

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

**BY
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DECLARATION

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.¹ 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.² 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.³

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.⁴ 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.⁵ A common feature of these conflicts is the extensive

¹ 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).

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

³ 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.

⁴ *Ibid.*

⁵ 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.⁶ 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'.⁷

The Organisation of the African Union (OAU) States have adopted the African Charter on the Rights and Welfare of the Child (African Charter),⁸ which creates a more stringent protection against recruitment of African children,⁹ as compared to the other treaties that prohibit the recruitment of children into armed forces.¹⁰ The African Charter has adopted a 'straight 18' position, which is compliant with the overall definition of a child.¹¹ 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.¹²

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.¹³ The African Charter is not the only international convention relevant for the protection of children against recruitment to which the African countries

⁶ 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.

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

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

⁹ 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.

¹⁰ 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.

¹¹ 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.

¹² Singh (see note 3 above) 219.

¹³ 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.¹⁴ 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.¹⁵

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.¹⁶ 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.¹⁷ 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.¹⁸

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

¹⁴They 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.

¹⁵ 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.

¹⁶ Mezmur (see note 11 above) 209.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Article 43, article 44 and article 45.

Charter; if the Committee were prompt in their considerations of these complaints.²⁰ The issue of individual communications seems to be drawing less attention from the Committee.²¹ 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.²² 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.²³ 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.²⁴ 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

²⁰ The individual complaints give the Committee 'hands on' on the situation on the ground.

²¹ Mezmur (see note 11 above) 208.

²² 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.

²³ 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.

²⁴ *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.²⁵ 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.²⁶ 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.²⁷

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.²⁸ 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.²⁹ Implementation depends to a large extent

²⁵ "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.

²⁶ 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.

²⁷ *Ibid* 1.

²⁸ *Ibid*.

²⁹ 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 legitimacy³⁰ accorded to children's rights norms in a society.³¹ 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.³² 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.³³ Some of the countries that encounter this practice in Africa are DRC, Liberia, Guinea, Burkina Faso and Sierra Leone.³⁴ 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.³⁵ 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.³⁶ Thus, cross-border recruitment makes the applicability of the existing provision of the Palermo Protocol difficult.³⁷ Furthermore, the

³⁰ "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.

³¹ Kaime (note 29 above) 221.

³² *Ibid.*

³³ 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.

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

³⁵ 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.'

³⁶ Mezmur (note 11 above) 208.

³⁷ *Ibid.*

Optional Protocol to the CRC in paragraph 11 of its preamble³⁸ also mentions cross-border recruitment, but just as with the Palermo Protocol, the lead in the preamble is not followed by any substantive provisions.³⁹ Unfortunately, the provisions of the preamble do not have the force of law, as the substantive provisions have.⁴⁰ 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.⁴¹

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.⁴² 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.⁴³ 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.

³⁸ 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...'.
³⁹ Mezmur (see note 11 above) 208.
⁴⁰ *Ex parte Johannesburg City Council* 1975 (1) SA (W) 817A-818C.
⁴¹ *Union and Rock Insurance Co. Ltd. v Carmichael's Executor* 1917 AD 593, 597.
⁴² Kaime (see note 29 above) 221.
⁴³ *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 23rd 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.⁴⁴ 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.⁴⁵ During the early days of modern warfare, young boys often took part in battles mainly as the ever-present 'drummer boys'.⁴⁶ The 20th century saw children being recruited as soldiers in both World War I and World War II. These children frequently participated in popular revolutions.⁴⁷ Similarly in Africa, throughout history, young men have played prominent roles in taking weapons to defend their villages.⁴⁸

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.⁴⁹ 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.⁵⁰ However, the Coalition to Stop the Use of Child Soldiers has reported a number of more than 500,000

⁴⁴ 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.

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

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

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

⁴⁸ 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.

⁴⁹ 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.

⁵⁰ Twun-Dauso (see note 7 above) 12.

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

As highlighted above, research has shown that this problem is critical on this continent.⁵² 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’.⁵³ Child soldiers are being recruited into armed forces in countries such as Burundi, Cote d’Ivoire, DRC, Rwanda, Sierra Leone, Somalia, Sudan, and Uganda.⁵⁴ The Ugandan Lord’s Resistance Army (LRA), which is a rebel group, is particularly notorious for its recruitment of child soldiers.⁵⁵ 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.⁵⁶ Some of the governments of these countries have even laid down the minimum age for recruitment⁵⁷ 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.⁵⁸ Despite government denials, Myanmar is the only country where government armed forces forcibly recruit children between the ages of 12 and 18.⁵⁹ Furthermore, Myanmar is believed to have more child soldiers (70 000) than any other country in the world.⁶⁰ 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

⁵¹ IRINnews.org ‘Too little to be fighting anyone’s wars’

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

⁵² Singh (see note 3 above) 206.

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

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

⁵⁵ 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) 2nd ed. Oxford: Oxford University Press 531.

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

⁵⁷ 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 accessed on 14 February 2009.

⁵⁸ Rialize (see note 54 above) 37.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

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

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.⁶³ 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.⁶⁴ 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.⁶⁵

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.⁶⁶ Children sometimes feel compelled due to the political, social and economic conditions directing their lives.⁶⁷ 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.⁶⁸ Furthermore, closely assessed, in

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

⁶² Rialize (see note 54 above) 37.

⁶³ Zounmenou (see note 48 above) 68.

⁶⁴ R. Brett & I. Specht (see note 61 above).

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

⁶⁶ *Ibid.*, 65.

⁶⁷ Singh (see note 3) 211.

⁶⁸ 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.⁶⁹

Cohn and Goodwin-Gill⁷⁰ 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.⁷¹

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 18.⁷² 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.⁷³ 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.⁷⁴ UNICEF has reported that in Sub-Sahara Africa, 55% of children are not registered by their fifth birthday.⁷⁵ 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.⁷⁶

⁶⁹ Zounmenou (see note 48 above) 34.

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

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

⁷² 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.’

⁷³ Mezmur (see note 11 above) 205.

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

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

⁷⁶ 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.⁷⁷ 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.⁷⁸ 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.⁷⁹

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.⁸⁰ 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.⁸¹

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

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

⁷⁸ Van Niekerk (see note 65 above) 58.

⁷⁹ *Ibid*.

⁸⁰ Kalis (see note 77 above).

⁸¹ 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.

⁸² 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 accessed on 3 September 2009.

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

⁸⁴ 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.⁸⁵ Governmental unwillingness and inability to curb the recruitment of child soldiers is a major reason why armed forces recruit children. As argued by Ayissi,⁸⁶ compliance with the established norms remains essentially a dream. Although governments have established minimum recruitment ages,⁸⁷ 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.⁸⁸

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.⁸⁹ 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

⁸⁵ Singh (note 3 above) 212.

⁸⁶ A. Ayissi 'Protecting children in armed conflict: from commitment to compliance' (2002) 3 *Children and Security* 5, 5.

⁸⁷ (see note 57 above).

⁸⁸ Kalis (see note 77 above).

⁸⁹ D.R. Gurnell 'Briewe - 'Community service - or conscription'' (2003) 93(2) *South African Medical Journal* 84, 84.

forces or groups.⁹⁰ 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'.⁹¹ 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 Service⁹² 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.

⁹⁰ 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'.

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

⁹² 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.⁹³ 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.⁹⁴ 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.⁹⁵ Furthermore,

⁹³ 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.

⁹⁴ For example, the issue of cross-border recruitment.

⁹⁵ 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.⁹⁶ IHL is the *lex specialis*,⁹⁷ which only applies in situations of armed conflict.⁹⁸ 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.⁹⁹ The role of IHL is to offer protection to persons and to property which may be affected by armed conflict.¹⁰⁰ IHL is therefore the body of law which *inter alia* regulates the law pertaining to child soldiers.¹⁰¹ Thus, the goal of IHL is to limit the consequences of war on people and property and to protect particularly vulnerable persons.¹⁰² The main IHL treaties are the four Geneva Conventions of 1949 and their Additional Protocols.¹⁰³ The Geneva Conventions and their Additional Protocols embody mainly the significant rules limiting the barbarity of war.¹⁰⁴

⁹⁶ K. Bell & D. Abrahams 'The use of child soldiers in armed conflict' (2008) *Obiter* 162, 170.

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

⁹⁸ 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.

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

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

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

¹⁰² Hrea.org 'International humanitarian law' http://www.hrea.org/index.php?doc_id=415 accessed 31 July 2009.

¹⁰³ 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).

¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ The two Protocols establish 15 years as the minimum age for recruitment.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰ Furthermore, whereas the AP-I prohibits only the recruitment for direct hostilities,¹¹¹ 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.¹¹² 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.¹¹³ Taking into consideration the situation in Africa, this is a positive development. Unfortunately, this has

¹⁰⁵ 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.

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

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

¹⁰⁸ 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.

¹⁰⁹ *Ibid.*

¹¹⁰ 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.

¹¹¹ Article 77(2).

¹¹² Singh (see note 3 above) 215.

¹¹³ 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.¹¹⁴

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.¹¹⁵ 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.¹¹⁶ 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’.¹¹⁷ Then later on in the document it provides 15 as the minimum age of recruitment for direct hostilities.¹¹⁸ 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.¹¹⁹ Thus, article 38(2) does not apply to all children and therefore does not offer all children equal protection.

¹¹⁴ Singh (see note 3 above) 206.

¹¹⁵ Mekonnen & Pretorius (see note 98 above) 81 fn21.

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

¹¹⁷ Article 1 of the CRC.

¹¹⁸ Article 38(2) *Ibid.*

¹¹⁹ 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 18.¹²⁰ Member States are obliged to take ‘all feasible measures’ to ensure that under-18s are not recruited into armed forces.¹²¹ It has, nevertheless, retained 15 years as the minimum age of voluntary enlistment.¹²² 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.¹²³ 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.¹²⁴ 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.¹²⁵ Unlike the CRC, it adopts a ‘straight 18’ position, which is compliant with the overall definition of a child.¹²⁶ 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.¹²⁷ 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.¹²⁸ Unfortunately, this is not the case because the recruitment of child soldiers does happen.

¹²⁰ Article 1 of the Optional Protocol to the CRC.

¹²¹ Article 1 *ibid.*

¹²² Article 3(3) *ibid.*

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

¹²⁴ 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.

¹²⁵ 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.

¹²⁶ Mezmur (see note 11 above) 202.

¹²⁷ Article 22(2).

¹²⁸ 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,¹²⁹ and in addition, the African Charter combines labour law and human rights norms.¹³⁰ 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.¹³¹ 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.¹³²

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.¹³³ In the context of the CRC and the African Charter, the Charter has a higher standard as compared to the CRC.¹³⁴ 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

¹²⁹ Article 38(1) of the CRC and article 22(1) of the African Charter.

¹³⁰ Article 15 of the African Charter.

¹³¹ Article 43(1) of the CRC and article 46 of the African Charter.

¹³² *Ibid.*

¹³³ Ang (see note 99 above) 64.

¹³⁴ 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.¹³⁵

The adoption of the African Charter is in tandem with the United Nations' recognition of regional arrangements for the protection of human rights.¹³⁶ 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.¹³⁷ However, for human rights to be successfully implemented there ought to be a meaningful interplay between international human rights standards and municipal law.¹³⁸ 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).¹³⁹ 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;¹⁴⁰ 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.¹⁴¹

There is incontrovertible evidence that the problem of child recruitment into armed forces is continuing on a large scale and new challenges keep emerging.¹⁴² The research will focus on the issue of child cross-border recruitment which has become wide spread in Africa.¹⁴³ 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.¹⁴⁴ The Optional Protocol to the CRC in paragraph 11 of its preamble condemns

¹³⁵ Article 22(3) of the African Charter.

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

¹³⁷ Article 41 of the CRC.

¹³⁸ Mubangizi (see note 116 above) 32.

¹³⁹ *Ibid.*

¹⁴⁰ 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.

¹⁴¹ 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).

¹⁴² For example, the issue of cross-border recruitment.

¹⁴³ Mezmur (see note 11 above) 209.

¹⁴⁴ *Ibid.*

child cross-border recruitment.¹⁴⁵ 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’.¹⁴⁶ 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.¹⁴⁷ Under the UN anti-trafficking mechanisms, the Office of the Special Representative for Combating the Traffic of Human Beings has been established;¹⁴⁸ 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.¹⁴⁹ 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.¹⁵⁰ This aspect is shown by the fact that the issue of child cross-border recruitment in Africa has become wide spread.¹⁵¹ 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.¹⁵²

2.2.3 International criminal law

¹⁴⁵ 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...’.

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

¹⁴⁷ The Optional Protocol to the CRC and Palermo Protocol.

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

¹⁴⁹ *Ibid*.

¹⁵⁰ 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.

¹⁵¹ *Ibid*.

¹⁵² Mezmur (note 11 above) 208.

Child soldiers have also found protection within the discourse of international criminal law.¹⁵³ International criminal law deals with the most serious crimes of international concern.¹⁵⁴ Under international criminal law, the recruitment of children under the age 15 years is considered a ‘war crime’.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹ The Rome Statute imposes penal sanctions upon offenders to this Statute,¹⁶⁰ thereby imposing necessary sanctions upon offenders and increasing the protection afforded to child soldiers.¹⁶¹

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.¹⁶² Child soldiers have also found protection within the discourse of international law on child labour.¹⁶³ Children recruited as combatants fit the definition of ‘child labour’.¹⁶⁴ 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

¹⁵³ The Rome Statute.

¹⁵⁴ The crime of genocide, crimes against humanity, war crimes and the crime of aggression.

¹⁵⁵ Article 8(2)(b)(xxvi) of the Rome Statute.

¹⁵⁶ *Ibid.*

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

¹⁵⁸ Article 8(2)(e)(vii).

¹⁵⁹ Article 1.

¹⁶⁰ Article 77.

¹⁶¹ Bell & Abraham (see note 96 above) 179.

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

¹⁶³ ILO Convention 182.

¹⁶⁴ 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'.¹⁶⁵ 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.¹⁶⁶ The ILO Convention 182 has banned the worst forms of child labor.¹⁶⁷ 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.¹⁶⁸

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.¹⁶⁹ 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).¹⁷⁰ 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.¹⁷¹ 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,¹⁷² the treaty should not have made such a distinction.

2.2.5 Conclusion

¹⁶⁵ 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.

¹⁶⁶ Stohl (see note 164 above).

¹⁶⁷ Article 1.

¹⁶⁸ *Ibid.*

¹⁶⁹ Mezmur (see note 11 above) 203.

¹⁷⁰ *Ibid.*

¹⁷¹ Article 3(b) of the Palermo Protocol.

¹⁷² 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.¹⁷³ 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.¹⁷⁴ 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.¹⁷⁵

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

¹⁷³ Ayissi (see note 86 above) 7.

¹⁷⁴ 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).

¹⁷⁵ Musila (see note 6 above) 332.

advocacy strategy to bring high-level visibility to the situation and rights of children affected by armed conflict.¹⁷⁶ 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.¹⁷⁷

Thus far, these collaborative efforts between the UN entities and their partners have resulted in significant advances, actions and tangible results for children.¹⁷⁸ 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.¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹ 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,¹⁸² and they are exercised through UN Security Council Resolutions. The

¹⁷⁶ 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.

¹⁷⁷ 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.

¹⁷⁸ 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.*

¹⁷⁹ 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.

¹⁸⁰ *Ibid.*

¹⁸¹ McIntyre (see note 91 above) 10.

¹⁸² Chapter V.

UNSC has passed a number of Resolutions condemning the recruitment of child soldiers.¹⁸³ Importantly, Resolution 1612 (2005) calls for a series of measures to be taken, including the establishment of a mechanism for monitoring and reporting violations.¹⁸⁴ 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.¹⁸⁵ 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;¹⁸⁶ to ensure that children are not recruited into armed forces in pursuant to the conclusions and recommendations of the UN-led task forces.¹⁸⁷ The army has also changed its integration process, which has led to the decrease in the number of active fighting zones.¹⁸⁸

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.¹⁸⁹ 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.¹⁹⁰ 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

¹⁸³ 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.

¹⁸⁴ Article 2 of the UNSC Resolution 1612.

¹⁸⁵ Mezmur (see note 11 above) 209.

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

¹⁸⁷ 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.

¹⁸⁸ *Ibid.*

¹⁸⁹ 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.

¹⁹⁰ *Ibid.*

certain individuals for political reasons.¹⁹¹ 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.¹⁹² 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.¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵

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.¹⁹⁶ 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;¹⁹⁷ with financial issues hampering on the progress of the body.¹⁹⁸

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

¹⁹² 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.

¹⁹³ Zandman (see note 191 above) 532-3.

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

¹⁹⁵ *Ibid.*

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

¹⁹⁷ 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.¹⁹⁹ For example, during the Rwandan genocide in 1994, the international-community let itself be a mere ‘eyewitness’ or ‘bystander’.²⁰⁰ Commonly, prosecutions for violation of international law are only effected following the cessation of hostilities and the signing of a peace agreement.²⁰¹ This means that the international community is unable to protect children during armed conflict, thus in a way leaving them vulnerable to recruitment.²⁰² 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.²⁰³ However, some countries do not offer amnesty deals to rebels. For example, the DRC government has detained the rebel leader, Laurent Nkunda.²⁰⁴

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’.²⁰⁵

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

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

¹⁹⁹ Harvey (see note 189 above) 18.

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

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

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

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

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

²⁰⁵ 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.²⁰⁷ 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.²⁰⁸ In Africa, there has been a lack of political will to support such interventions;²⁰⁹ 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.²¹⁰ 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.²¹¹ 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.²¹²

The UN can also deploy peacekeepers to post-conflict situations to offer protection for the populations under threat and to safeguard their rights.²¹³ 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.²¹⁴

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

²⁰⁷ De Beer (see note 200 above) 60.

²⁰⁸ *Ibid.*

²⁰⁹ Mezmur (see note 11 above) 209.

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

²¹¹ De Beer (see note 200 above) 60.

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

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

²¹⁴ *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.²¹⁵ 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).²¹⁶ 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.²¹⁷ These nations, due to superseding economic and political interests, continue small arms transfers through private deals on the black market.²¹⁸

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).²¹⁹ 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.²²⁰ POA also includes

²¹⁵ Singh (see note 3 above) 212.

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

²¹⁷ Kalis (see note 77 above).

²¹⁸ *Ibid.*

²¹⁹ 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.

²²⁰ 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.²²¹ 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.²²² Research done by Ndungu²²³ indicates an inconsistency in reporting, and sadly, the countries that have significant challenges in the proliferation of illicit arms rarely make their submissions.²²⁴ 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.²²⁵ 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 2006.²²⁶ The Convention is an extensive instrument that seeks to address several key elements of POA.²²⁷ 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.²²⁸ Furthermore, there is an irregular implementation of regional agreements which leaves loopholes that arms traffickers can exploit.²²⁹ Despite the challenges, Alusala argues that the Convention is a move in a positive direction.²³⁰

(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 Convention²³¹ and article 78 of the AP-II

²²¹ *Ibid.*

²²² Para. II.33 of the POA.

²²³ Ndungu (see note 220 above).

²²⁴ For example, the DRC.

²²⁵ Ndungu (see note 220 above).

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

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

²²⁸ *Ibid.*

²²⁹ Okereke (see note 226 above) 13.

²³⁰ *Ibid.*, 15.

²³¹ 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.²³² Unfortunately, there is no adherence to this rule, and these children are seen as easy targets for recruitment.²³³ 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.²³⁴

Nonetheless, in times of conflict, the difficulties facing these States are not just internal.²³⁵ The regional and defense organisations capable of helping the States at war can only come to their aid when the situation has neutralized.²³⁶ 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'.²³⁷ 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.²³⁸ Regrettably, there are also instances where State parties have taken advantage of these children and have deployed them into their armed forces.²³⁹

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.²⁴⁰ 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

²³² The children can be moved to a neutral country.

²³³ Singh (see note 3 above) 209 fn9.

²³⁴ 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.

²³⁵ Holzgrefe & Kedane (see note 205 above) 23.

²³⁶ *Ibid.*

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

²³⁸ Article 22 of the CRC & Article 33 of the African Charter.

²³⁹ 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.

²⁴⁰ 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.²⁴¹ 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.²⁴² Thus, the treaty only becomes applicable when national legislation has been enacted to give the treaty the force of law domestically.²⁴³ On the contrary, under the monist approach, treaties which are ratified by a State are directly applicable in that State.²⁴⁴

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.²⁴⁵ 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.²⁴⁶ Although member States have international obligations and national

²⁴¹ Mubangizi (see note 116 above) 32.

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

²⁴⁵ 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.

²⁴⁶ 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;²⁴⁷ 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.²⁴⁸

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.²⁴⁹ 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.²⁵⁰

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.²⁵¹ 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.²⁵² 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.²⁵³ This means that the Committee cannot

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

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

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

²⁵⁰ Kalis (see note 77 above).

²⁵¹ Ayissi (see note 86 above) 6.

²⁵² *Ibid.*

²⁵³ 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,²⁵⁴ and the seriousness with which the States treat the reporting process varies widely.²⁵⁵ 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,²⁵⁶ 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.²⁵⁷

In theory, the enforcement mechanisms in the African Charter are much stronger than those found in the CRC.²⁵⁸ Not only do the enforcement mechanisms include the reporting procedure, they also include individual complaints and investigations.²⁵⁹ 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.²⁶⁰ 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).²⁶¹

²⁵⁴ Mezmur (note 11 above) 209.

²⁵⁵ *Ibid.*

²⁵⁶ 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.

²⁵⁷ *Ibid.*

²⁵⁸ Chirwa (see note 23 above) 169.

²⁵⁹ Article 43, article 44 & article 45.

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

²⁶¹ 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 8th 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.’²⁶² The African Charter Committee may admit a communication from a State non-signatory to the Charter in the overall best interest of the child.²⁶³ The Guidelines for Communications also addresses the issue of admissibility;²⁶⁴ which was not dealt with previously in the Charter.²⁶⁵ Interestingly, the possibility for the complaint requesting that the Committee reconsider its decision by providing additional documents or facts is also provided for.²⁶⁶ 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.²⁶⁷ However, the considerations of the communications are of a confidential nature; the communications are considered in a session held in camera.²⁶⁸ Positively, the Guidelines embed one of the four cardinal principles of the African Charter, namely ‘child participation’, into the communication procedure.²⁶⁹ 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.²⁷⁰

In relation to ‘investigations’ the investigation missions can be initiated either by the Committee or at the invitation of a member State.²⁷¹ 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.²⁷² Later the mission’s final report must be prepared. The mission report is expected to make recommendations.²⁷³ Positively, the Committee has also established follow-up mechanisms in this regard. The Member State visited in the mission could be

²⁶² Chapter 1, article 2(1) of the Guidelines for Communications.

²⁶³ Chapter 2, article 1(II)(2) *ibid.*

²⁶⁴ Chapter 2, article 1(III)(b)-(c) *ibid.*

²⁶⁵ Mezmur (see note 261) 264.

²⁶⁶ Chapter 2, article 2(II)(3) of the Guidelines for Communications.

²⁶⁷ Chapter 2, article 2(IV)(1) *ibid.*

²⁶⁸ Chapter 3, article 1 *ibid.*

²⁶⁹ Chapter 3, article 3(3) *ibid.*

²⁷⁰ Chapter 3, article 4(1) *ibid.*

²⁷¹ Article 4(1) & (2) *ibid.*

²⁷² Article 12 *ibid.*

²⁷³ 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.²⁷⁴ Civil society could also be requested to furnish information on the situation on the ground.²⁷⁵

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.²⁷⁶ 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.²⁷⁷ 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.²⁷⁸ Interestingly, the complaint can request that the Committee reconsider its decision by providing additional documents or facts.²⁷⁹ 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.²⁸⁰ 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.²⁸¹ 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

²⁷⁴ Article 26(1) *ibid.*

²⁷⁵ Article 27(2) *ibid.*

²⁷⁶ 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.

²⁷⁷ Chapter 2, article 1(II)(2) *ibid.*

²⁷⁸ Chapter 2, article 2(IV)(1) of the Guidelines for Communications.

²⁷⁹ Chapter 2, article 2(II)(3) *ibid.*

²⁸⁰ Chirwa (see note 23 above) 170.

²⁸¹ Mezmur (see note 11 above) 208.

violation of children's rights.²⁸² 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 13th session which was held in 2009.²⁸³ Consequently, at the end of the session, the communication had still not been dealt with.²⁸⁴ The complaints mechanism is a powerful mechanism, if only the Committee were prompt in their considerations.²⁸⁵ Furthermore, the Committee is reluctant in initiating investigative missions that look into the problem of child soldiers,²⁸⁶ despite the fact that the problem is on a rampage in Africa.²⁸⁷ 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.²⁸⁸

Besides, the African Charter, the African regional human rights system, created under the auspices of the OAU,²⁸⁹ is also comprised of, inter alia, the Banjul Charter; which created the African Commission on Human and Peoples Rights (African Commission).²⁹⁰ The African Commission monitors compliance by member States with the Banjul Charter, inter alia, in terms of their Rules of Procedure²⁹¹ and in terms of the Reporting Guidelines for State Reports.²⁹² Furthermore, as part of its protective mandate, the Commission is competent to entertain applications from individuals and NGOs alleging violations of the Charter.²⁹³ However, the Commission has been criticised as being generally unable to 'act as a forceful guardian of rights'.²⁹⁴ Naldi argues that a literal reading of the Charter certainly suggests that the Commission possesses relatively weak powers of investigation

²⁸² Sloth-Nielsen & Mezmur (see note 22 above) 346.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ The individual complaints give the Committee 'hands on' on the situation on the ground.

²⁸⁶ Mezmur (see note 11 above) 208.

²⁸⁷ Singh (see note 3 above) 206.

²⁸⁸ For example, during the second ordinary session of the African Charter Committee, 36 reports were overdue. However, during the 10th ordinary session, there was some improvement because at least a few reports were submitted. Unfortunately, during the 11th and 12th 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.

²⁸⁹ Which has now been replaced by the African Union.

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

²⁹¹ Rules of Procedure ACHPR/RP/XIX.

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

²⁹³ Articles 55-9 of the Banjul Charter and chp. XVII of the Rules of Procedure.

²⁹⁴ 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.²⁹⁵ 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.²⁹⁶ Although the matters were not linked to the issue of child soldiers, the Commission has indicated interim measures in a number of cases.²⁹⁷ 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.²⁹⁸

However, the creation of an African Court on Human and Peoples Rights (the African Court)²⁹⁹ 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.³⁰⁰ 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.³⁰¹ 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.³⁰² 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.³⁰³

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid* 5.

²⁹⁷ *Ibid* 6.

²⁹⁸ Heyns (see note 290 above) 156.

²⁹⁹ 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).

³⁰⁰ Heyns (see note 290 above) 156.

³⁰¹ 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.

³⁰² Musila (see note 6 above) 323.

³⁰³ 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.³⁰⁴ At times, because of the terms of the peace agreements, perpetrators are not prosecuted.³⁰⁵ The international community has criticised this culture of impunity.³⁰⁶ 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.³⁰⁷ 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.³⁰⁸ 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,³⁰⁹ which were the first judgments at international level to address the recruitment of child soldiers.³¹⁰ 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.³¹¹ 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

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

³⁰⁵Tiefenbrunn (see note 2 above) 482.

³⁰⁶Article 9(4) of the UN Security Council Resolution 1379.

³⁰⁷*Ibid.*

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

³⁰⁹The AFRC judgment and the CDF judgment.

³¹⁰D. 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.

³¹¹*Prosecutor v Charles Taylor* SCSL-03-01-PT.

international level to address the recruitment of child soldiers.³¹² 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.³¹³ 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.³¹⁴ 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.³¹⁵ 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;³¹⁶ and this standard is binding on both State and non-State actors.

Importantly, the ICC's first trial focuses on child soldiers.³¹⁷ 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.³¹⁸ The ICC trial marks a significant step in efforts to establish responsibility for the recruitment of children into armed forces.³¹⁹ However, these efforts are hampered by States which decide to 'harbour fugitives' rather than arrest and surrender them to the ICC.³²⁰ 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

³¹² 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.

³¹³ CDF judgment para 692-3.

³¹⁴ *Ibid* para 731.

³¹⁵ AFRC judgment para 197.

³¹⁶ The basis of the principle of legality is that there is no retrospective criminalisation.

³¹⁷ *Prosecutor v Thomas Lubango Dyilo ICC-01/04-01/06*.

³¹⁸ 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.

³¹⁹ *Ibid*.

³²⁰ 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.³²¹ He was later on arrested whilst trying to cross the border into Cameroon. More recently, on the 4th 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.³²² 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.³²³ 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.³²⁴ Thus, ignoring the ICC warrant is contrary to their obligation under international law.³²⁵ 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.³²⁶ Different views are held about the question of accountability after the war.³²⁷ McIntyre argues that the notion of children themselves perpetrating atrocities has been met

³²¹ 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.

³²² Khulumani Support Group (see note 319 above).

³²³ *Ibid.*

³²⁴ Article 59 of the Rome Statute.

³²⁵ 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'.

³²⁶ Musila (see note 6 above) 321.

³²⁷ 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.³²⁸ 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’.³²⁹ 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.³³⁰

Under international law, the prosecution of children is not prohibited.³³¹ Although not necessarily addressed, both the CRC and the African Charter do not exclude the prosecution of children at international level.³³² 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.³³³ However, the Statute of the SCSL is the first international document that expressly provides for the prosecution of children for international crimes.³³⁴ 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.³³⁵ 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.³³⁶ 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.³³⁷ 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.

³²⁸ McIntyre (see note 91 above) 7.

³²⁹ Musila (see note 6 above) 322.

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

³³¹ Mezmur (see note 11 above) 211.

³³² 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.

³³³ Article 26 of the Rome Statute.

³³⁴ Article 7 of the Statute to the SCSL.

³³⁵ Mezmur (see note 11 above) 212.

³³⁶ *The Prosecutor v. Drazen Erdemovic* Case No. IT-96-22-T.

³³⁷ 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.³³⁸ In support of this contention, Musila argues that international criminal law, as currently structured, is not suited for the child perpetrator.³³⁹ 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.³⁴⁰ Instead of ordering imprisonment, the Statute of the SCSL can order a limited number of rehabilitative measures.³⁴¹ 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,³⁴² 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.³⁴³

(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.³⁴⁴ For example, the government-sponsored militia forces recruit child soldiers.³⁴⁵ What is more disturbing is that at times, governments of the member States do not impose penal sanctions on their agents.³⁴⁶ 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

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

³³⁹ Musila (see note 6 above) 324.

³⁴⁰ Bell & Abrahams (see note 96 above) 180.

³⁴¹ Article 7(2) of the Statute of the Special Court of Sierra Leone (2002).

³⁴² Article 26 of the Rome Statute.

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

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

³⁴⁵ *Ibid.*

³⁴⁶ Article 1 of the ILO Convention 182.

sanctions were issued against the forces.³⁴⁷ 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.³⁴⁸ 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.³⁴⁹ 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

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

³⁴⁸ Bell & Abrahams (see note 96 above) 162.

³⁴⁹ *Ibid* 188.

Convention 182 take the straight-18 approach.³⁵⁰ 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.³⁵¹

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.³⁵² 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’.³⁵³ 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.³⁵⁴ 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’,³⁵⁵ but later on in the document it provides 15 as the minimum age of recruitment.³⁵⁶ 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.³⁵⁷ The ‘straight 18’ position was challenged due to the fact that some of the countries involved during the finalizing of the instrument

³⁵⁰ 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.

³⁵¹ *Ibid.*

³⁵² Mezmur (see note 11 above) 201.

³⁵³ *Ibid.*

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

³⁵⁵ Article 1 of the CRC.

³⁵⁶ Article 38 *ibid.*

³⁵⁷ Mezmur (see note 11 above) 202.

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

Ironically, in a number of countries the age of majority is deemed to be twenty-one,³⁶⁰ and a number of international and regional treaties regard 18 as the minimum age for recruitment into armed forces.³⁶¹ 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.³⁶² 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.³⁶³

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.³⁶⁴ 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

³⁵⁸ '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.

³⁵⁹ 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.

³⁶⁰ 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.

³⁶¹ The African Charter and Optional Protocol to the CRC.

³⁶² Mezmur (see note 11 above) 202.

³⁶³ Bell & Abrahams (see note 96 above) 164.

³⁶⁴ 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,³⁶⁵ 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.³⁶⁶ The scope of the obligation contained in it is one of conduct rather than results.³⁶⁷

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).³⁶⁸ 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.³⁶⁹ 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.³⁷⁰ 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.³⁷¹ 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.³⁷² Consequently, this will only be applicable to State parties to the Rome Statute. Importantly, human rights norms do not have the same status

³⁶⁵ Mezmur (see note 11 above) 204.

³⁶⁶ Singh (note 3 above) 216.

³⁶⁷ Mezmur (see note 11 above) 204.

³⁶⁸ *Ibid* 205.

³⁶⁹ *Ibid*.

³⁷⁰ Bell & Abrahams (see note 96 above) 172.

³⁷¹ Mezmur (see note 11 above) 202.

³⁷² The Rome Statute.

under international law; some of the norms having achieved the status of customary international law.³⁷³ 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,³⁷⁴ 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.³⁷⁵ 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.³⁷⁶ 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.³⁷⁷ The voluntary participation of these children is often a response to pressure of some subtle nature.³⁷⁸ 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';³⁷⁹ 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.³⁸⁰

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.³⁸¹ As shown above in part 1.5, some of the governments of the State parties

³⁷³ 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.

³⁷⁴ Article 4(3)(c) of AP-II.

³⁷⁵ Bell & Abrahams (see note 96 above) 175.

³⁷⁶ *Ibid.*

³⁷⁷ McIntyre (see note 91 above) 15.

³⁷⁸ Van Niekerk (see note 65 above) 65.

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

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

³⁸¹ Article 3(2).

have laid down the minimum age for recruitment,³⁸² 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.³⁸³ 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.³⁸⁴

Nevertheless, to ensure that recruitment is voluntary, the Optional Protocol to the CRC mandates four safeguards.³⁸⁵ 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.³⁸⁶ 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.³⁸⁷

However, the possibility of genuine volunteerism, at least in exceptional cases cannot be ruled out.³⁸⁸ 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.³⁸⁹ Therefore, a tension is created between the right to participation,³⁹⁰ and the right to protection.³⁹¹ Nonetheless, this tension is solved by the 'best interests of the child' principle.³⁹² However, it is important for the international

³⁸² 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).

³⁸³ Human Rights Watch 'Uganda' (see note 247 above).

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

³⁸⁵ 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.'

³⁸⁶ Machel (see note 74 above) 16.

³⁸⁷ Mezmur (note 11 above) 205.

³⁸⁸ Lee (see note 26 above) 17.

³⁸⁹ *Ibid* 13&28.

³⁹⁰ Article 12 of the CRC.

³⁹¹ Mezmur (see note 11 above) 206.

³⁹² 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’.³⁹³ 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.³⁹⁴

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,³⁹⁵ 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.³⁹⁶ 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.³⁹⁷ 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.³⁹⁸ The different standards for State armed forces and the non-State parties were also prescribed in the two Additional Protocols;³⁹⁹ 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

³⁹³ Lee (see note 26 above) 25.

³⁹⁴ *Ibid.*

³⁹⁵ 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.

³⁹⁶ 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.

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

³⁹⁸ Mezmur (see note 11 above) 207.

³⁹⁹ AP-I applies to international armed conflicts and AP-II applies to non-international armed conflicts.

parties pursuant to other international treaties.⁴⁰⁰ 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,⁴⁰¹ 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;⁴⁰² 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.⁴⁰³

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.⁴⁰⁴ 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.⁴⁰⁵ However, experience has shown that States are reluctant in enforcing obligations especially if they are involved in the practice that has to be prohibited.⁴⁰⁶ The international community should

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

⁴⁰¹ Article 31(1)Vienna Convention on the Law of Treaties 1969.

⁴⁰² Mezmur (note 11 above) 208.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ 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.

⁴⁰⁶ 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.⁴⁰⁷ 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.

⁴⁰⁷ 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.⁴⁰⁸ 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.

⁴⁰⁸ 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.⁴⁰⁹ 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.⁴¹⁰ Children who are recruited into armed forces face abusive treatment,⁴¹¹ their lives are placed in danger, and they are deprived of educational opportunities and livelihoods.⁴¹²

The involvement of children in conflict is not a recent phenomenon. The military use of children dates back to ancient times.⁴¹³ 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.⁴¹⁴ 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.⁴¹⁵ Thus, due to the ‘moral panics and the new wars’;⁴¹⁶ which have changed the global assumptions and images of children,⁴¹⁷ 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

⁴⁰⁹ 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.

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

⁴¹¹ 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.

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

⁴¹³ 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.

⁴¹⁴ Lee (see note 26 above) 2.

⁴¹⁵ *Ibid*.

⁴¹⁶ 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.

⁴¹⁷ *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.⁴¹⁸

It has been estimated that there are around 300,000 child soldiers worldwide, of which half are in Africa.⁴¹⁹ 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.⁴²⁰ Boyden cautions that it is quite ‘ludicrous to talk about child soldiering as an ‘epidemic’ on the basis of speculative UN figures’.⁴²¹ 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’.⁴²² 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.⁴²³

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.⁴²⁴ 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

⁴¹⁸ McIntyre (see note 91 above) 10.

⁴¹⁹ Musila (see note 6 above) 332.

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

⁴²¹ 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.

⁴²² Ben-Ari (see note 416 above) 12.

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

⁴²⁴ 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.⁴²⁵ 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.⁴²⁶ The referral to the DRC is useful because of the cross-border recruitment, which has become wide spread in Africa.⁴²⁷ 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.⁴²⁸ 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.⁴²⁹ Lee argues that it is insufficient to talk about the recruitment of child soldiers

⁴²⁵ 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).

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

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

⁴²⁸ Lee (see note 26 above) 1, fn1.

⁴²⁹ *Ibid* 19.

simply as a clear case of barbarity and abuse of children.⁴³⁰ 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.⁴³¹ 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.⁴³²

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.⁴³³ 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

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

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

⁴³³ 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’.⁴³⁴ 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.⁴³⁵ It follows that culture may include artifacts, language, laws, customs and moral codes, or in fact, a people’s entire intellectual and material heritage.⁴³⁶ Tradition, which is the process of transmitting knowledge and beliefs to future generations, is part and parcel of culture.⁴³⁷ Not only is tradition the means for keeping a culture alive but it is also the means whereby items of culture gain moral authority.⁴³⁸ 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.⁴³⁹ However, culture is not static and harmful practices can be overcome.⁴⁴⁰

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.⁴⁴¹ 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.⁴⁴² 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.⁴⁴³

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

⁴³⁴ Bennett (see note 44 above) 2.

⁴³⁵ 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.

⁴³⁶ *Ibid.*

⁴³⁷ *Ibid.*

⁴³⁸ *Ibid.*

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

⁴⁴⁰ Kaime (see note 29 above) 227.

⁴⁴¹ Ibhawoh (see note 30 above) 843.

⁴⁴² Kaime (see note 29 above) 226.

⁴⁴³ Sierra Leone, Liberia, Afghanistan, Sudan, Nigeria and Cote d’Ivoire.

discourse.⁴⁴⁴ 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.⁴⁴⁵ The country's recourse to warfare represented the massive betrayal of the hopes and expectations of various groups.⁴⁴⁶ 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.⁴⁴⁷ Both the government forces and rebels recruited children. Sierra Leone had one of the world's worst records for recruiting children as soldiers.⁴⁴⁸ 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.⁴⁴⁹

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.⁴⁵⁰ However, according to the UN Works for Kids, during the 10-year civil war in Sierra Leone, 10000 children were recruited into armed forces.⁴⁵¹ 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

⁴⁴⁴ Lee (see note 26 above) 1.

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

⁴⁴⁶ *Ibid* 39.

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

⁴⁴⁸ Kalis (see note 77 above).

⁴⁴⁹ *Ibid*.

⁴⁵⁰ 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.

⁴⁵¹ The UN Works for Kids 'Child Soldiers in Sierra Leone' 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.⁴⁵²

In Sierra Leone, the practice of 'child soldiering' is understood differently in the local socio-economic contexts.⁴⁵³ 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;⁴⁵⁴ whereas childhood in Sierra Leone is almost defined by various types of labour.⁴⁵⁵ 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.⁴⁵⁶ 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.⁴⁵⁷ 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.⁴⁵⁸ 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'.⁴⁵⁹

In Sierra Leone most children do not leave with their families.⁴⁶⁰ 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.'⁴⁶¹ Such a prevalent practice of fosterage and norms of patronage shaped the understandings and dynamics of children's military recruitment during the war.⁴⁶² Many communities and children understood

⁴⁵² Omotola (see note 445 above) 39.

⁴⁵³ Lee (see note 26 above) 16.

⁴⁵⁴ OCHA 'Special Report: Child Soldiers' (2003)

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

⁴⁵⁵ 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.

⁴⁵⁶ 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.

⁴⁵⁷ 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.

⁴⁵⁸ Lee (see note 26 above) 17.

⁴⁵⁹ Shepler (see note 456 above) 88.

⁴⁶⁰ 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.

⁴⁶¹ Lee (see note 26 above) 18.

⁴⁶² *Ibid.*

military recruitment as a type of fosterage and patronage.⁴⁶³ 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.⁴⁶⁴ It also made sense for orphaned and displaced children to find a patron during the war for basic necessities as well as social protection.⁴⁶⁵

3.2.1 (a) Right to culture

Most human rights instruments guarantee both individual rights and a right to culture.⁴⁶⁶ 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.⁴⁶⁷ 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).⁴⁶⁸ 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.⁴⁶⁹ 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.⁴⁷⁰ 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.⁴⁷¹

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

⁴⁶³ Stovel (see note 455 above) 94.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

⁴⁶⁶ 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.

⁴⁶⁷ Ibhawoh (see note 30 above) 839.

⁴⁶⁸ Bennett (see note 44 above) 4.

⁴⁶⁹ *Ibid.*

⁴⁷⁰ Shepler (see note 456 above) 86.

⁴⁷¹ Francis (see note 457 above) 225.

⁴⁷² *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.⁴⁷³ As highlighted above, the Western conception of childhood defers from that of Africa.⁴⁷⁴ 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.⁴⁷⁵ Thus based on the socio-economic practicability and cultural norms regarding children's development, their childhood is almost defined by various types of labour.⁴⁷⁶ In Sierra Leone, during the war, this socio-economic context of child labour most likely influenced the way people understood military recruitment.⁴⁷⁷

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.⁴⁷⁸ However, the 'happy relationship' is endangered when practices which are considered 'cultural' conflict with the standards set by international human rights norms.⁴⁷⁹ 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.⁴⁸⁰ 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.⁴⁸¹ 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'.⁴⁸² Thus, the content of human rights, though founded on universal principles, have to bear the 'African

⁴⁷³ CRC and African Charter.

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

⁴⁷⁵ Lee (see note 22 above) 22.

⁴⁷⁶ Stovel (see note 455 above) 47.

⁴⁷⁷ Francis (see note 457 above) 225.

⁴⁷⁸ Kaime (note 29 above) 227.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid* 226.

⁴⁸¹ *Ibid* 227.

⁴⁸² Article 18 of the African Charter.

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

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.⁴⁸⁴ 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.⁴⁸⁵ In actual fact, culture does not have a privileged status.⁴⁸⁶ International law has characterized a child's 'culture' as first being universalized according to developmental assumptions and particularized in 'special cases'.⁴⁸⁷ 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.⁴⁸⁸

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.⁴⁸⁹ For example, in Sierra Leone, child labour is based on cultural norms regarding children's development,⁴⁹⁰ and the socio-economic context of child labour has influenced the way people understood military recruitment.⁴⁹¹ Thus, this has lead 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';⁴⁹² 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

⁴⁸³ Ibhawoh (see note 30 above) 843.

⁴⁸⁴ Kaime (note 29 above) 228.

⁴⁸⁵ Ibhawoh (see note 30 above) 842-3.

⁴⁸⁶ 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.

⁴⁸⁷ Schultheis (see not 53 above) 32.

⁴⁸⁸ *Ibid.*

⁴⁸⁹ Kaime (see note 29 above) 226.

⁴⁹⁰ Shepler (see note 456 above) 86.

⁴⁹¹ Francis (see note 457 above) 207.

⁴⁹² *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,⁴⁹³ 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.⁴⁹⁴ Hence, whenever the right to preserve a culture comes into conflict with a child's interests, the latter prevail.⁴⁹⁵ Cultural practices that might be prejudicial to a child's health or life are prohibited under human rights law.⁴⁹⁶ 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.⁴⁹⁷ 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.⁴⁹⁸ The prevalent practice of fosterage and norms of patronage shaped the understandings and dynamics of children's military recruitment during the war.⁴⁹⁹ Many communities and children understood military recruitment as a type of fosterage and patronage.⁵⁰⁰

As highlighted above, whenever the right to conserve a culture comes into conflict with a child's interests, the latter takes precedence.⁵⁰¹ 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.⁵⁰² Furthermore, the reality of the application of the 'child's best interests' principle is not quite as simple as it looks on

⁴⁹³ Bennett (see note 44 above) 5.

⁴⁹⁴ Article 3 of the CRC and article 4 African Charter.

⁴⁹⁵ Article 21 of the African Charter and article 24(3) of the CRC.

⁴⁹⁶ *Ibid.*

⁴⁹⁷ Harvey (see note 167 above) 18.

⁴⁹⁸ Stovel (see note 455 above) 94.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.*

⁵⁰¹ Article 21 of the African Charter and article 24(3) of the CRC.

⁵⁰² Bennett (see note 44 above) 5.

paper.⁵⁰³ 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.⁵⁰⁴ 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.⁵⁰⁵ 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.⁵⁰⁶ 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.⁵⁰⁷

It has been accepted that international human rights represent universal values.⁵⁰⁸ Thus, by implication, these values are culturally neutral.⁵⁰⁹ 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.⁵¹⁰ 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.⁵¹¹ 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.⁵¹² Furthermore, although Africans are entitled to preserve their cultural heritage, the welfare of children takes priority over cultural.⁵¹³

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

⁵⁰³ Ibhawoh (see note 30 above) 844.

⁵⁰⁴ *Ibid.*

⁵⁰⁵ 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.

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

⁵⁰⁷ Kaime (see note 29 above) 223.

⁵⁰⁸ *Ibid.* 4.

⁵⁰⁹ Bennett (see note 44 above) 4.

⁵¹⁰ Ibhawoh (see note 30 above) 839.

⁵¹¹ Bennett (see note 44 above) 4.

⁵¹² 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.

⁵¹³ Article 21 of the African Charter.

human dignity within the bounds of African culture.⁵¹⁴ However, since human dignity is also the value underlying all human rights, this argument has an immediate plausibility.⁵¹⁵ 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);⁵¹⁶ 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.⁵¹⁷ 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;⁵¹⁸ especially, when they feel that they have their own culturally distinctive way of securing human dignity.⁵¹⁹ 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.⁵²⁰

⁵¹⁴ Bennett (see note 44 above) 4.

⁵¹⁵ *Ibid.*

⁵¹⁶ *Ibid.*

⁵¹⁷ 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.

⁵¹⁸ 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.

⁵¹⁹ Bennett (see note 44 above) 4.

⁵²⁰ *Ibid* 1.

The well intentioned attempts to protect children from abusive practices can often leave the disadvantaged children even worse off than before.⁵²¹ 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.⁵²² Nevertheless – in an ideal world – international treaties are expected to be based on the findings obtained from research.⁵²³ 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.⁵²⁴

Concerns have been raised about the fact that cultures might be forced or 'created' to achieve ulterior means.⁵²⁵ 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.⁵²⁶ 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.⁵²⁷ 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.⁵²⁸ 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.⁵²⁹ 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.⁵³⁰ Bennett argues that culture can include, *inter alia*, laws.⁵³¹ thus it can be argued that the recruitment of child soldiers by the US is a

⁵²¹ Lee (see note 26 above) 19.

⁵²² Bourdillon (see note 432 above) 48.

⁵²³ *Ibid.*

⁵²⁴ Ben-Ari (see note 416 above) 4.

⁵²⁵ Bennett (see note 44 above) 4.

⁵²⁶ *Ibid.* 5.

⁵²⁷ See part 1.6 above.

⁵²⁸ Francis (see note 457 above) 207 & Lee (see note 26 above) 18.

⁵²⁹ Omotola (see note 445 above) 39.

⁵³⁰ Yarchyk (see note 359 above) 26.

⁵³¹ 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.⁵³²

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.⁵³³ 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.⁵³⁴ Many African States have demonstrated a willingness to introduce legislation holding national human rights above customs and cultural traditions where conflicts arise.⁵³⁵ 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.⁵³⁶

The balance can be achieved by maintaining human rights standards while resolving the obvious conflict between them and the dominant cultural traditions.⁵³⁷ 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.⁵³⁸ 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.⁵³⁹ In addition, African societies are constantly in the process of change which is shaped by a variety of cultural, social, and economic factors.⁵⁴⁰ Dominant cultural traditions can in fact be changed in response to different internal and external pressures.⁵⁴¹

3.2.1(b) Cultural legitimacy

⁵³² Yarchyk (see note 359 above) 30.

⁵³³ Grant (see note 506 above) 9.

⁵³⁴ Ibhawoh (see note 30 above) 847.

⁵³⁵ Grant (see note 506 above) 9.

⁵³⁶ Singh (see note 3 above) 206.

⁵³⁷ Bourdillon (see note 432 above) 48.

⁵³⁸ Ibhawoh (see note 30 above) 839.

⁵³⁹ Kaime (see note 29 above) 221.

⁵⁴⁰ *Ibid* 233.

⁵⁴¹ Ibhawoh (see note 30 above) 841.

The pursuit for consensus between cultural traditions and modern international legal standards is a theme of growing interest.⁵⁴² However, the crucial question in the case of Africa is how ‘this marriage of universal rights and culture can be achieved’.⁵⁴³ International treaties have tried to compromise between two competing rights, namely, the rights of the child and cultural rights.⁵⁴⁴ Attempts by African States to assert the supremacy of human rights over cultural traditions where conflicts arise have been unsuccessful.⁵⁴⁵ 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.⁵⁴⁶ The failure has been attributed to the fact the enactment of human rights as universal laws alone cannot change pervasive cultural attitudes.⁵⁴⁷

Certain traditional cultures have been revived to combat certain social pandemics and to promote and maintain cultural identity.⁵⁴⁸ Thus, one of the main reasons advanced for the cultural practices is that it allows societies and communities to preserve their culture and tradition.⁵⁴⁹ For example in Sierra Leone, childhood is defined by various forms of labour;⁵⁵⁰ which is based on cultural norms of regarding children’s development.⁵⁵¹ As a result, during the war, this socio-economic context of child labour most likely influenced the way people understood military recruitment;⁵⁵² they participate in military activities ‘within a system which made sense for children to be part of the adult activity’.⁵⁵³ 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 rights⁵⁵⁴

⁵⁴² *Ibid* 842.

⁵⁴³ *Ibid* 843.

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

⁵⁴⁵ Ibhawoh (see note 30 above) 857.

⁵⁴⁶ Singh (see note 3 above) 206.

⁵⁴⁷ Ibhawoh (see note 30 above) 857.

⁵⁴⁸ Moodley (see note 544 above) 65.

⁵⁴⁹ *Ibid* 65.

⁵⁵⁰ Stovel (see note 455 above) 47.

⁵⁵¹ Shepler (see note 456 above) 86.

⁵⁵² Francis (see note 457 above) 225.

⁵⁵³ Shepler (see note 456 above) 88.

⁵⁵⁴ 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.⁵⁵⁵ 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.⁵⁵⁶ 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).⁵⁵⁷ One of the main reasons advanced for the cultural practices; such as the recruitment of child soldiers into armed forces and female genital mutilation (FGM), even though they are detrimental to children, is that it allows societies and communities to preserve their culture and tradition.⁵⁵⁸ 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.⁵⁵⁹

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.⁵⁶⁰ However, the fact that human rights are considered 'alien' within some African societies has led to many societies failing to accept the universalism claim.⁵⁶¹ This aspect exposes the conceptual errors implicit in the conflation of 'human rights' as a concept and as practiced in different political systems.⁵⁶² 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.⁵⁶³ In response to this, African societies have argued that cultural liberty is an important right.⁵⁶⁴ 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

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

⁵⁵⁶ Kaime (see note 29 above) 223.

⁵⁵⁷ *Ibid* 840.

⁵⁵⁸ Moodley (see note 544 above) 69.

⁵⁵⁹ Ibhawoh (see note 30 above) 843.

⁵⁶⁰ Fayemi (see note 555 above) 1.

⁵⁶¹ Bennett (see note 44 above) 4.

⁵⁶² Fayemi (see note 555 above) 1.

⁵⁶³ 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.

⁵⁶⁴ *Ibid*.

every social grouping in the world has specific traditional cultural practices and beliefs; African communities are no different in this respect.⁵⁶⁵ 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.⁵⁶⁶ 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.⁵⁶⁷ 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.⁵⁶⁸ 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.⁵⁶⁹ Ideally, since respect for human rights is promoted by reason as well as by experience, a constructive approach to promoting human rights is ideal.⁵⁷⁰ 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.⁵⁷¹

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

⁵⁶⁵ 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.

⁵⁶⁶ 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.

⁵⁶⁷ *Ibid.*

⁵⁶⁸ *Ibid.* 842.

⁵⁶⁹ Kaime (see note 29 above) 223.

⁵⁷⁰ Ibhawoh (see note 30 above) 853.

⁵⁷¹ *Ibid.* 360.

⁵⁷² Moodley (see note 544 above) 78.

virginity testing and FGM is permitted in certain countries.⁵⁷³ 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.⁵⁷⁴ 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.⁵⁷⁵ For example in Sierra Leone, with the socio-economic practicality, child labour is also based on cultural norms regarding children's development.⁵⁷⁶ Thus, the practice of 'child soldiering' is understood differently in the local socio-economic contexts.⁵⁷⁷ 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.⁵⁷⁸

Kaime argues that for children's rights to enjoy sufficient observance and support they have to command adequate legitimacy.⁵⁷⁹ Significantly, cultural legitimacy derives its authority from internal validity.⁵⁸⁰ Thus, if a rule or norm does not command adequate legitimacy it will not enjoy sufficient observance or support.⁵⁸¹ 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'.⁵⁸² As highlighted above in part 3(a), the enactment of international human rights alone cannot change cultural

⁵⁷³ FGM is practised in more than 28 countries in Africa and in some countries in the Middle East and Asia.

⁵⁷⁴ World Health Organisation (WHO) 'Female genital mutilation' <http://www.who.int/mediacentre/factsheets/fs241/en/> accessed 5 October 2009.

⁵⁷⁵ Moodley (see note 544 above) 70.

⁵⁷⁶ Shepler (see note 456 above) 86.

⁵⁷⁷ Lee (see note 26 above) 16.

⁵⁷⁸ Kaime (see note 29 above) 222.

⁵⁷⁹ *Ibid.*

⁵⁸⁰ *Ibid.*

⁵⁸¹ *Ibid.*

⁵⁸² 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.⁵⁸³ 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.⁵⁸⁴ 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.⁵⁸⁵

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 18.⁵⁸⁶ However, the legal rationale behind the 'straight-18' position does not actually address the reasons for the cut-off.⁵⁸⁷ 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.⁵⁸⁸

Significantly, many African societies do not define the boundaries of childhood and adulthood in terms of chronological age;⁵⁸⁹ the boundaries of childhood and adulthood are defined in social terms which take place progressively through rites and practices that mark

⁵⁸³ Ibhawoh (see note 30 above) 840.

⁵⁸⁴ Moodley (see note 544 above) 65.

⁵⁸⁵ *MEC for Education, KwaZulu-Natal, and others v Pillay* (see note 439 above) 493E.

⁵⁸⁶ Lee (see note 26 above) 7.

⁵⁸⁷ *Ibid* 8.

⁵⁸⁸ *Ibid*.

⁵⁸⁹ *Ibid* 14.

and confirm an individual's social status.⁵⁹⁰ The social definition mostly comes from practical circumstances in many societies.⁵⁹¹ 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.⁵⁹² However, even though the local definitions of a 'child' differ from the global one; the local definitions must conform to the global one.⁵⁹³

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.⁵⁹⁴ 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.⁵⁹⁵ 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.⁵⁹⁶ Hence, this explains why many societies may consider military recruitment of adolescent boys as reasonable and even normal in the context of war.⁵⁹⁷ For example, in Sierra Leone, the socio-economic context of child labour most likely influenced the way people understood military recruitment,⁵⁹⁸ since child labour is based on cultural norms regarding children's development.⁵⁹⁹ 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.⁶⁰⁰

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

⁵⁹⁰ *Ibid.*

⁵⁹¹ *Ibid.*

⁵⁹² Stovel (see note 455 above) 65.

⁵⁹³ Lee (see note 26 above) 8.

⁵⁹⁴ *Ibid* 14.

⁵⁹⁵ *Ibid* 15.

⁵⁹⁶ H, Tefferi 'Reconstructing Adolescence after displacement: Experience from East Africa'(2007) 21 *Children & Society*, 297, 315.

⁵⁹⁷ Lee (see note 26 above) 16.

⁵⁹⁸ Francis (see note 457 above) 221.

⁵⁹⁹ Shepler (see note 456 above) 86.

⁶⁰⁰ Lee (see note 26 above) 16.

development.⁶⁰¹ Thus, during the war, this socio-cultural context of child labour most likely influences the way people understood military recruitment.⁶⁰² Therefore, even though during war time, the context has changed, the duties of the child in respect to the community still remain the same.⁶⁰³ 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.⁶⁰⁴ In this regard, the local meanings of what is identified as ‘child soldiering’ are different from the meanings attributed in the global discourse.⁶⁰⁵

The global humanitarian discourse fails to take into account children’s political and social agency.⁶⁰⁶ The concept of agency ‘refers to one’s active engagement with the world and their own efforts to cope with adversity’.⁶⁰⁷ Thus, the concept of agency is a critical one in understanding the phenomenon of ‘child soldiers’.⁶⁰⁸ 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.⁶⁰⁹ 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’.⁶¹⁰ 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.⁶¹¹ 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.⁶¹² 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.⁶¹³

⁶⁰¹ *Ibid* 17.

⁶⁰² *Ibid*.

⁶⁰³ Francis (see note 457 above) 222.

⁶⁰⁴ Lee (see note 26 above)17.

⁶⁰⁵ *Ibid*.

⁶⁰⁶ Lee (see note 26 above) 19.

⁶⁰⁷ *Ibid* 25.

⁶⁰⁸ *Ibid* 25.

⁶⁰⁹ *Ibid*.

⁶¹⁰ *Ibid* 26.

⁶¹¹ *Ibid*.

⁶¹² 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.

⁶¹³ *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.⁶¹⁴

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.⁶¹⁵ The well-intentioned humanitarian discourse on child soldiers has disregarded the complex local understandings and experiences of military recruitment.⁶¹⁶ 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.⁶¹⁷ 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.⁶¹⁸

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

⁶¹⁴ Lee (see note 26 above) 25.

⁶¹⁵ *Ibid* 4.

⁶¹⁶ *Ibid*.

⁶¹⁷ Grant (see note 506 above) 9.

⁶¹⁸ *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.⁶¹⁹ 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.'⁶²⁰

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 preamble⁶²¹ 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

⁶¹⁹ Mezmur (note 11 above) 209.

⁶²⁰ Security Council, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (2007) UN Document A/62/228.

⁶²¹ 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.⁶²²

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.⁶²³ 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,⁶²⁴ 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.⁶²⁵

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.⁶²⁶ In the same light, the European Union (EU) set the EU Guidelines on Children and Armed Conflict in

⁶²² Article 3 *Ibid.*

⁶²³ F. L. Morton *Law, politics, and the judicial process in Canada* (2001), Canada: University of Calgary Press 223.

⁶²⁴ Article 31(1) Vienna Convention on the Law of Treaties 1969.

⁶²⁵ Mezmur (note 11 above) 208.

⁶²⁶ 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 2003.⁶²⁷ 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.⁶²⁸

Recruitment of children in cross-border conflicts is of growing concern. Based on the UN Reports,⁶²⁹ 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.⁶³⁰ 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.⁶³¹ 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.⁶³² 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.⁶³³ 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.⁶³⁴

⁶²⁷ 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 1, 1 accessed on 5 October 2009.

⁶²⁸ 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.

⁶²⁹ 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.

⁶³⁰ Human Rights Watch 'Child soldiers' (see note 34 above).

⁶³¹ 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 accessed on 5 October 2009 and Coalition to Stop the Use of Child Soldiers *Global Report on Child Soldiers 2001*.

⁶³² Sloth-Neilsen (see note 128 above) 64.

⁶³³ Security Council, *Children and armed conflict - Report of the Secretary-General: DRC* (2007) UN Document A/62/609-S/2007/757.

⁶³⁴ *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.⁶³⁵ 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.⁶³⁶ 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.⁶³⁷ 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’.⁶³⁸ Although the DRC government has also been involved in this practice, it has denied this, and has shifted the blame on rebel groups.⁶³⁹ 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.⁶⁴⁰

The movement of armed groups across borders to recruit children from refugee and internally displaced person camps continues to be alarming.⁶⁴¹ 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.⁶⁴² 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.⁶⁴³ However, it is clear that refugee and internally

⁶³⁵ C.P. Cohen *Jurisprudence on the Rights of the Child* Vol III (2005), Ardsley, N.Y.: Transnational Publishers 2915.

⁶³⁶ Van Niekerk (see note 65 above) iv.

⁶³⁷ Security Council, *Children and armed conflict - Report of the Secretary-General: Uganda and the DRC* (2008) UN Document S/2008/693.

⁶³⁸ Security Council, *Children and armed conflict - Report of the Secretary-General: DRC* (2007) UN Document A/62/609-S/2007/757.

⁶³⁹ *Ibid.*

⁶⁴⁰ *Ibid.*

⁶⁴¹ *Ibid.*

⁶⁴² 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.

⁶⁴³ *Ibid.*

displaced person camps are now the primary recruiting grounds for child soldiers owing to the convenient concentration of vulnerable children.⁶⁴⁴

The lack of security around these camps is said to be an important factor that increases the likelihood of child recruitment.⁶⁴⁵ 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.⁶⁴⁶ 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.⁶⁴⁷

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.⁶⁴⁸ 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.⁶⁴⁹ 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.⁶⁵⁰ In Uganda, as of late, no cases have been attributed to the LRA because the group has not been

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Ibid.*

⁶⁴⁶ Security Council, *Children and armed conflict - Report of the Secretary-General* (2009) UN Document A/63/785-S/2009/158.

⁶⁴⁷ Security Council, *Children and armed conflict - Report of the Secretary-General: Uganda and the DRC* (2008) UN Document S/2008/693.

⁶⁴⁸ 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.

⁶⁴⁹ *Ibid.*

⁶⁵⁰ Singer (see note 426 above) 572.

operating in Ugandan territory.⁶⁵¹ However, disturbing new anecdotal evidence suggests that children are being recruited from Uganda into conflicts in neighboring DRC and Sudan.⁶⁵² The presence of the LRA has been reported in eastern DRC, southern Sudan and the Central African Republic.⁶⁵³ The LRA have recruited children from the DRC, Sudan and Central Africa.⁶⁵⁴ For example, it has been reported that the LRA has abducted 159 children in the DRC.⁶⁵⁵ 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.⁶⁵⁶

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.⁶⁵⁷ 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.⁶⁵⁸ 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.⁶⁵⁹

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.⁶⁶⁰ Although at times precedent from the international courts

⁶⁵¹ 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.

⁶⁵² 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.

⁶⁵³ 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.

⁶⁵⁴ *Ibid.*

⁶⁵⁵ *Ibid.*

⁶⁵⁶ 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.

⁶⁵⁷ 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.

⁶⁵⁸ Article 2 (2.6) of the Agreement on Disarmament, Demobilization and Reintegration, Juba, Sudan.

⁶⁵⁹ *Ibid.*

⁶⁶⁰ Optional Protocol to the CRC and the Palermo Protocol.

is used to clarify or add ‘flesh’ to the international treaties,⁶⁶¹ 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.⁶⁶² 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.⁶⁶³

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;⁶⁶⁴ 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.⁶⁶⁵ Thus, the fact that the discourse of ‘child soldiers’ exists as a historical construct; due to evolving perceptions

⁶⁶¹ AFRC judgment.

⁶⁶² 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.

⁶⁶³ 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).

⁶⁶⁴ Mezmur (see note 11 above) 209.

⁶⁶⁵ 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.⁶⁶⁶ 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.⁶⁶⁷ This has led to 'tension' between other 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.⁶⁶⁸ 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.⁶⁶⁹

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.⁶⁷⁰ Experiences have shown that formal legislative enactments alone cannot change pervasive cultural attitudes.⁶⁷¹ However, the crucial question in the case of Africa is how 'this marriage of universal rights and culture can be achieved'.⁶⁷² 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.⁶⁷³ Significantly, international human rights cannot derive their legitimacy only from international authority but also from the force of cultural traditions.⁶⁷⁴ Thus, the balance can be achieved by maintaining human rights standards while resolving the obvious conflict between them and the dominant cultural traditions.⁶⁷⁵ 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.⁶⁷⁶

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

⁶⁶⁶ *Ibid.*

⁶⁶⁷ Ibhawoh (see note 30 above) 840.

⁶⁶⁸ Kaime (see note 29 above) 227.

⁶⁶⁹ *Ibid* 221.

⁶⁷⁰ Ibhawoh (see note 30 above) 839.

⁶⁷¹ *Ibid.*

⁶⁷² *Ibid* 843.

⁶⁷³ Kaime(see note 29 above) 223.

⁶⁷⁴ Ibhawoh (see note 30 above) 842.

⁶⁷⁵ Bourdillon (see note 432 above) 48.

⁶⁷⁶ 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.⁶⁷⁷ 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.⁶⁷⁸ 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.⁶⁷⁹ 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

⁶⁷⁷ Bell & Abrahams (see note 96 above) 162.

⁶⁷⁸ For example, the issue of cross-border recruitment.

⁶⁷⁹ 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.⁶⁸⁰ 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.⁶⁸¹ 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.⁶⁸² This has led to 'tension' between 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.⁶⁸³

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.⁶⁸⁴ Experiences have shown that formal legislative enactments alone cannot change pervasive cultural attitudes.⁶⁸⁵ However, the crucial question in the case of Africa is how 'this marriage of universal rights and culture can be achieved'.⁶⁸⁶ 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.⁶⁸⁷ Significantly, international human rights cannot derive their legitimacy only from international authority but also from the force of cultural traditions.⁶⁸⁸ Thus, the balance can be achieved by maintaining human rights standards while resolving the obvious conflict between them and the dominant cultural traditions.⁶⁸⁹ In the case of detrimental cultural practices, solutions need to be found in consultation with practicing

⁶⁸⁰ Lee (see note 26 above) 2.

⁶⁸¹ *Ibid.*

⁶⁸² Ibhawoh (see note 30 above) 840.

⁶⁸³ Kaime (see note 29 above) 227.

⁶⁸⁴ Ibhawoh (see note 30 above) 839.

⁶⁸⁵ *Ibid.*

⁶⁸⁶ *Ibid* 843.

⁶⁸⁷ Kaime(see note 29 above) 223.

⁶⁸⁸ Ibhawoh (see note 30 above) 842.

⁶⁸⁹ Bourdillon (see note 432 above) 48.

communities and adequate social support should be given to individuals who choose to abandon the practice.⁶⁹⁰

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.⁶⁹¹ 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

⁶⁹⁰ Kaime (see note 29 above) 221.

⁶⁹¹ 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.⁶⁹² The voluntary participation of these children is often a response to pressure of subtle nature.⁶⁹³ Children sometimes feel compelled due to the political, social and economic conditions directing their lives to 'voluntary' join the armed forces.⁶⁹⁴ 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.⁶⁹⁵ 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

⁶⁹² *Ibid.*

⁶⁹³ Van Niekerk (see note 65 above) 65.

⁶⁹⁴ Singer (see note 426 above).

⁶⁹⁵ 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.⁶⁹⁶ 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.⁶⁹⁷ 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.⁶⁹⁸ 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.⁶⁹⁹

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.⁷⁰⁰ The enactment of human rights as universal laws alone cannot change pervasive cultural attitudes.⁷⁰¹ This has resulted in the pursuit for consensus between cultural traditions and modern international legal standards becoming a theme of growing interest.⁷⁰² Practices like the recruitment of child soldiers are against the implementation of children's rights within the African cultural context.⁷⁰³ Cultural values and the reasons for the existence of such a practice must be understood before embarking on a programme of eradication.⁷⁰⁴ Solutions towards eradication must be sourced and drawn up in consultation with practicing communities, as opposed to merely copied from outside.⁷⁰⁵ It must be appreciated that eradicating deep-rooted cultural practices and

⁶⁹⁶ Bourdillon (see note 432 above) 48.

⁶⁹⁷ Lee (see note 26 above) 19.

⁶⁹⁸ *Ibid.*

⁶⁹⁹ Kaime (see note 29 above) 236.

⁷⁰⁰ *Ibid.*

⁷⁰¹ Ibhawoh (see note 30 above) 857.

⁷⁰² *Ibid.* 842.

⁷⁰³ Kaime (see note 29 above) 236.

⁷⁰⁴ *Ibid.*

⁷⁰⁵ *Ibid.*

customs cannot be achieved through the adoption of one method or policy stance.⁷⁰⁶ There is need for multi-sectoral and collaboration approaches.⁷⁰⁷ Such a stance avoids duplication and strengthens intervention efforts.⁷⁰⁸

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.⁷⁰⁹ 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.⁷¹⁰ Many African States have demonstrated a willingness to introduce legislation holding national human rights above customs and cultural traditions where conflicts arise.⁷¹¹ 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.⁷¹² Thus, the balance can be achieved by maintaining human rights standards while resolving the obvious conflict between them and the dominant cultural traditions.⁷¹³ 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.⁷¹⁴

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.⁷¹⁵ 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.⁷¹⁶ African societies are constantly in a process of change which is shaped by a variety of cultural, social, and

⁷⁰⁶ *Ibid.*

⁷⁰⁷ *Ibid.*

⁷⁰⁸ *Ibid.*

⁷⁰⁹ Grant (see note 506 above) 9.

⁷¹⁰ Ibhawoh (see note 30 above) 847.

⁷¹¹ Grant (see note 506 above) 9.

⁷¹² Kaime (see note 29 above) 223.

⁷¹³ Bourdillon (see note 432 above) 48.

⁷¹⁴ Ibhawoh (see note 30 above) 843.

⁷¹⁵ *Ibid.* 839.

⁷¹⁶ Kaime (see note 29 above) 221.

economic factors.⁷¹⁷ Dominant cultural traditions can in fact be changed in response to different internal and external pressures.⁷¹⁸

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.⁷¹⁹ For children's rights to enjoy sufficient observance and support they have to command adequate legitimacy.⁷²⁰ Significantly, cultural legitimacy derives its authority from internal validity.⁷²¹ Thus, if a rule or norm does not command adequate legitimacy it will not enjoy sufficient observance or support.⁷²²

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.

⁷¹⁷ *Ibid* 233.

⁷¹⁸ Ibhawoh (see note 30 above) 841.

⁷¹⁹ Kaime(see note 29 above) 223.

⁷²⁰ *Ibid* 222.

⁷²¹ *Ibid*.

⁷²² *Ibid*.

5. BIBLIOGRAPHY

5.1 Primary Sources

5.1.1 Table of documents

African Charter on the Rights and Welfare of the Child, 1990 OAU Doc CAB/LEG/24.9/49 (1990)

Agreement on Disarmament, Demobilization and Reintegration, Juba, Sudan (2007)

Charter of the United Nations (1945)

Constitution of the Republic of Botswana, 1966

Constitution of Republic of Zambia, 1991

Constitution of the Republic of Zimbabwe, 1980

Constitutive Act of the African Union, 2000 OAU Doc OAU/AEC

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

ECOWAS Convention on Small Arms and Light weapons, their ammunition and other related materials (2006)

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

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

1949 Geneva Convention III Relative to the Treatment of Prisoners of War. Geneva: United Nations 75 UNTS 135

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

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)

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)

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

Optional Protocol to the Convention on the Rights of the Child, 2002 A/RES/54/263 (2002)

Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002)

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)

Reporting Guidelines for State Reports AFR/COM/HPR.5(IV)

Rules of Procedure ACHPR/RP/XIX

Rome Statute of the International Criminal Court, 1998 U.N. Doc. A/CONF.183/9 (1998)

Statute of the Special Court of Sierra Leone (2002)

Statute of the Special Court for Sierra Leone, 2000 S/RES/315 (2000)

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 1998 UN Doc A/CONF. 183/2/Add.1 (1998)

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)

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)

UN General Assembly Resolution A/RES/47/125 (1992)

UN General Assembly Resolution A/RES/51/77 (1997)

UN Security Council Resolution 1261, 1999 S/RES/1261 (1999)

UN Security Council Resolution 1314, 2000 S/RES/1314 (2000)

UN Security Council Resolution 1379, 2001 S/RES/1379 (2001)

UN Security Council Resolution 1460, 2003 S/RES/1461 (2003)

UN Security Council Resolution 1612, 2005 S/RES/1612 (2005)

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)

Vienna Convention on the Law of Treaties 1969

5.1.2 Reports

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

Coalition to Stop the Use of Child Soldiers *Global Report on Child Soldiers 2001*.

Machel G. *Report to the Secretary General on the Impact of Armed Conflicts on Children* (1996) New York: UNICEF (1996)

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

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

Security Council, *Children and armed conflict - Report of the Secretary-General: Uganda and the DRC* (2008) UN Document S/2008/693

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

Security Council, *Children and armed conflict - Report of the Secretary-General 'Children and armed conflict in Uganda* (2009) UN Document S/2009/462

Security Council, *Children and armed conflict - Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (2009) UN Document A/62/228

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

5.1.3 Cases

Ex parte Johannesburg City Council 1975 (1) SA (W)

MEC for Education, KwaZulu-Natal, and others v Pillay 2008 (1) SA 474 (CC) 493E

Prosecutor v Thomas Lubango Dyilo ICC-01/04-01/06

Prosecutor v Charles Taylor SCSL-03-01-PT

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

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

Prosecutor v. Drazen Erdemovic Case No. IT-96-22-T

Union and Rock Insurance Co. Ltd . v Carmichael's Executor 1917 AD 593

5.2 Secondary sources

5.2.1 Books

Brett, R. & Specht, I. *Young soldiers: Why they choose to fight* (2004), Boulder, Colo.: Lynne Rienner Publishers, 2004

Cohen, C.P. *Jurisprudence on the Rights of the Child* Vol III (2005), Ardsley, N.Y.: Transnational Publishers, 2005

Cohn, I. and Goodwin, G.S. *Child Soldiers – The Role of Children in Armed Conflict* (1994) New York: Oxford University Press, 1994

Dinstein Y. 'The Conduct of Hostilities under Law of International Armed Conflict' (2004) Cambridge: Cambridge University Press, 2004

Dugard, J. *International law: a South African perspective* (2005) South Africa: Juta, 2005

Grotius, H. *The Rights of War and Peace* Book III (2005), Indianapolis, Ind.: Liberty Fund, 2005

Happold, M. *Child Soldiers in International Law*, (2005) Manchester: Manchester University Press, 2005

Holzgrefe, J.L. & Kedane RO *Humanitarian Intervention: Ethical, Legal, and political dilemma* (2003), Cambridge: Cambridge University Press, 2003

Machel, G. *The impact of war on children* (2001), London: Hurst & Company, 2001

South African Concise Oxford Dictionary (2002), Cape Town: Oxford University Press Southern Africa, 2002

Morton, F.L. *Law, politics, and the judicial process in Canada* (2001), Canada: University of Calgary Press, 2001

Mubangizi, J.C. 'The protection of human rights in South Africa: A legal and practical Guide' (2004) South Africa: Juta, 2004

5. 2. 2 Chapter in book

Harvey, R. 'Section 1: Overview of international law and developments' in *Children and Armed Conflict: A guide to international humanitarian law and human rights* (2003) Montreal, Canada: International Bureau for Children's Rights, 2003

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

Steiner H.J. & Alston P., *International Human Rights in Context: Law, Politics, Morals* (2000) 2nd ed. Oxford: Oxford University Press, 2000

Stavrou, S. *et al* 'The Reintegration of Child Soldiers and Adducted Children: A case study of Palaro and Pabbo Gala District Northern Uganda' in Bennett, E. *et al* (eds) *ACT Against Child Soldiers in Africa* (2008) Pretoria: Institute for Security Studies, 2000

Stavrou, A. 'Youth Citizenship and Mobilisation in Uganda', in McIntyre, A. and Ebo, A. (eds) *Invisible Stakeholders: The Impact of War on Children* (2004) Pretoria: Institute for Security Studies, South Africa, 2004

Sloth-Nielsen, J. '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, 2008

Mezmur B.D. 'Children at Both Ends of the Gun: Child Soldiers in Africa' in J. Sloth-Nielsen (ed) *Children's Rights in Africa: A legal perspective* (2008), Burlington: Ashgate, 2008

5.2.3 Journals

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

Amoah, J. & Bennett, T. '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

Ang F. 'Article 38 Children in armed conflict: A Commentary on the United Nations Convention on the Rights of a Child' (2005) 1

Apuuli, K.A. '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

Ayissi, A. 'Protecting children in armed conflict: from commitment to compliance' (2002) 3 *Children and Security* 5

Baker, A. and Ben-Ari, H. 'The Use of Children in Armed Conflict' (2000) 26 *Justice* 7

Bell, K. & Abrahams, D. 'The use of child soldiers in armed conflict' (2008) *Obiter* 162

Ben-Ari, E. '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

Bennett, T.W. 'Using children in armed conflict: A legitimate African tradition? Criminalising the recruitment of child soldiers' (1998) 32 *Institute of Security Studies Monograph* 1

- Berrigan, F. 'Big battles over small arms: But progress at the United Nations is too slow' (2006) 15(2) *African Security Review* 116
- Bodansky, D. 'Special Court of Sierra Leone—International Criminal law—Crimes against humanity—War Crimes—Recruitment and use of child soldiers' (2007) *American Journal of International Law* 848
- Bourdillon, M. 'How bad is 'child labour'?: Viewpoint' (2008) 4(3) *Quest* 48
- Boyden, J. '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
- Brandy, C. 'Street Sociology and Pavement Politics: Aspects of Youth and Student Resistance in Cape Town, 1985' (1987) 13(3) *Journal of Southern African Studies* 303
- Cahn, N. 'Poor children: child "witches" and child soldiers in sub-Saharan Africa' (2006) *Ohio State Journal of Criminal Law*, 413
- Chirwa, D.M. '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
- Cilliers, J. & Sturman, K. 'Challenges facing the AU's Peace and Security Council' (2004) 13(1) *African Security Review* 97
- De Beer, W. 'When to intervene to save lives: international law' (2008) 8(3) *Without Prejudice* 60
- Duncan, N. & Bowman, B. 'Educational aspirations, child labour imperatives and structural inequality in the South African agricultural sector: Research Article' (2008) 26(3) *Perspectives in Education* 29
- Fayemi, A. 'Towards an African theory of democracy' (2009) *Research Review* 1
- Francis, D. '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
- Forte, D. 'From words to deeds: Addressing peacekeepers' violations of human rights' (2006) 3 *Conflict Trends* 44
- Grant, E. 'Human rights, cultural diversity and customary law in South Africa' (2006) 50(1) *Journal of African Law* 2
- Gueli, R. 'Humanitarian intervention in Africa: towards a new posture' (2004) 32(1) *Scientia Militaria : South African Journal of Military Studies* 120
- Gurnell, D.R. 'Briewe – 'Community service - or conscription'' (2003) 93(2) *South African Medical Journal* 84

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

Hopkins, K. 'The effect of an African Court on the domestic legal orders of African States' (2002) 2(2) *African Human Rights Law Journal* 234

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

Ibhawoh, B. 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State' (2000) 22.3 *Human Rights Quarterly* 838

Kaime, T. '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

Kalis, A.M. 'Child soldiers in Africa: solutions to a complex dilemma' (2002) 2 (2) *African Journal on Conflict Resolution* 1

Kent, V.L. 'Examining the UN's plans to eliminate and address cases of sexual exploitation and abuse in peacekeeping operations: peacekeepers as perpetrators of abuse: essay' (2005) 14(2) *African Security Review* 85

Lee, A. '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' (2009) 52 *Refugee Studies Centre* 1

Lloyd, A. 'Report of the second ordinary session of the African Committee of Experts on the Rights and Welfare of the Child: recent developments' (2003) 3(2) *African Human Rights Law Journal* 329

Llyod, A. '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

Madhavan, S. 'Fosterage patterns in the age of AIDS: continuity and change' (2004) 58 *Social Science & Medicine* 1443

Marlowe, A, & Oosterveld, V. '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

Mazurana, D. and McKay, S. 'Child soldiers: What About Girls?' (2001) 57(5) *Bulletin of the Atomic Scientists* 1

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

McIntyre, A. 'Rights, root causes and recruitment: The youth factor in Africa's armed conflicts' (2003) 12 *African Security Review*, 93

- Mekonnen, D.R. & Pretorius, J.L. 'Prosecuting the main perpetrators of international crimes in Eritrea : possibilities under international law' (2008) 33(2) *Journal for Juridical Science* 76
- Mezmur, B.D. 'The 9th ordinary session of the African Committee of Experts on the Rights and Welfare of the Child: looking back to look ahead: recent development' 2007 7(2) *African Human Rights Law Journal* 545
- Mezmur, B.D. '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
- Moodley, I. 'Customary initiation rites and the Children's Act 38 of 2005' (2008) 23(1) *SA Publiekreg = SA Public Law* 65
- Musila, G.M. '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
- Muzuzi, J.D. '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
- Naldi, G.J. '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
- Ndungu, I. '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
- Okereke, C.N. 'Implementing the ECOWAS convention on small arms and light weapons: Challenges and prospects' (2008) 1(4) *Arms Control: Africa* 11
- Omotola, J. 'The Sierra Leone Lomé Peace Accord' (2007) 3 *Conflict Trends* 38
- Quee, A. 'Regional Child Warriors in West Africa' (2008) *Conflict Trends* 3
- Price, L. 'Conserving (not preserving) culture: Avoiding the damage to culture of veiled moralism in HIV education' (2009) *The Southern African Journal of HIV Medicine* 12
- Rialize, F. 'Child soldiers in African Wars' 2009 7(1) *Commonwealth Youth and Development* 37
- Schultheis, A. 'African Child Soldiers and Humanitarian Consumption' (20) *Peace Review: A Journal of Social Justice* 31
- Sesay, A. *et al* 'Liberian Child Soldiers: Prospects and Problems' (2000) 30(1) *Scientia Militaria* 44

- Shepherd, A. 'Child soldiers: Is the optional protocol evidence of an emerging "straight-18" consensus?' (2000) *International Journal of Children's Rights* 37
- Shepler, S. '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
- Singer, P.W. 'Talk is cheap: Getting serious about preventing child soldiers' (2004) 37 *Cornell International Law Journal* 561
- Singh, D. 'When a child is not a child: The scourge of child soldiering in Africa' (2007) 7 *African Human Rights Law Journal* 206
- Sloth-Nielsen, J. & Mezmur, B.D. 'Win some, lose some: the 10th ordinary session of the African Committee of Experts on the Rights and Welfare of the Child' 2008 8(1) *African Human Rights Law Journal* 207
- Sloth-Nielsen, J. & Mezmur, B.D. '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
- Stovel, L. '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.
- Tefferi, H. 'Reconstructing Adolescence after displacement: Experience from East Africa' (2007) 21 *Children & Society* 297
- Tiefenbrum, S. 'Child soldiers, slavery and the trafficking of children' (2008) *Fordham International Law Journal* 415
- Twala, C. 'The African tradition of initiation and circumcision: A curse or cure in South Africa?' (2007) 21(1) *S.A. Tydskrif vir Kultuurgeskiedenis* 22
- Twun-Dauso, A. 'Africa's Young Soldiers: The Co-option of Childhood' (2003) 82 *Institute for Security Studies Monograph* 1
- Utas, M. 'Sweet Battlefields: Youth and the Liberian Civil War' (2003) Thesis (Ph.D.), Department of Cultural Anthropology and Ethnology, Uppsala University, Uppsala, Sweden 1
- Yarchyk, B. '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
- Van Niekerk, N. *Weak States and Child Soldiering in Africa: Contextual Factors* (2003) University of Stellenbosch 1
- Zandman H.J.G. 'Economic sanctions: An ethical primer' (2008) 42(3) *In die Skriflig* 531

Zounmenou, D. *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

5.2.4 Electronic Media

‘Acholi Religious Leaders Peace Initiative Abducted and Abused: Uganda’
www.acholipeace.org accessed 25 March 2007

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

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

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

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

CSR Alerts ‘The official definition of a child soldier from the Cape Town Principles’
<http://childsoldierrelief.com/2008/07/22/official-definition-of-a-child-soldier-from-cape-town-principles/> accessed on 14 February 2009

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 accessed on 5 October 2009

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

Coalition to Stop the Use of Child Soldiers ‘Africa Report’ 2001 http://www.child-soldier.org/reports_africa/executive_summary.htm accessed on 14 February 2009

Fontanini, F. ‘Liberia’s child soldiers relive lost childhood in Sierra Leone’
<http://www.hrea.org/lists/child-rights/markup/msg00166.html> accessed on 7 February 2009

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

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

Human Rights Watch 'Youth, Poverty, and Blood: The lethal legacy of West Africa's regional warriors' (2005) <http://hrw.org/reports/2005/westafrica0405> accessed on 26 April 2009

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

Human Rights Watch 'DRC: ICC's First Trial Focuses on Child Soldiers' <http://www.hrw.org/en/news/2009/01/22/drc-icc-s-first-trial-focuses-child-soldiers> accessed on 8 February 2009

Human Rights Watch 'More than 120,000 child soldiers fighting in Africa' <http://www.hrw.org/press/1999/apr/cs0419.htm> accessed on 8 February 2009

Human Rights Watch 'Nepal: Maoists should release child soldiers' <http://www.hrw.org/english/docs/2006/11/27> accessed on 12 November 2008

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

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

Human Rights Watch 'Uganda' <http://www.hrw.org/reports/2003/uganda0303/uganda0403-02.htm#TopOfPage> accessed 8 February 2009

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

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

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) accessed on 26 August 2009

International Committee of Red Cross 'International Humanitarian Law – Treaties & Documents' <http://www.icrc.org/ihl.nsf/Pays?ReadForm> accessed on 26 August 2009

ICRC 'International Humanitarian Law (IHL)' <http://www.icrc.org/Eng/ihl> accessed on 20 August 2009

IRINnews.org 'Too small to be fighting in anyone's war' <http://www.irinnews.org/webspecials/childsoldiers/default.aspx> accessed 5 February 2009

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](#) accessed on 3 September 2009

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

Lederer, E. 'Darfur children endure 'unspeakable acts of abuse'
http://www.mg.co.za/articlepage.aspx?area=/breaking_news/breaking_n.../&articleid=30515 accessed on 7 February 2009

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

OCHA 'Special Report: Child Soldiers' (2003)
<http://www.irinnews.org/pdf/in-depth/Child-Soldiers-IRINIn-Depth.pdf> accessed on 5 October 2009

Office of the Special Representative of the Secretary-General for Children and Armed Conflict 'Advocacy' <http://www.un.org/children/conflict/english/theoffice.html> accessed 03 June 2009

Office of the Special Representative of the Secretary-General for Children and Armed Conflict 'Country visits' <http://www.un.org/children/conflict/english/theoffice.html> accessed 03 June 2009

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

Office of the Special Representative of the Secretary-General for Children and armed conflict 'Machel study 10-year strategic review: Children and conflict in a changing world' <http://www.un.org/children/conflict/english/machel10.html> accessed on 6 February 2009

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

Reteurs AlertNet 'Nigerian rebel leaders give up arms in amnesty deal'
<http://www.alertnet.org/thenews/newsdesk/L3428248.htm> accessed 31 October 2009

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

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

The Economists 'Daddy Wore A Blue Helmet' www.economist.com accessed on 12 November 2008

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

The UN Works for Kids 'Child Soldiers in Sierra Leone'
http://www.un.org/works/goingon/soldiers/goingon_soldiers.html accessed 5 October 2009

UNHR 'International Humanitarian Law'
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> accessed on 20 August 2009

UNICEF 'Special concerns' <http://www.un.org/rights/concerns.htm> accessed 31 October 2009

UNICEF 'The 'Rights' Start to Life: A Statistical Analysis of Birth Registration' (2005)
http://www.unicef.org/publications/files/BirthReg10a_rev.pdf accessed 14 February 2009

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 1, 1 accessed on 5 October 2009

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

World Health Organisation (WHO) 'Female genital mutilation'
<http://www.who.int/mediacentre/factsheets/fs241/en/> accessed 5 October 2009

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

UNICEF 'Special concerns' <http://www.un.org/rights/concerns.htm> accessed 31 October 2009