treaties creates an obstacle to the implementation of the international law under the circumstances;<sup>664</sup> it is clear that even substantive provisions will not curb the problem. This is because, although there are substantiated provisions that relate to the general recruitment of child soldiers, the practice still persists. The enforcement and monitoring mechanisms embodied within the treaties, as highlighted in part 2, are not effective. Furthermore, State parties do not live up to their international commitments.

### 3.4 CONCLUSION

The military use of children dates back to ancient times. Therefore, this shows that our views regarding the legitimacy and morality of children’s military participation is a historical construct, shaped by particular social and political forces.<sup>665</sup> Thus, the fact that the discourse of ‘child soldiers’ exists as a historical construct; due to evolving perceptions

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<sup>661</sup> AFRC judgment.

<sup>662</sup> For example, although the DRC government is involved in the practice of child cross-border recruitment, all the blame is being shifted to the LRA.

<sup>663</sup> Coalition to stop the use of Child Soldiers ‘Resisting War, Promoting Children’s Rights in Africa: Getting Kids out of the Crossfire’ (see note 652 above).

<sup>664</sup> Mezmur (see note 11 above) 209.

<sup>665</sup> Lee (see note 26 above) 2.

of the discourse of 'child soldiers', there is bound to be possible gaps between the global discourse and local realities.<sup>666</sup> This is because the global human rights discourse has failed to focus on specific empirical studies on the role of culture in the development of human rights.<sup>667</sup> This has led to 'tension' between other human rights and the right to culture, in particularly when practices which are considered to be in 'cultural' conflict with the standards set by international human rights norms.<sup>668</sup> However, in order to try and resolve this 'tension', reasons for the existence of a practice have to be taken into account, and a compromise has to be ascertained in order to protect children's rights. This requires an understanding of the cultural context of the recruitment of child soldiers into armed forces in Africa, together with solutions and adequate social support for those involved.<sup>669</sup>

However, it is not enough to identify the cultural barriers and limitations to human rights standards; the challenge is how to achieve a balance of values.<sup>670</sup> Experiences have shown that formal legislative enactments alone cannot change pervasive cultural attitudes.<sup>671</sup> However, the crucial question in the case of Africa is how 'this marriage of universal rights and culture can be achieved'.<sup>672</sup> The success of implementing children's rights in Africa depends to a large extent on the level of cultural legitimacy accorded to children's rights norms.<sup>673</sup> Significantly, international human rights cannot derive their legitimacy only from international authority but also from the force of cultural traditions.<sup>674</sup> Thus, the balance can be achieved by maintaining human rights standards while resolving the obvious conflict between them and the dominant cultural traditions.<sup>675</sup> In the case of detrimental cultural practices, solutions need to be found in consultation with practicing communities and adequate social support should be given to individuals who choose to abandon the practice.<sup>676</sup>

Furthermore, the issue of child cross-border recruitment has become wide spread in Africa. It has been argued that the omission of child cross-border recruitment in international

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<sup>666</sup> *Ibid.*

<sup>667</sup> Ibhawoh (see note 30 above) 840.

<sup>668</sup> Kaime (see note 29 above) 227.

<sup>669</sup> *Ibid* 221.

<sup>670</sup> Ibhawoh (see note 30 above) 839.

<sup>671</sup> *Ibid.*

<sup>672</sup> *Ibid* 843.

<sup>673</sup> Kaime(see note 29 above) 223.

<sup>674</sup> Ibhawoh (see note 30 above) 842.

<sup>675</sup> Bourdillon (see note 432 above) 48.

<sup>676</sup> Kaime (see note 29 above) 221.

documents creates an obstacle to the implementation of the international law under the circumstances. However, it is unlikely that the establishment of substantive provisions with regards to cross-border recruitment will 'extinguish' the practice. Experience has shown that with the general child soldier recruitment, the practice is still continuing despite substantive provisions that prohibit this practice. Thus, it is only the change in attitude by the government forces and rebels that engage in this practice, that will see this practice become 'extinct'.

## CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

### 4.1 CONCLUSIONS

The recruitment of child soldiers is by its very character paradoxical, in that the provisions that relate to the recruitment of child soldiers are contradictory.<sup>677</sup> It is therefore not surprising that the law relating to the recruitment of child soldiers is vague and often unclear.

In conclusion it can be argued that despite the various international treaties regulating the practice of child recruitment, there is incontrovertible evidence that the problem is continuing on a large scale and new challenges keep emerging.<sup>678</sup> Regardless of the fact that the norm on the prohibition of recruitment of children into armed forces has acquired customary law status, recruitment has still continued. The 'loopholes', vagueness and inconsistencies of the international law relating to the recruitment of child soldiers have the potential of creating legal uncertainty which will ultimately result in further injustice for the child.

In addition, most of the treaties do not offer equal protection to children who are recruited into armed forces. The issue of age is a complex one. The two Additional Protocols of 1977, the CRC and the Rome Statute prohibit recruitment of under-15s into armed forces; whilst, the Optional Protocol to the CRC, African Charter and the ILO Convention 182 raise the minimum age of recruitment from 15 to 18. Ironically, in a number of countries the age of majority is deemed to be twenty-one.<sup>679</sup> Thus, there is already some indication of contradicting provisions between the age of majority in a number of countries and the minimum age of recruitment into armed forces.

It can be argued that the legal uncertainty is not *per se* the cause of recruitment continuing. The cause is more complex. Even though the some member States are incorporating the international law into municipal law, these provisions are not being enforced. There is no political willingness to enforce these laws. Furthermore, the enforcement and monitoring mechanisms embodied in the treaties are not as effective as anticipated. Although some of

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<sup>677</sup> Bell & Abrahams (see note 96 above) 162.

<sup>678</sup> For example, the issue of cross-border recruitment.

<sup>679</sup> In South Africa, the Age of Majority Act 57 of 1972 has recently been amended by the Children's Act 38 of 2005 to reduce the age of majority to eighteen.

the enforcement and monitoring mechanisms have generated positive outcomes; overall, most of them are simply too 'weak' and this has led to the further prejudice for the child.

Because the military use of children dates back to ancient times, it is obvious that our views regarding the legitimacy and morality of children's military participation is a historical construct, shaped by particular social and political factors.<sup>680</sup> Thus, the fact that the discourse of 'child soldiers' exists as a historical construct; due to evolving perceptions, there is bound to be possible gaps between the global discourse and local realities.<sup>681</sup> This is because the global human rights discourse has failed to focus on specific empirical studies on the role of culture in the development of human rights.<sup>682</sup> This has led to 'tension' between human rights and the right to culture, in particular when practices which are considered to be in 'cultural' conflict with the standards set by international human rights norms.<sup>683</sup>

However, it is not enough to identify the cultural barriers and limitations to human rights standards; the challenge is how to achieve a balance of values.<sup>684</sup> Experiences have shown that formal legislative enactments alone cannot change pervasive cultural attitudes.<sup>685</sup> However, the crucial question in the case of Africa is how 'this marriage of universal rights and culture can be achieved'.<sup>686</sup> The success of implementing children's rights in Africa depends to a large extent on the level of cultural legitimacy accorded to children's rights norms.<sup>687</sup> Significantly, international human rights cannot derive their legitimacy only from international authority but also from the force of cultural traditions.<sup>688</sup> Thus, the balance can be achieved by maintaining human rights standards while resolving the obvious conflict between them and the dominant cultural traditions.<sup>689</sup> In the case of detrimental cultural practices, solutions need to be found in consultation with practicing

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<sup>680</sup> Lee (see note 26 above) 2.

<sup>681</sup> *Ibid.*

<sup>682</sup> Ibhawoh (see note 30 above) 840.

<sup>683</sup> Kaime (see note 29 above) 227.

<sup>684</sup> Ibhawoh (see note 30 above) 839.

<sup>685</sup> *Ibid.*

<sup>686</sup> *Ibid* 843.

<sup>687</sup> Kaime(see note 29 above) 223.

<sup>688</sup> Ibhawoh (see note 30 above) 842.

<sup>689</sup> Bourdillon (see note 432 above) 48.

communities and adequate social support should be given to individuals who choose to abandon the practice.<sup>690</sup>

Lastly, the issue of child cross-border recruitment has become wide spread in Africa. It has been argued that the omission of child cross-border recruitment in international documents creates an obstacle to the implementation of the international law under the circumstances. However, it is unlikely that the establishment of substantive provisions with regards to cross-border recruitment will 'extinguish' the practice. Experience has shown that with the general child soldier recruitment, the practice is still continuing despite substantive provisions that prohibit this practice. Thus, it is only the change in attitude by the government forces and rebels that engage in this practice, that will see this practice become 'extinct'.

#### 4.2 RECOMMENDATIONS

In order to offer an equal protection to children, all treaties should maintain the age of 18, or even a higher age, as the overall definition of a child. This will provide all children adequate protection from recruitment into armed forces. Currently, in relation to international law, the issue of age is complex. The two Additional Protocols of 1977, the CRC and the Rome Statute prohibit recruitment of under-15s into armed forces. The Optional Protocol to the CRC, African Charter and the ILO Convention 182 raise the minimum age of recruitment from 15 to 18. The Optional Protocol to the CRC has, nevertheless, retained 15 years as the minimum age of voluntary enlistment. Ironically, in a number of countries the age of majority is deemed to be twenty-one.<sup>691</sup> Thus, there is already some indication of contradicting provisions between the age of majority in a number of countries and the minimum age of recruitment into armed forces.

If any provisions contained in the law of a State or international law in force for that State offer a higher standard of protection for children, the provisions should automatically take precedent over any other law; whether municipal or international. In relation to this article 41 of the CRC states that if any provisions contained in the law of a Member State or international law in force for that State are more conducive to the realization of the rights

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<sup>690</sup> Kaime (see note 29 above) 221.

<sup>691</sup> In South Africa, the Age of Majority Act 57 of 1972 has recently been amended by the Children's Act 38 of 2005 to reduce the age of majority to eighteen.

of the child, the provisions have to take precedence over the CRC. Although this provision is only applicable to member States to the CRC, as highlighted above, the researcher submits that such a standard should be used in respect to all the international treaties that prohibit the recruitment of child soldiers. With the very diverse standards set in the different international treaties, this standard will offer better protection to children involved in the practice.

The validity of voluntary recruitment should not be accepted particularly in the African context. The Optional Protocol to the CRC by allowing voluntary recruitment into a state's armed forces of 15 years olds under article 3(3) lowers the level of protection for children who volunteer to join governmental armed forces.<sup>692</sup> The voluntary participation of these children is often a response to pressure of subtle nature.<sup>693</sup> Children sometimes feel compelled due to the political, social and economic conditions directing their lives to 'voluntary' join the armed forces.<sup>694</sup> Although the Optional Protocol to the CRC mandates four safeguards to ensure that recruitment is voluntary, their practicality in the African context is questionable.

In order for international law to be respected, it must set the same standards for both Member State and non-State party forces. Article 3(3) of the Optional Protocol to the CRC allows voluntary recruitment by the government, while article 4(1) prohibits the same from being exercised by armed forces distinct from Member State forces. This is a creditable step since the recruitment of child soldiers is more extensive among non-governmental armed forces than government forces. It is clear that the Optional Protocol to the CRC has double standards as it provides different standards for armed forces to a Member State and non-State armed forces.<sup>695</sup> It is most probable that non-State armed forces will not feel obliged to abide by a standard which is different from that imposed on the State.

When addressing the issue of child soldiers in Africa, there is a need to look beyond a set of laws in understanding and addressing the phenomenon. Most human rights instruments guarantee both individual rights and a right to culture. Conversely, the most important

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<sup>692</sup> *Ibid.*

<sup>693</sup> Van Niekerk (see note 65 above) 65.

<sup>694</sup> Singer (see note 426 above).

<sup>695</sup> Bell & Abrahams (see note 96 above) 176; Singh (see note 3 above) 217; Mezmur (see note 11 above) 206-7.

tenet of the human rights law on children is that a child's interests are to be given paramount consideration. Hence, whenever the right to preserve a culture comes into conflict with a child's interests, the latter prevail. Cultural practices that might be prejudicial to a child's health or life are prohibited under human rights law. However, relying on global discourse on the aspect of the recruitment of child soldiers and failing to employ this kind of engagement in the local context of their recruitment may lead to negative consequences for the intended beneficiaries.<sup>696</sup> Thus far, international law has not been able to eradicate the practice of the recruitment of child soldiers into armed forces. Research has shown that there are aspects of children's recruitment into armed forces that are not acknowledged in the global humanitarian discourse.<sup>697</sup> Lee argues that it is insufficient to talk about the recruitment of child soldiers simply as a clear case of barbarity and abuse of children.<sup>698</sup> There is need to concretize the aspirations embodied in these standards through the implementation of programmes, projects and other interventions which result in positive norm change.<sup>699</sup>

Furthermore, in order to ensure that international standards promote the eradication of harmful practices, such as the recruitment of child soldiers into armed forces; it is important to acknowledge that these practices cannot be eradicated by a simple process of legislation of alternative norms.<sup>700</sup> The enactment of human rights as universal laws alone cannot change pervasive cultural attitudes.<sup>701</sup> This has resulted in the pursuit for consensus between cultural traditions and modern international legal standards becoming a theme of growing interest.<sup>702</sup> Practices like the recruitment of child soldiers are against the implementation of children's rights within the African cultural context.<sup>703</sup> Cultural values and the reasons for the existence of such a practice must be understood before embarking on a programme of eradication.<sup>704</sup> Solutions towards eradication must be sourced and drawn up in consultation with practicing communities, as opposed to merely copied from outside.<sup>705</sup> It must be appreciated that eradicating deep-rooted cultural practices and

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<sup>696</sup> Bourdillon (see note 432 above) 48.

<sup>697</sup> Lee (see note 26 above) 19.

<sup>698</sup> *Ibid.*

<sup>699</sup> Kaime (see note 29 above) 236.

<sup>700</sup> *Ibid.*

<sup>701</sup> Ibhawoh (see note 30 above) 857.

<sup>702</sup> *Ibid.* 842.

<sup>703</sup> Kaime (see note 29 above) 236.

<sup>704</sup> *Ibid.*

<sup>705</sup> *Ibid.*

customs cannot be achieved through the adoption of one method or policy stance.<sup>706</sup> There is need for multi-sectoral and collaboration approaches.<sup>707</sup> Such a stance avoids duplication and strengthens intervention efforts.<sup>708</sup>

However, it is not enough to identify the cultural barriers and limitations to human rights standards; the challenge is how to achieve a balance of values.<sup>709</sup> The articulation of cultural rights in international treaties and the prohibition of customary practices that conflict with human rights standards have not been successful in actually resolving the inherent conflicts between human rights objectives and some dominant cultural traditions.<sup>710</sup> Many African States have demonstrated a willingness to introduce legislation holding national human rights above customs and cultural traditions where conflicts arise.<sup>711</sup> However, experiences have shown that formal legislative enactments alone cannot change pervasive cultural attitudes. The success of implementing children's rights in Africa depends to a large extent on the level of cultural legitimacy accorded to the children's rights norms.<sup>712</sup> Thus, the balance can be achieved by maintaining human rights standards while resolving the obvious conflict between them and the dominant cultural traditions.<sup>713</sup> This can be achieved by insuring that the legitimacy and acceptability of the modern universal human rights regime is harmonized and strengthened with the specific cultural experiences of various societies.<sup>714</sup>

Furthermore, it is even more important to appreciate the social basis of these cultural traditions and how they may be adapted to or integrated with national legislation to promote human rights.<sup>715</sup> In the case of detrimental cultural practices, solutions need to be found in consultation with practicing communities and adequate social support should be given to individuals who choose to abandon the practice.<sup>716</sup> African societies are constantly in a process of change which is shaped by a variety of cultural, social, and

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<sup>706</sup> *Ibid.*

<sup>707</sup> *Ibid.*

<sup>708</sup> *Ibid.*

<sup>709</sup> Grant (see note 506 above) 9.

<sup>710</sup> Ibhawoh (see note 30 above) 847.

<sup>711</sup> Grant (see note 506 above) 9.

<sup>712</sup> Kaime (see note 29 above) 223.

<sup>713</sup> Bourdillon (see note 432 above) 48.

<sup>714</sup> Ibhawoh (see note 30 above) 843.

<sup>715</sup> *Ibid.* 839.

<sup>716</sup> Kaime (see note 29 above) 221.

economic factors.<sup>717</sup> Dominant cultural traditions can in fact be changed in response to different internal and external pressures.<sup>718</sup>

The enactment of international human rights alone cannot change cultural practices. Reasons for the existence of a practice have to be taken into account, and a compromise has to be reached in order to protect children's rights. The success of implementing children's rights in Africa depends to a large extent on the level of cultural legitimacy accorded to children's rights norms.<sup>719</sup> For children's rights to enjoy sufficient observance and support they have to command adequate legitimacy.<sup>720</sup> Significantly, cultural legitimacy derives its authority from internal validity.<sup>721</sup> Thus, if a rule or norm does not command adequate legitimacy it will not enjoy sufficient observance or support.<sup>722</sup>

In relation to the issue of child cross-border recruitment, the issue should be 'adequately' addressed in international law. This will make the applicability of the relevant international law simpler, and this will also improve on the effectiveness of the respective treaties in this regard; especially the enforcement and monitoring mechanisms embodied within the treaties. Furthermore, State parties need to live up to their international commitments, instead of them also becoming perpetrators of the violation of children's rights. This is because the 'inadequacy' is not *per se* the only reason why the issue of child soldiers is wide spread in Africa; the prohibition of general child recruitment has been in international treaties, and yet recruitment continues.

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<sup>717</sup> *Ibid* 233.

<sup>718</sup> Ibhawoh (see note 30 above) 841.

<sup>719</sup> Kaime(see note 29 above) 223.

<sup>720</sup> *Ibid* 222.

<sup>721</sup> *Ibid*.

<sup>722</sup> *Ibid*.

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