

# **MIDLANDS STATE UNIVERSITY**



## **FACULTY OF LAW**

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### **THE LEGAL REGULATION OF CHILDREN RECRUITMENT AND PARTICIPATION IN ARMED CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW.**

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**APPROVAL FORM**

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## DECLARATION

I do hereby declare that this dissertation, **'THE LEGAL REGULATION OF CHILDREN RECRUITMENT AND PARTICIPATION IN ARMED CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW'**, is a result of my own investigation and research, save to the extent indicated in the acknowledgment, references and comments included in the body of the research, and that to the best of my knowledge, it has not been submitted either wholly or in part thereof for any other degree at any other University.

**THOMAS GURAJENA**

Signed.....

## **DEDICATION**

I dedicate this work to no one but my late father Abisayi Gurajena.

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## **ABSTRACT**

This dissertation explores the legal regulation of children recruitment and participation in armed conflict under international humanitarian law (IHL), addressing how IHL protects children aged between 15 and 18 years. It assesses whether IHL has done so in a manner which proffers adequate legal protection such that there is no need for other branches found international law to chip in to close gaps or weaknesses. This dissertation interrogates the IHL regime as well as other discourses in international law. It highlights that IHL instruments protect children aged below 15 years from recruitment and participation in armed conflict but fails to cover all situations which expose children from the perils of war. This study proves that whereas customary international law and IHL has laid the minimum age of recruitment and participation in armed conflict, now used in international criminal law, state practice shows that states are evolving towards a 'straight 18 position'. For this reason states whose domestic laws permit recruitment of children below 18 years face criticism for their recruitment policies. In addition, the research acknowledges the stance adopted by African states in the African Children's Charter. It recommends that other regional blocks should adopt guiding principles or declarations which raise the minimum age of recruitment from 15 – 18 years as the whole international community gears towards embarking on establishing an international convention reflecting a 'straight 18 position'.

## **LIST OF ACRONYMS**

**ICC - International Criminal Court ICC**

**ICL - International criminal law**

**IHL - International humanitarian law**

**IHRL - International human rights law**

**ICRC- International Committee of the Red Cross**

**CRC- Convention on the Rights of the Child**

**ACRWC- African Charter on the Rights and Welfare of the Child**

**IAC - International armed conflict**

**NIAC - Non international armed conflict**

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# CHAPTER ONE

## INTRODUCTION

### 1.1 PREAMBLE

Modern international and non-international armed conflicts are conducted in ways that have devastating impacts on children. There is a widespread employment of children as soldiers. The term “child soldier” is used to refer to any “child associated with an armed force or armed group” and includes any girl or boy less than 18 years old<sup>1</sup> “recruited or used by an armed force or armed group in any capacity,” including as “fighters, cooks, porters, messengers, spies or for sexual purposes”.<sup>2</sup> Child soldiers are found on each continent, in nearly every major armed conflict in the world today.<sup>3</sup>

While the use of child soldiers is a worldwide problem, it is particularly acute in Africa<sup>4</sup> children in other regions of the world, notably Asia and Latin America suffer the same fate during armed conflict.<sup>5</sup> Statistics from human rights organisations and international court cases show that the level of recruitment and participation of children in armed conflict has risen to unprecedented margins. More so, there have been various sorts of human rights abuses of children during armed conflict. The magnitude at which children are abused during armed conflict is startling, considering that children are a vulnerable group in need of greater protection during times of unrest than during peace time<sup>6</sup>.

### 1.2 BACKGROUND TO THE STUDY

The legal basis for protecting children against violations during armed conflict in international law is well established in international humanitarian law (IHL),

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<sup>1</sup> Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, 2.1 (2007) available on <http://www.un.org/children/conflict/documrnts/pdf> (accessed on 14 May 2015).

<sup>2</sup> N 1 above.

<sup>3</sup> Ilona Topa, ‘Prohibition of Child Soldiering: International Legislation and Prosecution of Perpetrators’, *Hanse Law Review*, Vol. 3 No. 1, 2007, 105 available on [www.hanselawreview.org/pdf5/Vol3No1Art06.pdf](http://www.hanselawreview.org/pdf5/Vol3No1Art06.pdf) (accessed on 14 May 2015).

<sup>4</sup> Human Rights Watch (2004a), ‘Facts about Child soldiers’ available on [www.humanrightswatch.org/campaigns/crp/facts.htm](http://www.humanrightswatch.org/campaigns/crp/facts.htm) (accessed on 14 May 2015).

<sup>5</sup> Anatole Ayissi, ‘Protecting children in armed conflict: from commitment to compliance’, 2002:10 available on [www.isn.ethz.ch/Digital-Library/Publications/Detail/?lang=en&id](http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lang=en&id) (accessed on 26 June 2015).

<sup>6</sup> J. Rehman (2010) *International Human Rights Law*, 2<sup>nd</sup> Edition, Person Education Limited, England

international human rights law (IHRL) and international criminal law (ICL).<sup>7</sup> While IHRL, ordinarily, applied only in peacetime it is now widely accepted that it applies to situations of armed conflict or in times of belligerent occupation (where IHL is considered the *lex specialis*<sup>8</sup>). The legal standard established in the four Geneva Convention (1949) (also referred to as 'law of Geneva', or 'Geneva law'), 1977 Additional Protocols<sup>9</sup> and the 1989 Convention on the Rights of the Child (hereafter referred to as CRC) stipulates that children as young as fifteen can be legally recruited and used in combat<sup>10</sup>. Both Additional Protocols, as with the Rome Statute<sup>11</sup>, prescribe 15 as the minimum age for recruitment and participation in hostilities.<sup>12</sup> The adoption of 15 years as the limit in IHL seems to depict that once one has attained this age then he/she is a major who can be recruited and also participate in armed conflict. This legal position seems to expose children between 15 – 18 years to conscription or recruitment into armed forces. On the other hand, in ICL, recruitment of children aged between 15 -18 years is not a war crime under the Rome Statute<sup>13</sup>. To buttress this view, it can be noted that even the recent cases prosecuted in the Special Court for Sierra Leone<sup>14</sup> and the trial of Thomas Lubanga Dyilo in the International Criminal Court

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<sup>7</sup> The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation, available on <http://childrenandarmedconflict.un.org> (accessed on 26 June 2015).

<sup>8</sup> *Lex specialis*, in short, means the “law governing a specific subject matter” which when applied overrides more general laws.

<sup>9</sup> Article 77(2), Additional Protocol I and Article 4(3)(c) of Protocol II to the Geneva Conventions.

<sup>10</sup> D.B. Mulira, ‘International Legal Standards Governing the Use of Child Soldiers’, Published LLM Theses and Essays, Paper 88, University of Georgia School of Law, 2007,22 available on [http://digitalcommons.law.uga.edu/stu\\_llm/88](http://digitalcommons.law.uga.edu/stu_llm/88) (accessed 21 March 2015).

<sup>11</sup> Art. 8(2)(b) and 8(2)(e) Rome Statute.

<sup>12</sup> B.D. Mezmur, “Children at Both ends of the Gun: Child Soldiers in Africa”, in Sloth- Nielsen (Ed) Children’s Rights in Africa: A legal Perspective J,Ashgate Publishing Limited, England (2010) 201. Article 77 of Protocol (I) Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (hereinafter called ‘Additional Protocol I’ or ‘API’) and Article 4 of Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter called ‘Additional Protocol II’ or ‘APII’)

<sup>13</sup> Rome Statute, Article 8 (2) (b) (xxvi)

<sup>14</sup> Prosecutor v. Fofana & Kondewa, Judgment, Trial Chamber I, SCSL-04-14-T, at para. 182-199; Prosecutor v. Brima, Kamara & Kanu, Judgment, Trial Chamber II, SCSL-04-16-T, at paras. 727-728.

were based on the 15 years old standard established in the Additional Protocols in 1977<sup>15</sup>.

Defining the groups of people in international law helps affording status and protection which they need. The term “child” in IHL extends from newly born babies, very small children, children below 5 years, young children, adolescents and children between 15 and 18<sup>16</sup>. However, it would seem that when the parties to the Geneva Conventions drafted the four conventions and the two additional protocols different levels of protections from recruitment were accorded to these groups of children. In the past decades three decades international law instruments have adopted a universal definition which states that a ‘child’ means ‘any person below 18 years’ in a bid to close legal gaps found in instruments drawn before they were drawn. However, it would seem IHL, as *lex specialis* in armed conflict, has not been porous enough to adopt the definition of a ‘child’ found in a wide range of branches of law under international law.

The rate at which African Charter on the Rights and Welfare of the Child (hereinafter called ‘ACRWC’ or ‘African Children’s’ Charter’) and Optional Protocol on the Involvement of Children in Armed,<sup>17</sup> (hereinafter called the ‘Optional Protocol’) have been ratified indicates willingness and commitment by states to raise the minimum age of recruitment from 15 to 18 years<sup>18</sup>. This fact is evidenced by the number of countries who have domestic laws prohibiting recruitment of children below 18 years. On this note, one questions the relevance and adequacy of IHL as it has failed to move in tandem with state practice and recent developments in other fields of international law. In light of such developments one queries the relevance of encouraging states to ratify international conventions proffering low thresholds of protection to children. It is against this background

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<sup>15</sup> Carlos Iván Fuentes, ‘The Applicability of International Humanitarian Law to Situations of Urban Violence: Are cities turning into war zones?’, p 11 available on <http://www.ubcpres.ca/books/pdf/chapters/2012/ModernWarfare.pdf>

<sup>16</sup> Stanislava Hýbnerová, ‘Prohibition Of Recruiting Child Soldiers And/Or Achievable Obligations?’, available on [www.cvil.eu/contents](http://www.cvil.eu/contents) (accessed on 25 June 2015)

<sup>17</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, 25 May 2000.

<sup>18</sup> Lilian Peters, ‘War is no Child’s Play: Child Soldiers from Battlefield to Playground’, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper – Nº8 @ p 7 available on [www.isn.ethz.ch/Digital-Library/Publications/Detail/?lang=en&id](http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lang=en&id) (accessed 13 July 2015)

that this study seeks to assess the regulation of children recruitment and participation in armed conflict under international humanitarian law.

### **1.3 STATEMENT OF THE PROBLEM**

It is unanimously agreed that the recruitment of children of any age group into militia and their participation in hostilities is unacceptable as it is contrary to principles of international law. While humanity has made efforts to address the problem of recruitment and participation of children in hostilities, there have been problems in formulating a uniform standard applicable in all branches of international law. The age group 15-18 years has presented problems in so far as making laws geared to protect or regulate it in war. While IHL has drawn the minimum age for recruiting children and participation in armed conflict, international law instruments have left states to formulate legislation governing the ages from 15 -18 years. Consequently children aged 15-18 years are now afforded different levels of protection depending on the varying perceptions of their societies on transition from childhood to adulthood. Similarly, some branches in international law regard the age group, 15-18 years, as still falling under protection of laws governing all other children below 15 years yet others prefer according it roles and status of adults for certain roles in society. This appears to have led to problems in the regulation of children recruitment and participation in war.

It seems IHL provisions seek to protect all children at a crucial and vulnerable time but shields one age group and exposes the other to recruitment and participation in war despite the fact that children need the same legal protection. The main problem is that presently there seems to be no provision in the body of IHL which prohibits a person from recruiting into militia children between 15 and 18 years or making them to participate in armed conflict. Scholars are yet to agree on whether it is logical to raise the minimum age of recruitment in IHL or let IHRL cover any weaknesses in IHL in view of the complementarity principle. Whilst it is argued that there is enough legal protection in IHL other discourses in international law have expanded legal protection to all children below 18 years evidencing that IHL's legal protection seems inadequate. This paper therefore seeks to assess the

extent to which children between 15 and 18 years are protected by IHL instruments from recruitment and participation in hostilities.

#### **1.4 RESEARCH OBJECTIVES**

1. To explore the problem of child soldiers in international law, particularly their recruitment and participation in war, the roles played by children and the consequences of their participation in hostilities.
2. To explore the normative legal regime in IHL protecting children from recruitment into militia and participation in armed conflict.
3. To examine standards and measures in other areas of international law that should filter and influence changes and developments in IHL so as to fill possible gaps and weaknesses.
4. To make recommendations that can be made in IHL in improving protection of children aged 15-18 years from recruitment and participation in armed conflict.

#### **1.5 METHODOLOGY**

In writing the research, a qualitative approach was followed. The research was restricted to the desktop research. Both primary and secondary sources including published books, international and regional human rights instruments, journal articles and decided cases in international courts dealing with regulation of recruitment and participation of children in armed conflict were consulted. Various internet websites were also consulted to obtain current information on state practice regarding regulation of child soldiering. A comparative analysis was done between IHL and other international instruments in IHRL, ICL and international labour law dealing with the same subject matter.

#### **1.6 LITERATURE REVIEW**

Legal authorities agree that in IHL the Law of Geneva and the two 1977 Additional Protocols to the Geneva Conventions regulate the recruitment and participation of children in hostilities. Mezmur<sup>19</sup> observes that the first three Geneva Conventions have no specific provisions on children besides making provision for material

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<sup>19</sup> Mezmur (N13 above) 200.

relief, distribution of food, etc. Löfgren<sup>20</sup> in support of Mezmur<sup>21</sup> postulates that the fourth Geneva Convention is the only one in Geneva Law giving special protection and treatment to children below 15 years of age.<sup>22</sup>

Provisions in Additional Protocols stipulate that children enjoy general protection either as persons taking or not taking part in hostilities, and special protection as persons who are particularly vulnerable<sup>23</sup>. According to Löfgren,<sup>24</sup> though IHL provisions allude to protection of children, neither defines what is meant by 'special protection' nor defines the term 'child' in its conventions. The only time the fourth convention refers to children as persons under the age of 18 is when it refers to children being subjected to death penalty and forced labour by the occupying power. Another scholar, Fox,<sup>25</sup> states that such shortcomings in IHL arise from the fact that historically speaking, the child soldiers phenomenon rampant today was unheard of, so the law was 'unprepared' hence it has evolved to cover such developments no wonder some inconsistencies, contradictions, legal gaps, and lack of clarity, still beset that legal framework up to now.

There are two schools of thought on this subject, the first one by scholars like Frostad,<sup>26</sup> which says children in armed conflict are covered by international agreements, and the second, by academics like Aguja,<sup>27</sup> which state that Geneva law does not address legal protection of child

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<sup>20</sup> Linda Hårsta Löfgren, 'Child Soldiers from a Legal Perspective : A Literature Based Case Study of the Democratic Republic of Congo, Sierra Leone and Uganda' available on [www.diva-portal.org/smash/get/diva2:718792/FULLTEXT01.pdf](http://www.diva-portal.org/smash/get/diva2:718792/FULLTEXT01.pdf) (accessed 28 May 2015).

<sup>21</sup> Mezmur (N12 above) 200

<sup>22</sup> Löfgren(N20 above)

<sup>23</sup> ICRC on International Humanitarian Law, 'Legal Protection of Children in Armed Conflict', 0577/002;03 available on [www.icrc.org](http://www.icrc.org) (accessed 21 March 2015)

<sup>24</sup> Löfgren(N21 above)

<sup>25</sup> Mary-Jane Fox 'Child Soldiers and International Law: Patchwork Gains and Conceptual Debates', available on [www.faculty.maxwell.syr.edu/hpschmitz/FoxHumanRightsReview](http://www.faculty.maxwell.syr.edu/hpschmitz/FoxHumanRightsReview) (accessed 30 August 2015).

<sup>26</sup> Magne Frostad, 'Child Soldiers: Recruitment, Use and Punishment', International Family Law, Policy and Practice, Vol. 1.1, 2013: 71, available on <https://uit.no/.../Child%20Soldiers%20-%20Recruitment,%20Use%20> (accessed on 29 August 2015).

<sup>27</sup> Hilton Joyo Aguja, 'The Child Soldier In International Humanitarian Law: Focus On The Moro Islamic Liberation Front In The Southern Philippines', available on [www.victoria.ac.nz/law/nzacl/PDFS/CLJP\\_JDCP/.../09%20Aguja.pdf](http://www.victoria.ac.nz/law/nzacl/PDFS/CLJP_JDCP/.../09%20Aguja.pdf) (accessed on 21 July 2015).



soldiers in all age groups. In opposing the later view, Frostad<sup>28</sup> states that different thresholds are found in the law of armed conflict regarding the termination of the special protection offered to children; from 12, via 15 to 18 years. Happold<sup>29</sup> and Sandoz et al<sup>30</sup> concur with Frostad<sup>31</sup> and further observe that though the 1949 Geneva Conventions can be said to apply a threshold of 15, the 1977 Additional Protocol I to the Geneva Conventions would seem to apply 18 years as the general cut-off point with 15 years as the minimum threshold for the prohibition of recruitment.

Another bone of contention in the legal protection of children in armed conflict pertains to restriction of voluntary recruitment into armed groups rather than armed forces of a state, a feature found in IHRL and not in IHL. Mezmur<sup>32</sup> states that such restriction among non-state actors is laudable because such recruitment, use and abuse is rampant in that sector. From another perspective Vandergrif<sup>33</sup> and Graca Machael<sup>34</sup> completely rule out volunteerism into both government armed forces and armed groups especially in the African context considering the immense socio-economic pressures compelling children to join the armed forces.

Whilst a number of authorities concur the fact children have also found protection within other discourses of international law there is disagreement on whether it is logical to expand the threshold of protection in IHL to 18 years or rather maintain it at 15 years and at the same time strengthen existing mechanisms already in place. In response to these averments Wanyoike<sup>35</sup> argues that the laws that have

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<sup>28</sup> Frostad, (N26 above) 71

<sup>29</sup> Matthew C. E. Happold, *Child soldiers in international law: The legal regulation of children's participation in hostilities*, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 32.

<sup>30</sup> Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross and Martinus Nijhoff Publishers Geneva 1987, pp. 899-900, paras. 3178-3179.

<sup>31</sup> Frostad, (N 27 above) 71

<sup>32</sup> Mezmur, ( N 12 above) 205

<sup>33</sup> Vandergrif, K, 'International Law Barring Child Soldiers in Combat: Problems in enforcement and Accountability: Challenges in implementing and enforcing Children's Rights', *Cornell International Law Journal*, 2004, 37,550.

<sup>34</sup> Graca Machael, (1996) *Report to the Secretary General on the Impact of Armed Conflict on Children* (New York : UNICEF) available on <http://wn.apc.org/mstudy/mstudy/html> (accessed on 23 March 2015)

<sup>35</sup> Unpublished: Kinuthia Wanyoike, 'An Evaluation of the Laws that Govern Child Soldiers in Africa: A Case Study of Democratic Republic Of Congo', Unpublished LLM thesis, University of Nairobi, 2013:38-39

been enacted in international law to protect child soldiers are more than enough all that needs to be done is to ensure that they are implemented effectively.

Another intriguing feature in the legal regulation on recruitment of children stems from the various socio-cultural perceptions of states pertaining to childhood. Peters<sup>36</sup> posits that the tolerable age of 15 in the CRC was a compromise arrangement to accommodate specific cultural norms of other states which bestow manhood earlier than the age of 18. While Peters<sup>37</sup> agrees with Rivert<sup>38</sup> that domestic laws in place reflect the various and cultural sensitivities, there seems to be a feeling that whole international community is being prevented by the most powerful states from adopting a 'straight 18 position' as the powerful states seek to pursue and protect recruitment policies in their jurisdictions. Peters<sup>39</sup> argues that although the minimum age for recruitment and participation in combat remains 15 years, *opinio juris* and practice of states is evolving towards a 'straight 18 position'. Hýbnerová<sup>40</sup> concurs with Peters<sup>41</sup> that the world community aspires towards a comprehensive ban on the participation in armed conflict of child soldiers under the age of 18. Hýbnerová opines that this has not been achieved as yet. To this end, the debate regarding appropriate minimum age for military recruitment has been on whether it is desirable to maintain the age at 15 or whether it is feasible to raise it and still get consensus from states considering that Africa already has a regional instrument out rightly prohibiting recruitment and participation of any child below 18 years.<sup>42</sup>

## **1.7 CHAPTER SYNOPSIS**

### **Chapter One**

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<sup>36</sup> Peters, ( N18 above)

<sup>37</sup> Supra note at 7.

<sup>38</sup> Unpublished: Annabelle Karen Rivet, 'The Criminal Liability of Child Soldiers in International Criminal Law: Does Restorative Justice offer a balance between the Rights of the Victim and the Rights of the Child Perpetrator? Unpublished LLM thesis, University of Pretoria, 2014:9

<sup>39</sup> Peters (N 18 above).

<sup>40</sup> Hýbnerová, (N 16 above).

<sup>41</sup> Peters (N 18 above).

<sup>42</sup> International Law Barring Child Soldiers in Combat: Problems in Enforcement and Accountability - Question & (and) Answer Session, Cornell International Law Journal: Vol. 32: Issue 3, Article 19, 2004: 559.

This introductory chapter is characterised by an introduction and background to the study, statement of the problem, an outline of the research objectives, overview of the literature, methodology and the synopsis of chapters.

## **Chapter Two**

This chapter will explore the problem of child soldiers in international law, particularly the recruitment and participation in war, the roles played by children and the consequences of their participation in hostilities.

## **Chapter Three**

This chapter will explore the normative IHL legal regime protecting children from recruitment into militia and participation in armed conflict in general before proceeding to assess whether the ages between 15 and 18 are covered.

## **Chapter Four**

This chapter will examine standards and measures in other areas of international law that should filter and influence changes and developments in IHL so as to fill current gaps and weaknesses.

## **Chapter Five**

This chapter will conclude the dissertation and advance some recommendations aimed at addressing the problems that militate against the adoption of 18 years in IHL as the minimum age of recruitment or participation of children in armed conflict.

## **CHAPTER TWO**

### **THE PROBLEM OF CHILD RECRUITMENT AND PARTICIPATION IN WAR.**

#### **2.1 Introduction**

This chapter explores the problem of child soldiers in international law. Emphasis is placed on the causes for the recruitment and participation of children in hostilities, particularly in view of the roles played during hostilities. It will also explain the methods used in recruitment of children and the consequences of their participation in armed conflict. Focusing on these issues on this part of the dissertation elucidates the magnitude of the problem of child soldiering worldwide.

#### **2.2 CAUSES OF CHILD RECRUITMENT IN ARMED CONFLICT**

Children recruitment into militia as child soldiers is not a new phenomenon, rather it has increased recently. Hackenberg<sup>43</sup> quoted by Mulira<sup>44</sup> states that approximately 300,000 children below the age of eighteen are used in both international and national conflicts around the world and twenty million children have died as a result of participation in armed conflict. However, this estimation in number is probably inadequately authenticated.

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<sup>43</sup> Marsha L. Hackenberg, Can the Optional Protocol For the Convention on the Rights of the Child Protect the Ugandan Child Soldier? 10 , International & Comparative Law Review, (2000) 417, 418 available on [www.mcser.org/journal/index.php/ajis/article/download/791/822](http://www.mcser.org/journal/index.php/ajis/article/download/791/822) (accessed on 14 May 2015).

<sup>44</sup> Mulira ( N 10 above) 1.

A variety of reasons have been proffered for the recruitment of child soldiers. According to Machel (1996), children are mainly recruited because certain nation states have improper birth registration procedures, if at all, and because of a lack of other inadequate institutional services that cater to children. From a different opinion, Happold<sup>45</sup> dismisses Machael's argument and gives two major reasons, namely that there has been a change in trend in use of children from auxiliary functions to active participation in hostilities, and a change in society's perception of when a person moves from childhood to adulthood. In support of this view, Abraham<sup>46</sup> posits that child soldiers are preferred by armed forces because they are easy to arm and control and easier to manage than adults. Nhenga<sup>47</sup> rather opines that child soldiers are preferred since they are unaware of their rights, obedient, unlikely to organise themselves, flexible and ultimately expendable. This obedience makes them easy to manipulate and unlikely to question orders<sup>48</sup>. Coalition to Stop the Use of Child Soldiers observed that the recruitment of children has a direct correlation to enduring conflict in that the shortage of manpower, due to increasing casualties and escalation of the conflict, leads to an ever more desperate search for fresh recruits to fill the ranks<sup>49</sup>. Consequently, armed forces end up recruiting children to beef up their manpower. Though this argument holds water, it has been observed that some have recruited child soldiers from the onset in armed conflict.

Happold<sup>50</sup> argues that the proliferation of light simple weaponry in over the years has led to the exploitation of children as combatants in battle. According to Morisseau's accessibility thesis the increased reliance on small arms and light weapons has made using children as soldiers practical since these weapons are easily obtainable,

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<sup>45</sup> Matthew C. E. Happold, Child soldiers in international law: The legal regulation of children's participation in hostilities, 47 (1), Netherlands International Law Review, (2000) 27, 28.

<sup>46</sup> Shara Abraham, 'Child Soldiers and the Capacity of the Optional Protocol to Protect Children in Conflict', available on [www.wcl.american.edu/hrbrief](http://www.wcl.american.edu/hrbrief) (accessed on 22 July 2015).

<sup>47</sup> Unpublished: TC Nhenga 'Application of the International Prohibition on Child Labour in an African Context: Lesotho, Zimbabwe and South Africa' Unpublished LLM thesis, University of Cape Town, 2008: 29.

<sup>48</sup> Graca Machel, Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children, available on <http://www.un.org/documents/ga/docs/51/plenary/a51-306.htm> (accessed 25 August 2015).

<sup>49</sup> Coalition to Stop the Use of Child Soldiers, 'The Use of Children As Soldiers: A Growing Phenomenon' available at

<http://www.childsoldiers.org/cs/childsoldiers.nsf/0/035a7elf4ee6b20c802569ba007cd51a?OpenDocument> (accessed 25 August 2015).

<sup>50</sup> Happold (N 45 above)

relatively cheap, and easy to operate, repair and transport<sup>51</sup>. Unlike earlier weapons, which required precision aiming and physical strength, these weapons are ultra-light automatic weapons that can be carried and fired by children as young as ten<sup>52</sup>. Linking the notion of accessibility and recruitment of child soldiers, Stichick and Bruderlein<sup>53</sup> state that in some conflict areas a lightweight machine gun can be purchased for the same price as a chicken and the same weapon can be stripped and loaded by a ten year old in a matter of minutes.

## **2.3 METHODS OF CHILD RECRUITMENT IN ARMED CONFLICT**

Two major methods of recruiting child soldiers have been given. These are forced recruitment or involuntary participation and voluntary participation.

### **2.3.1 Forced recruitment**

During war both armed opposition groups and national armed forces use actual physical force and threats to recruit under-age children. Forges<sup>54</sup> states that several rebel groups and national armed forces around the world practice forced recruitment of under-age children by abducting children from schoolyards, buses, market places, streets, churches, or refugee camps. Grac'a Machel<sup>55</sup> says this form of press gang, known in Ethiopia as "afesa", was prevalent there in the 1980's, when armed militia, police or army cadres would roam the streets picking up anyone they encountered. However, it is still widely used as forced recruitment to date.

### **2.3.2 Voluntary Participation**

Children may voluntarily join government armies and opposition groups on their own. Quite a number of 'push and pull factors' ranging from social, economic, and political have been advanced as motivators to voluntary participation of children in war.

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<sup>51</sup> Nancy Morisseau, 'Seen but not Heard: Child Soldiers Suing Gun Manufacturers Under Alien Tort Claims Act', 89 Cornell Law Review (2004) 1263.

<sup>52</sup> Supra note

<sup>53</sup> Theresa Stichick and Claude Bruderlein, 'Children Facing Insecurity: New Strategies for Survival in a Global Era', available on <http://www.hpcrresearch.org/sites/default/files/publications/ChildrenFacingInsecurity.pdf> (accessed 25 August 2015).

<sup>54</sup> Alison Des Forges, 'Burundi: Children Abducted for Military', available at <http://hrw.org/english/docs/2001/11/14/burund3355.htm> (accessed 25 August 2015).

<sup>55</sup> Graca Machel ( N 48 above).

Fontana<sup>56</sup> argues that according to experts, numbers recruited by voluntarily participation that exceeds forced recruitment. Morisseau<sup>57</sup> argues that use of the word “voluntary” in reference to the use of child soldiers in armed conflict is misleading given the brutal conditions that motivate children to join armed forces. Graca Machael<sup>58</sup> completely ruled out the idea of volunteerism in the African context as young children can easily be forced to say they joined voluntarily. Vandergrif<sup>59</sup> says the question that remains is whether it is truly voluntary when there are immense pressures to join armed forces, hence, in the bulk of cases it has been observed that children join the war because of the sheer need to survive<sup>60</sup>. Quite a number of scholars concur that some of the personal factors leading children to volunteer for the armed forces include poverty, death, loss, displacement, religious motivations, need for revenge, and collapse of social structure. Against this background, scholars have argued the recruitment by armed groups can never be regarded as voluntary, hence, it has been held they must not be held criminally liable for acts they committed as child soldiers.

In other situations, children are motivated to join armed hostilities due to pressure from their families, peer groups, and religious or other community-based groups. According to Cohn & Guy and Gill<sup>61</sup> a child’s surrounding has an impact on a child’s decision to participate in hostilities. The society’s view about participation in war and heroic perceptions associated with holding the ‘gun’ at a tender age have also led some children to envy becoming child soldiers. In some cases, children are recruited upon being subjected to ideological propaganda which encourages them to join armed groups<sup>62</sup>.

## **2.4 CONSEQUENCES OF PARTICIPATION IN ARMED CONFLICT**

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<sup>56</sup> Barbara Fontana, Child Soldiers and International Law, African Security Review, Vol.6, No. 3, (1997) available on <https://www.issafrica.org/pubs/asr/6No3/Fontana.html> (accessed 27 August 2015).

<sup>57</sup> Morisseau ( N 51 above) 1280.

<sup>58</sup> Graca Machael, (N34 above)

<sup>59</sup> K. Vandergrif, ‘International Law Barring Child Soldiers in Combat: Problems in enforcement and Accountability: Challenges in implementing and enforcing Children’s Rights’, Cornell International Law Journal, 2004, 37,550.

<sup>60</sup> United Nations Security Council Resolution A/RES54/ 263 of 25 May 2000.

<sup>61</sup> Ilene Cohn & Guy S, Goodwin-Gill, ‘Child Soldiers: The Role of Children in Armed Conflict’, (1993) 37-43.

<sup>62</sup> Supra note at 168-169.

The direct or indirect exposure of children in armed conflict, either voluntarily or as a result of forced recruitment, violates customary international law. Participation in war robs off children their childhood development as the child soldiers are forced to suffer the rigors of military life<sup>63</sup>. Abbott<sup>64</sup> in Mulira<sup>65</sup> argues this result in malnutrition, disease, sexual exploitation, mental abuse, and physical injury. Mulira<sup>66</sup> posits that child soldiers are subjected to dangerous risks, some of which are beyond the normal perils of war. Some are made to walk across fields ahead of their abductors and to plant landmines or clear fields of landmines, and therefore are the first to die if they miss a mine. In addition, child soldiers face the additional risk of drug and alcohol abuse, which is often used to desensitize them from horrific scenes violence they are deliberately exposed<sup>67</sup>. According to reports some have even been forced to commit atrocities against their own families as a way of severing all ties with their communities.

Although boys are recruited in larger numbers, mostly opposition forces recruit girls who participate in hostilities indirectly or directly. Some upon recruitment are often raped and forced to become wives of combatants. In the majority of cases, girl child soldiers join armed groups due to poverty, to avenge violence against themselves or their families, to be protected against forced abduction, rape or other forms of violence<sup>68</sup>. The involvement in war by girl soldiers leads in their sexual exploitation as they are exposed to unsafe sex and rape, unwanted pregnancies<sup>69</sup>. In addition it exposes the girl soldiers to deadly sexually transmitted diseases like HIV/AIDS, which affect the immediate and future sexual reproductive health. It has been observed that girls that have been repeatedly raped face the risk of chronic pelvic

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<sup>63</sup> Chapter Nine, 'Child Soldiers - The Advocates for Human Rights' available on [http://www.theadvocatesforhumanrights.org/uploads/chapter\\_9-child\\_soldiers.pdf](http://www.theadvocatesforhumanrights.org/uploads/chapter_9-child_soldiers.pdf) (accessed 25 August 2015).

<sup>64</sup> Amy Beth Abbott, 'Child soldiers-The use of Children as Instruments of War', Suffolk Transnational law Review (2000) 499, 508.

<sup>65</sup> Mulira (N10 above) 18.

<sup>66</sup> Supra at 16.

<sup>67</sup> Press summary: Wars against children – Unicef, available on <http://www.unicef.org/graca/summary.html> (accessed 25 August 2015).

<sup>68</sup> International Labour Organisation, 'Red Shoes: Experiences of Girl- combatants in Liberia', 2005:27-43, available on <http://www.ilo.org/public/english/employment/crisis/download/redshoes.pdf> (accessed on 27/08/2015).

<sup>69</sup> Sexual and Gender-Based Violence Against Children, available at <http://www.un.org/special-rep/children-armed-conflict/English/SexualViolence.html> (accessed 27 August 2015).



inflammatory disease and death<sup>70</sup>. Girl child soldiers who are recruited face that same predicament. Some end up committing suicide because of the humiliation, while others flee from their homes leading to ostracism and further displacement<sup>71</sup>. According to Child Soldiers Global Report 2008<sup>72</sup>, girl mothers and babies born of rape in countries such as the DRC, Liberia and Uganda are especially vulnerable to rejection.

## **2.5 CONCLUSION**

In summation, the society's perception towards using child soldiers and the proliferation of light weapons in recent years are the two main propositions for the increased recruitment of children. It has been observed that the two main methods used to recruit children are voluntary and forced or involuntary recruitment. Due to the immense social and economic factors existing in times of war, volunteerism in recruitment must be reconsidered. The child's consent to recruitment in conflict situations is not legal but a survival tactic. Basing on the foregoing it can be stated that the participation in war affects all rights that the children are entitled to. Children, regardless of their age, face hardships as a result of taking part directly or indirectly in hostilities. Taking cognisance of the negative consequences resulting from children participation, it would be prudent for States to protect all children from recruitment and participation in war bearing in mind that children are the only future that humanity has.

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<sup>70</sup> Graca Machel (N 48 above).

<sup>71</sup> Abbott (N 64 above) 506.

<sup>72</sup> Child Soldiers Global Report, 2008: 18, available on [www.child-soldiers.org](http://www.child-soldiers.org) (accessed 25 August 2015).

## **CHAPTER THREE**

### **THE LAW REGULATING CHILDREN RECRUITMENT AND PARTICIPATION IN HOSTILITIES UNDER IHL.**

#### **3.1 Introduction**

In Chapter 2 the causes of child soldiering, methods used in recruitment of children and the consequences of their participation in hostilities were discussed. This Chapter will explore the IHL normative legal regime necessary for protecting children from recruitment into militia and participation in armed conflict. The Chapter will also critically analyse the IHL instruments protecting children from recruitment and participation for the purpose of highlighting their strengths and weaknesses.

#### **3.2 SCOPE OF APPLICATION**

International humanitarian law is the body of law that establishes rules that seek to limit the effects of armed conflict by protecting non-combatants and by restricting the

means and methods of warfare<sup>73</sup>. The sources of international humanitarian law are vast, and are broadly divided into two categories of substantive rules, the law of The Hague<sup>74</sup> and the law of Geneva. The law of Geneva comprises the four Geneva Conventions of 1949 plus the two additional protocols of 1977. It regulates the treatment of persons who do not take part in the armed hostilities (such as civilians, the wounded, the sick) and those who used to take part but no longer do (such as prisoners of war)<sup>75</sup>. The Geneva Conventions have attained universal ratification<sup>76</sup> worldwide such that even those who are not signatories are still bound by their provisions given that they are now deemed to fall under customary international law<sup>77</sup>.

IHL has two different set of rules the applicability of which is determined by the classification of an armed conflict as either an international armed conflict (IAC) or non international armed conflict (NIAC).<sup>78</sup> An armed conflict occurs when there is resort to armed force between States or there is intense protracted violence between governmental authorities and organised armed groups.<sup>79</sup> Its application extends from the initiation of such armed conflict and extends beyond the cessation of hostilities until a general conclusion of peace is achieved.<sup>80</sup> A major shortcoming of IHL to make a note of is that it does not apply to any form of violence but to intense and protracted armed violence.<sup>81</sup> In reality, however, classifying specific conflicts is often not a straightforward matter in view of the evolving nature of modern conflicts.<sup>82</sup> For Parties to agree or disagree to the application of IHL, the first port of call is determination of whether the conflict has reached a certain level of intensity and

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<sup>73</sup> L. Wells quoted in Mulira ( N 10 above)23.

<sup>74</sup> The law of The Hague comprises the Hague Conventions of 1868, 1899 and 1907 which regulate the means and methods of warfare.

<sup>75</sup> Salim, A.Nakhjavan , "International crimes" in Max du Plessis (Ed) African Guide to International Criminal Justice, Institute for Security Studies, Pretoria, (2008) 72 available on [www.isafrica.org](http://www.isafrica.org) .

<sup>76</sup> International Human Rights Law and International Humanitarian Law in Armed Conflict: Legal Sources, Principles and Actors, United Nations Publication, HR/PUB/11/01, 2011.

<sup>77</sup> Prosecutor v. Sam Hinga Norman, Case Number SCSL-2003-14-AR 72 (E) ruled that recruitment or use of children under 15 years in hostilities is a war crime under customary international law.

<sup>78</sup> Unpublished : Thompson Chengeta, Are U.S Drone Targeted Killings within the Confines of the Law?, Unpublished LLM Thesis , Human Rights And Democratisation In Africa, 2011:14

<sup>79</sup> Prosecutor v Tadic Case No: IT-94-1-AR72,2 October 1995, para 70

<sup>80</sup> Tadic Case ( N 79 above) para 71

<sup>81</sup> M. Shaw International Law, 6<sup>th</sup> Edition, Cambridge University Press, United Kingdom, (2008) 1195.

<sup>82</sup> Elizabeth N Griffi and Başak Çalı, International humanitarian law, p42 available on [www.jgu.edu.in/joss/PDF/11-Cali-Chap11.pdf](http://www.jgu.edu.in/joss/PDF/11-Cali-Chap11.pdf) (accessed 12 May 2015).

must have spanned over a certain period of time.<sup>83</sup> Reaching such consensus by the High Contracting Parties may be taxing as no single authoritative body exists to determine issues such as the existence of an armed conflict.<sup>84</sup>

### 3.3 PROTECTION UNDER CUSTOMARY LAW

International humanitarian law also finds its sources in customary international law.<sup>85</sup> Under customary international humanitarian law recruitment of children and their participation in hostilities is prohibited both in international and internal armed conflicts. However, this body of law sets no universal accepted age limit of recruitment, but it is clear that children should not be below 15 years of age.<sup>86</sup> The same applies to children participation in hostilities<sup>87</sup>. To that effect it can be stated that it seems even under customary law there is a lacuna since children aged between 15 and 18 are not protected. Nevertheless, all children affected by armed conflict are entitled to special respect and protection by the High contracting parties. Such protection includes protection from every form of sexual violence, from family separation and access to basic provisions among others.

### 3.4 PROTECTION UNDER 1949 GENEVA CONVENTIONS

According to Harvey<sup>88</sup> the overarching goals of law of Geneva is to protect victims of international conflict. Geneva Convention I<sup>89</sup> concern the treatment and protection of members of the armed forces who are wounded and sick in the battle field. Geneva

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<sup>83</sup> Tadic Case ( N 79 above) 24

<sup>84</sup> S. Sivakumaran, 'International law', in International Human Rights Law, Second Edition, (Eds) D. Moeckli, Shah and S. Sivakumaran, Oxford university Press, United Kingdom, 2014:484.

<sup>85</sup> According to Asylum Case ( Columbia V Peru), [1950] I.C.J Rep. 266 at 276, for international law to be considered customary, there must be evidence of sufficient and settled state practice, consistent and uniform state usage, and it must be accepted as *opinion juris*.

<sup>86</sup> Customary IHL- Rule 136. Recruitment of Child Soldiers available on [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule136](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule136) (accessed 10 September 2015)

<sup>87</sup> Customary IHL-Rule 137. Participation of Child Soldiers in Hostilities available on [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule137](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule137) (accessed 10 September 2015)

<sup>88</sup> Rachael Harvey, Children and Armed Conflict: A Guide to International Humanitarian and Human Rights Law, p8 available on [https://www.essex.ac.uk/armedcon/story\\_id/000044.pdf](https://www.essex.ac.uk/armedcon/story_id/000044.pdf) (accessed on 27 July 2015).

<sup>89</sup> Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949 available on <http://www.icrc.org/ihl/INTRO/365?OpenDocument> (accessed 10 March 2015)

Convention II<sup>90</sup> regulates the treatment and protection of members of the armed forces who are shipwrecked or wounded and sick at sea. Geneva Convention III<sup>91</sup> provides a framework for the treatment and protection of prisoners of war. Geneva Convention IV<sup>92</sup> addresses the treatment and protection of civilian persons in times of war, occupation or internment.

The Geneva Conventions do not specifically address participation of children in armed forces. However, under Geneva Convention IV children benefit from the general provision provided for civilians not taking part in hostilities, thus, provisions in the law of Geneva do not provide protection to all children less than 18 years. Harvey<sup>93</sup> argues that this is so because the concept that all persons under 18 are children, and are therefore entitled to special protection, did not exist in 1949 and has only been accepted by the international community in recent decades. Hýbnerová and Aguja<sup>94</sup> state that this is despite the fact IHL provisions, in both conventions and protocols were meant to protect children in all ages from newly born babies to those aged 18 years.

Summing up on the law of Geneva, it can be stated that despite their good intentions the Geneva Conventions fail to adequately protect child soldiers, especially those in internal armed conflict. This is of course with the exception Common Article 3 found in the four Conventions.

### **3.5 PROTECTION UNDER COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS**

Common Article 3 applies to non-international armed conflicts or internal armed conflicts and sets out minimal standard of humanitarian protection<sup>95</sup> to persons taking no active part in the conflict. Thus, children taking no active part in hostilities

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<sup>90</sup> Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949 available on

<http://www.icrc.org/ihl/INTRO/370?OpenDocument> (accessed 10 March 2015)

<sup>91</sup> Geneva Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 available on <http://www.icrc.org/ihl/INTRO/375?OpenDocument> (accessed 10 March 2015)

<sup>92</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 available on <http://www.icrc.org/ihl/INTRO/380> (accessed 10 March 2015)

<sup>93</sup> Harvey (N 88 above) 8

<sup>94</sup> Hýbnerová ( N 16 above) ; Aguja (N27 above)

<sup>95</sup> Such persons are protected from violence to life and person, health and physical or mental well-being; outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault and slavery and slave trade in all their forms.

are protected by Common Article 3 of the Geneva Conventions as they are classified under the same category of armed forces who have laid down arms and the 'hors de combat'. However, children who take a direct part in hostilities fall outside the ambit of this protection and lose all protection offered under Common Article 3 of the Geneva Conventions.

At this juncture, one can posit that Common Article 3 does not explicitly tackle the subject of child combatants as it lumps them up with other groups of persons taking no active part in hostilities because of sickness, wounds, detention etc. As mentioned above, one of the problems of the Law of Geneva is that it doesn't protect children directly participating in armed conflicts in its provisions. Therefore, it follows that neither Common Article 3 nor the Geneva Conventions protect children taking a direct part in hostilities, hence, they fall stuck between the gaps of IHL. Applicability of Common Article 3 is also compounded by the fact that some states have denied its application since it also lacks a clear definition of what constitutes an armed conflict for the article to be applied. Nevertheless, since the obligations enclosed in Common Article 3 are deemed to fall under customary international law even parties denying the duties and obligations placed on them are bound.

From the preceding paragraphs, it has been noted that Common Article 3 to the Geneva Conventions fails to protect children taking active part in war since it explicitly protects persons taking no active part in hostilities. More so, it does not regulate recruitment of children into government and armed forces.

### **3.6.0 PROTECTION UNDER THE 1977 ADDITIONAL PROTOCOLS**

In 1977 the international community formulated the Additional Protocols<sup>96</sup> to the Geneva Conventions as the first international instruments to protect children from recruitment and participation in hostilities. Before adoption of the Protocols children who faced the effects of an internal armed conflict were assured of minimum standards of protection under Common Article 3 as stated above. In addition, child combatants would be protected in the same way as adults if injured (the First and

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<sup>96</sup> Additional Protocol I and Additional Protocol II (N 12 above)

Second Geneva Conventions of 1949) or taken prisoner (the Third Geneva Convention of 1949). To this end, it is proper to argue that in 1949 when the Geneva Conventions were drafted no distinct protection for children was deliberated since back then states had the belief that children participation in hostilities was an internal matter.

### 3.6.1 Additional Protocol I (AP1)

AP1 states that

*'The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities ( underlined for my own emphasis) and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the parties to the conflict shall endeavour to give priority to those who are oldest'.<sup>97</sup>*

Implicitly, Article 77(2) defines “child” as a person under 15 years, since “persons” between 15 and 17 may be recruited<sup>98</sup>. From the above quotation in Article 77, it can also be stated that the major concern in the provision was to preventing children under 15 from engaging in ‘direct’ roles in conflict, implementation of the ‘priority rule’ in recruitment and carrying out ‘feasible measures’ in procuring the same. At this juncture, one can also argue that although the adoption of the ‘priority rule’ was a compromise arrangement after State Parties failed to agree on total prohibition of child recruitment, there is no provision in AP1 punishing those who breach the ‘priority rule’. On another note, use of the term ‘feasible measures’ as opposed ‘to all necessary measures’ suggests that exclusion of children from recruitment was inexorable as Renteln<sup>99</sup> quoted by Mulira<sup>100</sup> argues. Despite the criticisms levelled against provisions in Article 77 of AP1, the parties to Geneva should be commended for it the first time that the issue of children recruitment was addressed in an international binding document.

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<sup>97</sup> Article 77(2) of AP1

<sup>98</sup> T. Vandewiele, “Optional Protocol: The Involvement of Children in Armed Conflicts”, in: A. Alen et al (Eds.) A Commentary on the United Nations Convention on the Rights of the Child, Martinus Nijhoff Publishers, Leiden, (2006: 6)

<sup>99</sup> Alison Dundes Renteln, The Child Soldier: The Challenge of Enforcing International Standards, 21 Whittier L. Rev. 1999:194.

<sup>100</sup> Mulira (N10 above) 26

The provision in Article 77 is not concerned with indirect roles played by child soldiers,<sup>101</sup> however, it reflects the ‘principle of distinction’ between combatants and civilians. The principle of distinction is one of the fundamental rules of international humanitarian law specifying that only combatants are allowed to take a direct part in hostilities. According to Dieter<sup>102</sup> and Topa<sup>103</sup> taking “direct part in hostilities” means to undertake the acts of war that are likely to cause actual harm to adverse party”. Principles of IHL relating to conduct of war stipulate that once a person directly takes part in hostilities as a combatant, he/she is no longer entitled to special protection accorded to civilians. Thus, it is imperative that children who take part in hostilities lose this special protection. Be that as it may, AP II maintains that even if children take direct part in hostilities, they still have to be provided with the care and aid they require<sup>104</sup>.

### **3.6.2 Additional Protocol II (AP II)**

Additional Protocol II applies to non-international armed conflicts just as Common Article 3, though the former only applies to conflicts of a certain degree of intensity and does not have exactly the same field of application as Common Article 3. For Additional Protocol II to apply the armed groups must exercise control over territory, must be under an organised command structure and must be able to sustain military operations and must be able to distinguish themselves.<sup>105</sup> APII does not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”<sup>106</sup> To this end, the threshold of violence needed for the IHL of non-international armed conflicts to apply is therefore higher than for international armed conflicts.<sup>107</sup> Thus, one can also assert that APII needs a high threshold application hence this can compound its applicability as some States parties can deny that their internal

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<sup>101</sup> See N2 above on indirect roles of children in hostilities. Other supplementary roles strongly connected with children in armed groups, such as scouting, spying, sabotage, porters and the use of children as decoys, couriers or at military checkpoints are not included.

<sup>102</sup> Fleck Dieter (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, New York ( 1995: 65) available on <https://books.google.co.za/books?isbn=0199232504> (accessed on 24 July 2015).

<sup>103</sup> Topa ( N3 above) 108

<sup>104</sup> Löfgren(N20 above) 17

<sup>105</sup> APII Scope of Application.

<sup>106</sup> Article 1 (2) of Protocol II

<sup>107</sup> M. Sassòli et al, *How Does Law Protect in War?; Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 3<sup>rd</sup> Edition, Volume I , ICRC, pg 23



conflicts fall under APII threshold arguing that their conflicts are simply interior disorders, riots, or sporadic acts. Arguably, some state that the term ‘*a certain level of intensity*’ is vague and this exacerbates the problem of classifying conflicts. Under these circumstances, one wonders as to how parties can then amicably agree to the application of provisions in APII protecting children from recruitment and participation in conflict.

Be that as it may, in the event that APII is applied, provisions in APII emphatically state that, ‘*Children [...] shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities*’.<sup>108</sup> The use of the word “shall” depicts that the provision is mandatory. On the other hand, omission of the word “direct” suggests that the rule established in Additional Protocol II is broader than that in AP1 and covers different types of use of children during armed conflicts<sup>109</sup>. For this reason it is also argued that this total prohibition in Article 4 (3)(c) of APII prohibits both indirect participation and voluntary enlistment of children below 15 years.

Notwithstanding the aforementioned rules in AP1 and APII, children who directly take part in international armed conflict are recognized as combatants and if they are captured they are accorded prisoner-of-war status under Geneva Convention III. By virtue of taking part in hostilities children lose the general protection granted to civilians under Geneva Convention IV, nevertheless they retain the special protection enjoyed by children during armed conflict. The Additional Protocols provide that child combatants under 15 are entitled to privileged treatment in that they continue to benefit from the special protection accorded to children by international humanitarian law.<sup>110</sup> Thus, all parties to the conflict must provide children with such required aid and care<sup>111</sup>, hence, children younger than 15 years, who take part in hostilities and fall into the power of an adverse party, are entitled to continue to benefit from the special protection<sup>112</sup>.

To conclude on the Protocols, it can be stated that both Protocols and Geneva conventions are incapable of protecting children from recruitment and participation in

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<sup>108</sup> Article 4 (3)(c) of APII

<sup>109</sup> Topa ( N3 above) 108 para 1

<sup>110</sup> Article 77(3) of API and Article 4(3)(d) of APII.

<sup>111</sup> Peters (N 18 above) 5

<sup>112</sup> Supra note at 5

armed conflicts, especially during conflicts of a non- international nature. This is because there are no international conflicts to date in which children are fighting to which AP 1 would apply, moreover, if AP 1 would be applicable it would only prohibit “direct” participation of children’s in hostilities. Over and above all, though APII has been hailed for providing greater protection to child soldiers, than AP 1, two main weaknesses have been levelled against it. Firstly, AP II provides no monitoring and reporting mechanism and secondly, the Protocol does not apply to conflicts of lower threshold.

### **3.7 CONCLUSION**

It has been established that the Geneva Conventions and their Protocols prescribe the minimum age of recruitment and participation in hostilities for children at 15 years. Thus, it would seem to depict in terms of IHL, that once one has attained this age then he/she becomes a major who can be recruited and also participate in armed conflict. It has been noted that IHL has no provision prohibiting recruitment of children between 15 and 18 years into militia or making them to participate in hostilities. As discussed, there are problems in the application of provisions in the Additional Protocols due to requirements in classification of conflicts. Thus, due to such disagreements between high contracting parties, application of relevant provisions protecting children from recruitment and participation remains a nightmare. The stated problems in application of IHL exposes children to the negative consequences discussed above in Chapter 2. It is therefore prudent to argue that IHL, as the *lex specialis* in armed conflict, needs to address the threshold of protection on recruitment and participation in its provisions to remain relevant in the field of international law. The next feat would be to assess whether there are any standards and measures in other areas of international law that should filter and influence changes and developments in IHL so as to fill current gaps and weaknesses

## **CHAPTER 4**

### **LEGAL STANDARDS IN OTHER BRANCHES OF INTERNATIONAL LAW**

#### **4.1 INTRODUCTION.**

In Chapter Three, the protection of children from recruitment and participation in armed conflict under IHL has been discussed. It has been highlighted that the law of Geneva does not define the term 'child' and that the Geneva Conventions of 1949 per se do not protect children between 15 and 18 years from recruitment and participation in armed conflict. It has also been indicated that AP1 which regulates

international armed conflicts does not regulate indirect roles which child soldiers participate in. The researcher further stated that APII offers better protection than API, however, the former does not apply on lower levels of hostilities which are rampant especially in Africa, and in addition, it lacks monitoring and reporting mechanisms.

Against that background, this chapter is going to firstly look at how the term 'child' has been defined by international instruments outside IHL. It will then unpack the various international law and regional instruments with standards and measures that should filter and influence IHL so as to fill current IHL gaps and weaknesses. It will further give a critical evaluation of the UN Security council led mechanisms and other mechanisms placed by international community to protect children during armed conflict. This chapter will finally analyse the attitude of states towards persons who violate the prohibition protecting children from child soldiering.

#### **4.2 DEFINING THE TERM 'CHILD'**

Defining the child's age in international law is one cardinal factor influencing the child status. The legal protection accorded to children is derived from the international human rights law ability to explicitly define the term 'child', a feature which is absent in IHL instruments. This feature makes human rights instruments distinct from IHL. According to Topa<sup>113</sup> the CRC was the first international instrument to define the term "child". Pursuant to Article 1 of the CRC, *'a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'*. It can be noticed that eighteen years was adopted using the Universalist approach, despite the divergent views existing worldwide surrounding childhood. This definition is sufficient evidence pointing that the international community acknowledges that nations may recognise children as adults before attaining the age of 18, notwithstanding the CRC definition on childhood.<sup>114</sup>

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<sup>113</sup> Ilona Topa ( N3 above) 107

<sup>114</sup> Mark Gee, 'Why is the International Justice System Ineffective at Protecting the Rights of Child Soldiers?' Internet Journal of Criminology , 2010:3-4 available on [www.internetjournalofcriminology.com](http://www.internetjournalofcriminology.com) (accessed 10 September 2015).

In the foregoing, it can be submitted that the age of 15 years used as minimum threshold for recruitment and participation in IHL is justified since the law allows children to be recognised as adults even before attaining the age of 18. On this basis states that continue recruiting children using the minimum age in accordance with customary international law are justified and should therefore stand no criticism for having lower standards as long as it does not go below the age of 15. On the other hand, it can be posited that such flexibility simply reflects a compromise position on children recruitment since states cannot agree due to different cultural and social perceptions on childhood.

### 4.3 APPLICATION OF HUMAN RIGHTS IN ARMED CONFLICT

Realising problems existed in the applicability of IHL in conflict zones, the international community developed a body of law called international human rights law which continues to apply alongside IHL. This overlap was recognised in 1970 in General Resolution 2675 (XXV) which emphasised that fundamental human rights continue to apply in situations of armed conflict.<sup>115</sup> In ***Cyprus V Turkey (First and Second Applications)***, the European Commission on Human Rights declared that in belligerent operations a state was bound to respect not only humanitarian law but also fundamental human rights.<sup>116</sup> Although complementing IHL with international human rights law has proffered distinct advantages in protection of humankind, there are problems among scholars in determining the exact relationship between the two bodies of law,<sup>117</sup> and for this reason the *lex specialis* principle was developed.

Despite the applicability of IHRL in armed conflict there has been concern that in internal tensions and disturbances States can, however, declare internal tensions and strife as grave public emergencies warranting suspension of certain human rights obligations or standards.<sup>118</sup> Under such circumstances, for security reasons, States can argue derogation from certain human right standards was justified. In such situations it can be stated that a potential lacuna exists in the international regulation of tensions and strife. In light of such potential lacuna, one can posit that

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<sup>115</sup> Shaw ( N 81 above) 1197

<sup>116</sup> Report of the Commission of 10 July 1976, paras 509-10.

<sup>117</sup> Sivakumaran ( N84 above) 479.

<sup>118</sup> Supra Note at 484.

placing minimum human rights standards of protection to be applied and monitored by an international body with capacity and mechanisms to enforce would reduce such violations. Wars fought outside the territory of a state can be held to pose difficulties on extraterritorial application of IHRL.<sup>119</sup> A state fighting on the territory of another is nevertheless bound to respect international humanitarian law in the same way as if it were fighting on its own territory.

#### **4.4 PROTECTION UNDER INTERNATIONAL HUMAN RIGHTS LAW**

Under IHRL the legal protection of children in armed conflict is embodied in the CRC and the Optional Protocol on the Involvement of Children in Armed (Optional Protocol) among other instruments.

##### **4.4.1 The Convention on the Rights of the Child**

The Convention on the Rights of the Child has been one of the most comprehensively and widely ratified human rights treaty currently existing in child rights jurisprudence. It offers a wide range of rights to children and embodies both human rights and humanitarian law components including protection of children from recruitment and participation in armed conflict in Articles 38 and 39 of its provisions. In terms of Article 38;

*“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” and “States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest”.*<sup>120</sup>

Parallels can be drawn in the above mentioned provision in Article 38 of CRC and Article 77(2) of API<sup>121</sup>. Frostad<sup>122</sup> criticises Article 38 of the CRC on the basis that it fails to distinguish between armed conflicts of international and non-international

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<sup>119</sup> Al-Skeini & ors V UK (2011) 53 EHRR 18 paras 130-40, Tom Hamilton, Case Note – Al Skeini And Others V United Kingdom (2011) 53 EHRR 18, University of Cambridge, UK Law Student Review - January 2013 - Volume 1, Issue 2, p 91

<sup>120</sup> Para. 2 and 3 of Article 38 of CRC

<sup>121</sup> Article 77(2) of API (N103 above)

<sup>122</sup> Frostad ( N 26 above)74

character or taking part in ‘hostilities’ or ‘armed conflict’<sup>123</sup> and fall short of making a distinction between conscription and enlistment for children. Lastly, the provisions do not strictly prohibit children under 15 from participating indirectly in hostilities. This observation is indeed correct in view of the fact that indirect and direct participation are different.

According to Topa<sup>124</sup> the provision in Article 38 calling on states to ‘*take all feasible measures*’ is not sufficient to protect children and prevent them from taking part in hostilities or being recruited bearing in mind that the phrase “all feasible measures” is an excessively broad term and does not impose any calculable obligations on states. In light of this, the above criticism holds water since states can justify its little efforts which are far beyond expectation as being adequate though falling short of the minimum standards.

Morini<sup>125</sup>, Wanyoike<sup>126</sup> and other academics concur with Ang<sup>127</sup> that Article 38 is the only provision in the Convention which deviates from the general age limit of eighteen in Article 1 of the CRC by providing a minimum age of recruitment at fifteen years. Quite a number of scholars state that powerful States, like the US opposed the adoption of a “straight 18” position on recruitment and participation of children in war. This subsequently led to the adoption of the Optional Protocol by the Committee on the Rights of the Child in a bid to circumvent hurdles that had been met in Article 38 of Convention on the Rights of the Child.

#### 4.4.2 The Optional Protocol

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<sup>123</sup> Vandewiele, (N 98 above) at 21 states that Article 1 of the Optional Protocol refers to the participation of children in ‘hostilities’ and not in ‘armed conflicts’. The term armed conflict is broader in its scope than the later which covers ‘not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon’. The failure to distinguish the two is also found in Article 38 of the CRC.

<sup>124</sup> Ilona Topa ( N3 above) 109

<sup>125</sup> Claudia Morini, ‘First victims then perpetrators: child soldiers and International Law’, Vol. 3 , 2010: 192, available on [www.dialnet.unirioja.es/descarga/articulo/4941895.pdf](http://www.dialnet.unirioja.es/descarga/articulo/4941895.pdf) (accessed on 01 September 2015)

<sup>126</sup> Unpublished: Kinuthia Wanyoike ( N 52 above) 14

<sup>127</sup> Fiona Ang, Article 38 : A Commentary on the United Nations Convention on the Rights of the Child, Article 38: Children in Armed Conflicts available on <https://books.google.co.za/books?isbn=9004147306> (accessed on 23 September 2015)

The Optional Protocol has notable provisions in Article 1, 2, 4(1) and 2 of the Protocol. Whereas Article 77(2) of APII targets children under the age of 15 years, the Optional Protocol extends this protection in Article 1 read together with Articles 3(1) and 4 and in addition it also excludes all children under 18 from direct participation in hostilities.<sup>128</sup> The Optional Protocol and in its *travaux préparatoires*, however, do not provide guidance on the interpretation of direct ‘participation in hostilities’<sup>129</sup> nor do they define the difference between ‘direct’ and ‘indirect’ participation. It is also worth mentioning that under the Protocol governments have a stronger obligation to ensure that “*persons who have not attained the age of eighteen years are not compulsorily recruited into their armed forces*”.<sup>130</sup> Whilst the Protocol prohibits compulsory recruitment of any persons below 18, on the other hand it obliged governments to deposit binding declarations stating their minimum recruiting age.<sup>131</sup> Thus, one can argue that this provision giving states a platform to make declarations stating minimum age of recruitment provides them with the opportunity to deviate from the set standard in Article 2 which prohibits persons below 18 years from being compulsorily recruited into their armed forces. Thus, as long as the declaration states any age between 15 and 18 years there is no violation of children right to protection from recruitment. For this reason, the IHL and customary international law standards which set the minimum age of recruitment at 15 can also be argued to be in sync with minimum age of recruitment set by IHRL. Thus, States which recruit volunteers between 15 and 18 years must not be criticised because they are above the minimum set standard since there is no other universal recruitment age other than the 15 year age limit.

It must also be noted that Article 3(3) of the Optional Protocol has four safeguards which must be ensured by the State to guarantee that recruitment is voluntary.<sup>132</sup> Though the safeguards can be commendable the practicability of applying them in

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<sup>128</sup> Vandewiele, (N 98 above) 8

<sup>129</sup> See comment by Vandewiele at N 123 above.

<sup>130</sup> Optional Protocol at Article 2.

<sup>131</sup> Article 3(2) Supra.

<sup>132</sup> These safeguards require that (i) the recruitment is genuinely voluntary (ii) the recruitment is carried out with informed consent of the potential recruit’s parents or legal guardians; (iii) the potential recruit is fully informed of the duties involved in such military service, and (iv) the recruit provides reliable proof of age prior to the acceptance.



the African context is questionable since poor birth registration system exists in most African countries. Furthermore, it is problematic to ascertain a child's age in the absence of a birth certificate or securing the consent of a parent or legal guardian during armed conflicts as displacements are common.

Another significant feature found in the Optional Protocol is that it forbids rebel or other non- governmental armed groups from recruiting persons under the age of eighteen years or using them in hostilities under any circumstances.<sup>133</sup> It calls governments to take "all feasible measures" to prevent any such recruitment by taking stringent measures including criminalising the act.<sup>134</sup> Such provisions found in the Protocol prohibiting rebel or other non- governmental armed groups from recruiting children are commendable since recruitment of children is mostly done by non-state actors compared to government forces. However, making non-state actors accountable for their actions is difficult under this Protocol since they were not party to the agreement.

Over and above all, the use of the phrase 'all feasible measures' in the Optional Protocol poses problems similar to those found in Article 38 of CRC as it places a lesser and imprecise obligation on the state.<sup>135</sup> Besides, the phrase 'should not' used in the provisions seems to impose a moral rather than a legal obligation, hence, it has been observed that such wording in the Optional Protocol has allowed states to enter declarations interpreting the word 'feasible', so as to weaken their obligation to ensure under 18 year olds are not deployed.<sup>136</sup> For instance, United Kingdom and Viet Nam made declarations on Article 1 stipulating that the article does not exclude the deployment of under-18s in certain exceptional circumstances<sup>137</sup>. At international law such declarations are binding as long as they do not defeat the object or purpose of the treaty.

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<sup>133</sup> Article 4(1) of the Optional Protocol.

<sup>134</sup> Article 4(2) of the Optional Protocol.

<sup>135</sup> Mezmur (N12 above) 204

<sup>136</sup> Children and Armed Conflict, A Guide to International Humanitarian and Human Rights Law, p 102, available on [www.icrc.org](http://www.icrc.org) (accessed 23 April 2015). United Kingdom entered a declaration, available on [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-b&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en#EndDec)

<sup>137</sup> Vandewiele, (N 98 above) 21.

The Optional Protocol utilises the state reporting mechanism which is widely implemented in the discourse of international human rights law. Although this mechanism has been hailed, its effectiveness has been widely criticised as it does not fully guarantee implementation of children's rights<sup>138</sup> especially during states of emergency. Moreover, like any other human rights instrument, the Protocol allows states to put derogation clauses which suspend some rights in narrowly determined situations, in particular during public emergencies. From another perspective, the Optional Protocol, just like the CRC, has no judicial mechanism or individual complaints mechanism, hence, this hinders child soldiers whose rights have been infringed from have accessing justice. Despite the shortcomings in the Optional Protocol, the instrument is a major landmark in the international community's effort to stop of all forms of recruitment and participation of children in armed conflict.

#### **4.5 PROTECTION OF CHILDREN BY INTERNATIONAL HUMAN RIGHTS LAW REGIONAL INSTRUMENTS**

At regional level, the African Charter on the Rights and Welfare of the Child (hereinafter called 'ACRWC' or 'African Children's Charter') is the only regional treaty in the world addressing the issue of child soldiers.<sup>139</sup> African states felt that their interests had been inadequately represented during the drafting process of the CRC.<sup>140</sup> African Union had to adopt the African Children's Charter as an African embellishment to the protection of children rights.<sup>141</sup> In addition, there was concern among African nations that the CRC failed to fully reflect the precarious position of the African child<sup>142</sup> as regional specificities were sacrificed during the drafting process at the altar of consensus.<sup>143</sup> Just like the CRC, the African Children's

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<sup>138</sup> Harvey (N88 above) 29

<sup>139</sup> Claudia Morini ( N125 above)193.

<sup>140</sup> Priscilla Yachat Ankut, "The African Charter on the Rights and Welfare of the Child: Linking Principles with Practice", available on [www.fairplayforchildren.org/pdf/1299577504.pdf](http://www.fairplayforchildren.org/pdf/1299577504.pdf) (accessed 7 October 2015).

<sup>141</sup> Eric Ngonji Njungwe, 'International Protection of Children Rights: An analysis of African attributes in the African Charter on the Rights and Welfare of the Child', Cameroon Journal on Democracy and Human Rights, Volume 3, 2009: 11.

<sup>142</sup> Children in Armed Conflict: A Guide to International Humanitarian and Human Rights Law (N144 above)100.

<sup>143</sup> A.L Muthoga quoted in Eric Ngonji Njungwe (N 141 above) 12

Charter cannot be suspended during armed conflict, however, it is distinguishable in its scope of application as it is not limited to international conflicts like IHL instruments. Unlike the Geneva Conventions and their Additional Protocols, the African Children's Charter is applicable to tension and strife situations.<sup>144</sup>

Contrary to the formulation used in Article 38 as read with Article 1 of the CRC, the African Children's Charter puts forward a watertight prohibition on the recruitment and participation of persons below 18 years of age.<sup>145</sup> Unlike the CRC, the African Children's Charter is not subject to alternative prescriptions at the domestic level as it outlaws any majority attained earlier than 18 years. While the CRC allows child soldiers to be recruited and be used in direct hostilities, the CRC outlaws the use of child soldiers.<sup>146</sup> At this point one can posit that the definition of the term 'child'<sup>147</sup> in the African Children's Charter makes it difficult to derogate unless domestic provisions proffer better protection than the minimum standard laid down in Article 2 of the African Children's Charter. The Charter prohibits the recruitment and use of children less than eighteen years in both international and internal armed conflicts. Thus, unlike customary international law, IHL, and the CRC which permit the recruitment of children between 15 and 18 years the African Children's Charter prohibits. It further requires States to "take all necessary measures", as opposed to "all feasible measures" as in the Optional Protocol,<sup>148</sup> to ensure that no child is recruited or takes a direct part in hostilities. Nonetheless, though the African Children's Charter sets a better standard in regulating child recruitment and participation in armed conflict, Hýbnerová<sup>149</sup> observes that the African Children's Charter prohibits only the direct participation of children in hostilities regardless of the fact that the African continent has the greatest number of children taking part in

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<sup>144</sup> Article 22 of ACRWC.

<sup>145</sup> K.C.J.M. Arts, 'The International Protection of Children's Rights in Africa: the 1990 AU Charter on the Rights and Welfare of the Child', *The African Journal of International and Comparative Law* I, No. 5, 1993: 152.

<sup>146</sup> Paula Proudlock, "Children's Socio-economic rights" in T. Boezaart, (Ed) *Child Law in South Africa*, Juta & Co Ltd, 2009: 341.

<sup>147</sup> Article 2 of ACRWC states that '*a child means every human being below the age of 18 years*'.

<sup>148</sup> See Mezmur (N143 above) 204, Article 22(2) of African Children's Charter.

<sup>149</sup> Stanislava Hýbnerová( N 16 above) 116.

hostilities of all types.<sup>150</sup> This criticism does not hold water in consideration of the wide interpretation that was adopted by the ICC in the Lubanga Case.<sup>151</sup>

Furthermore, the African Children's Charter just like the Convention on the Rights of the Child and the Optional Protocol, provides for periodic review<sup>152</sup> and sets up a committee (African Children's Committee) for implementing the treaty, however, the African Children's Charter goes a step further to afford an individual complaints mechanism<sup>153</sup> and judicial redress. Despite these strengths, the ovation given to the African states for adopting the African Children's Charter, some critics, especially in the west, have criticised African states' straight 18 position as being desirable and one that is feasible<sup>154</sup> since some African countries do not accept it.

#### **4.6 PROTECTION UNDER INTERNATIONAL CRIMINAL LAW**

The Rome Statute of 1998, which came into force in 2002, established the International Criminal Court (hereinafter called the 'ICC') and was set up as a permanent institution to exercise its jurisdiction over persons for the 'most serious crimes of international concern' and to be 'complementary to national criminal jurisdictions'.<sup>155</sup> The crimes within its jurisdiction include among others genocide, war crimes and crimes against humanity. The conscription, enlistment or use in active hostilities of child soldiers under the age of fifteen years, both in international and non-international armed conflicts is criminalized in the Rome Statute<sup>156</sup> and regarded as a war crime. In terms of Article 8(2)(a), war crimes under the Rome Statute are founded on grave breaches of the Geneva Conventions. Criminalisation implies that

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<sup>150</sup> Article 22(2) of African Children's Charter.

<sup>151</sup> In Prosecutor v Thomas Lubanga Dyilo (Trial Chamber I of 14 March 2012) ICC 01/04-01/06, para 24, the trial chamber concluded that the term active participation in hostilities includes a wide range of activities from those children on the front line (who participate directly) to boys and girls involved in a myriad of roles that support combatants. The decisive factor is whether the support provided exposed the child to real danger as a potential target.

<sup>152</sup> Article 43 of ACRWC.

<sup>153</sup> Article 44(1) of ACRWC.

<sup>154</sup> International Law Barring Child Soldiers in Combat: Problems in Enforcement and Accountability - Question & (and) Answer Session (N51 above) 559; According Mulira, ( N10 above) 37 the term "feasible" means that which is practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.

<sup>155</sup> Hassan Jallow and Fatou Bensouda, "International criminal law in an African context" in African Guide to International Criminal Justice, (Ed) Max du Plessis, Institute for Security Studies, Pretoria, 2008:39; Preamble of International Criminal Court 2002.

<sup>156</sup> Article 8(2)(b)(xxvi), (e)(vii) of Rome Statute.

those who commit crimes in the ICC jurisdiction are subject to universal jurisdiction, more so, ratification of the ICC statute by states confirms their obligation to extradite (*aut dedere aut iudicare*) or prosecute and punish those alleged to have committed such grave violations. This prosecution is done regardless of the perpetrators' position, against whom and where the international crime was committed. In addition the Statute encourages states Parties to draft new domestic legislation with complementary child protection provisions.<sup>157</sup>

Be that as it may, unlike the African Children's Charter, the Rome Statute, just like the two Additional Protocols, does not adopt a straight 18 position on recruitment and participation in hostilities. In spite of this observation, the Rome Statute stands as the first international treaty in which the recruitment of children is recognized as war crime. In the same vein, the ICC stands as the first permanent treaty based international court. However, before its establishment there were *ad hoc* tribunals, for instance, the International Criminal Tribunal for the former Yugoslavia (ICTY), established in 1993 and the International Criminal Tribunal for Rwanda (ICTR) of 1994, established in to deal with international crimes. The Special Court for Sierra Leone (hereinafter called 'SCSL') is an example of a special court or tribunal specifically mandated to prosecute persons who had committed violations of IHL in the territory of Sierra Leone since 30 November 1996.<sup>158</sup> Like the ICTR, the SCSL has contributed significantly to the jurisprudence of international criminal law.<sup>159</sup>

#### **4.7 PROTECTION UNDER INTERNATIONAL LABOUR LAW**

Recruitment of children for use as child soldiers can be classified as a form of slavery or practice similar to slavery considering that the child is forced to provide unpaid labour. Under the International Labour Organization's Convention No. 182 on the Worst Forms of Child Labour (hereinafter called Convention 182) recruiting

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<sup>157</sup> These include among others those in the Rome Statute and Article 38(2) and (3) of CRC, Article 1 and 2 the of CRC Optional Protocol.

<sup>158</sup> For instance, in 2007, the Former Liberian President, Charles Taylor was tried at the SCSL on 11 charges of war crimes and crimes against humanity, including conscripting children into the armed forces and using them in combat.

<sup>159</sup> Hassan Jallow and Fatou Bensouda ( N155 above) 38-39 state that in *Prosecutor v Sam Hinga Norman* the SCSL ruled that the act of recruiting child soldiers was a war crime outlawed under international humanitarian law.

children below the age of 18 is categorised as “*one of the worst forms of child labour*”,<sup>160</sup> although it is not explicitly ban by the Convention itself, probably leaving it to the *lex specialis* on armed conflict to govern. Despite the failure to ban it, Convention 182 illustrates the concern by states to end child recruitment and participation in armed conflict, though there is disagreement on measures and policies to be universally applied. For this reason Article 4(1) of the Convention calls upon each state which ratifies the instrument to take immediate and effective measures to tackle worst forms of child labour. Following up on Convention 182, Recommendation 190 provides that member states should criminalise such recruitment.<sup>161</sup>

#### **4.8 UN SECURITY COUNCIL LED MECHANISM ON PROTECTION OF CHILDREN IN ARMED CONFLICT**

Besides the above mentioned international instruments protecting children from recruitment and participation in armed conflict there are quite a number of thematic resolutions passed by the United Nations Security Council (hereinafter called the Security Council). In addition, as from the 1990s the UN made international initiatives to stop the recruitment and use of children in armed conflicts. These are discussed briefly hereunder.

##### **4.8.1 International Initiatives to Stop the Recruitment and Use of Children in Armed Conflicts**

In Resolution 48/157 of December 20, 1993, the UN appointed Ms Graça Machel as an independent expert to study the impact of armed conflict on children. In 1996 she submitted to the General Assembly her final report entitled “*Impact of Armed Conflict on Children*”<sup>162</sup> which recommended, among other things, the cessation of all recruitment of children younger than 18 years and their demobilized and re-integration. The “Machel Report” is of significance as it highlighted the magnitude of the problem of child soldiering and the malleability and susceptibility of children caught up in armed conflict. Following up on “Machel Report”<sup>163</sup> to the Secretary-

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<sup>160</sup> Convention No. 182 (1999), Articles 1-3

<sup>161</sup> Para 12 (a), R190 Worst Forms of Child Labour Recommendation, 1999.

<sup>162</sup> Graça Machael ( N34 above)

<sup>163</sup> Supra

General, the General Assembly adopted in February 1997 Resolution 51/77<sup>164</sup> which appointed a Special Representative on the impact of armed conflict of children. The Special Representative's role is to build awareness of the needs of war affected children, to propose ideas and approaches to enhance child protection and to bring together key actors to promote concerted and effective responses. He works with Child Protection Advisors assigned to United Nations agencies, such as United Nations International Children's Fund, United Nations High Commissioner for Refugees (UNHCR), and the Department of Peacekeeping Operations (DPKO) and a wide range of other non-governmental organizations in fulfilling his mandate.

#### **4.8.2 Security Council Resolutions**

The Security Council, established by Chapter V of the Charter of the United Nations, is a body of the United Nations primarily responsible for maintaining international peace and security in the whole world.<sup>165</sup> In accomplishing its responsibilities it utilises a wide range of tools including passing resolutions. Since 1999, the Security Council has adopted several resolutions on children and armed conflict, condemning the recruitment and deployment of children as soldiers, identifying children and armed conflict as an issue affecting international peace and security, under Chapter VII of the Charter of the United Nations.<sup>166</sup> According to Dugard<sup>167</sup> the accumulation of resolutions and a repetition of recommendations on a particular subject in international law amount to evidence of state practice. Furthermore, observations and recommendations in resolutions reflect growing awareness of the impact of war on children.

#### **4.8.3 Fact-finding missions, commissions of inquiry and monitoring bodies**

The United Nations High Commissioner for Human Rights, its subsidiary bodies, and human rights treaty bodies have the responsibility to watching over the implementation of international human rights instruments.<sup>168</sup> Fact-finding missions

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<sup>164</sup> A/51/615 (1997).

<sup>165</sup> Article 24, Charter of the United Nations.

<sup>166</sup> Lilian Peters (N 17 above) 28

<sup>167</sup> J. Dugard, "International Law: A South African Perspective", Juta, 2005:62

<sup>168</sup> Bertrand Ramcharan, The United Nations High Commissioner For Human Rights And International Humanitarian Law, Program on Humanitarian Policy and Conflict Research Harvard University, Occasional Paper Series , Number 3 , 2005: 21 available on [www.hpcr.org](http://www.hpcr.org) (accessed on 25 September 2015)

and commissions of inquiry are mandated, in most cases by the United Nations Human Rights Council to investigate human rights situations and/or IHL implications. The primary objective of the commissions of inquiry are to investigate cases involving international human rights violations and/or IHL, analyse facts on the ground, establish the applicable law, promote accountability for violations, and ensure that those responsible for violations are brought to justice.

#### **4.9 OTHER MECHANISMS TO END CHILD SOLDIERING**

Besides resorting to hard law, the international community also utilises soft law instruments, such as the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups and Cape Town Principles and Best Practices on the Prevention and Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa. It must be noted that although these principles are not legally binding, they are evidence of state practice. The Paris Principles, for instance, have gained wide political and moral acceptance among states<sup>169</sup> hence can be argued to have gained the status of customary international law.<sup>170</sup>

On another note, besides UN established bodies, there are several non-governmental organisations worldwide also calling for the end to child recruitment and participation in armed conflict. For instance, The Coalition to Stop the Use of Child Soldiers which organised a series of regional conferences calling for an end to the recruitment and use of child soldiers, attended by representatives of governments, the United Nations, non-governmental organisations, and civil society.<sup>171</sup> These conferences resulted in the adoption of declarations in Maputo (1999), Montevideo (1999), Berlin (1999), Kathmandu (2000) and Amman (2001).<sup>172</sup>

#### **4.10 STATE PRACTICE UNDER INTERNATIONAL LAW ON VIOLATIONS PROTECTING CHILDREN FROM RECRUITMENT AND PARTICIPATION IN ARMED CONFLICT.**

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<sup>169</sup> [www.onhr.ac](http://www.onhr.ac)

<sup>170</sup> Asylum Case ( N85 above)

<sup>171</sup> Children in Armed Conflict ( N145 above)113

<sup>172</sup> Supra at 113, para 2



State practice confirms that there is an *erga omnes* duty among states to punish those who violate laws protecting children from recruitment and participation in armed conflict as opposed to amnesty. In ***Prosecutor V Gbao***<sup>173</sup> and ***State V Wouter Basson***<sup>174</sup> it was stated that international law obliges states to prosecute crimes whose prohibition has the status of *jus cogens*. Furthermore, authors in the field of international criminal law contend that the duty to prosecute and punish international law crimes is well established in international law.<sup>175</sup> Be that as it may, the establishment of the ICTY, ICTR, SCSL and ratification of the Rome Statute by over 100 States to date constitutes significant evidence of an acknowledgment of the duty to prosecute and punish those who commit such international crimes.

#### **4.11 STATE PRACTICE IN THE UNITED KINGDOM (U.K) AND UNITED STATES OF AMERICA (U.S)**

The UK is the only country in Europe and the only country among the permanent members of the UN Security Council which recruits 16 year olds into its armed forces.<sup>176</sup> It has been observed that U.K remains the only EU country to recruit 16 year olds into the military and one of very few EU countries to recruit 17 year olds.<sup>177</sup> In support of this observation Vautravers (2008) in Mark Gee<sup>178</sup> states that UK recruits approximately 40% of its forces between the ages of 16-17 years. In U.K, children as young as 15 years, 7 months can apply for the Army.<sup>179</sup> According to the 2014 statistics from U.K Ministry of Defence, *“more than one in 10 new army recruits are boy soldiers of just 16 years old, .... and more than one in four of all new Army recruits are under 18. And the proportion of Army recruits aged just 16 has risen from 10 per cent in 2012-13 to 13 per cent in 2013-14.”*<sup>180</sup>

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<sup>173</sup> Prosecutor V Gbao, Appeals Chamber SCSL -04-15-PT-141, 25 May 2004, 10

<sup>174</sup> State V Wouter Basson 2005 SA 30/03 CC para 37

<sup>175</sup> M.C Bassioni cited by Ken Obura, 'Duty to Prosecute International Crimes under International Law', in *Prosecuting International Crimes in Africa*, Eds Chacha Murungu and Japhet Biegion, Pretoria University Law Press, 2011:27.

<sup>176</sup> <https://you.38degrees.org.uk/.../stop-recruitment-of-16-year-olds-into-th>

<sup>177</sup> [www.paxchristi.net/news/petition-stop-recruitment-16...uk...forces/2906](http://www.paxchristi.net/news/petition-stop-recruitment-16...uk...forces/2906)

<sup>178</sup> Mark Gee ( N 114 above) 4

<sup>179</sup> [www.paxchristi.net/news/petition-stop-recruitment-16...uk...forces/2906](http://www.paxchristi.net/news/petition-stop-recruitment-16...uk...forces/2906)

<sup>180</sup> [Jonathan Owen](http://www.independent.co.uk/.../uk/.../uk-under-fire-for-recruiting-an-army), UK under fire for recruiting an 'army of children', *The Independent*, U.K , Sunday 25 May 2014 available on [www.independent.co.uk/.../uk/.../uk-under-fire-for-recruiting-an-army](http://www.independent.co.uk/.../uk/.../uk-under-fire-for-recruiting-an-army) ( Accessed 5 October 2015).

It is vital to note that although the recruitment age of U.K is above the minimum prescribed under customary international law, it is widely criticised in comparison with some African countries like Burundi and Rwanda who are argued to be having the lowest legal recruitment ages of 15 or 16 years for volunteers.<sup>181</sup> Despite mounting pressure within U.K from the UK Parliamentary Joint Committee on Human Rights<sup>182</sup> and internationally, from UN bodies such as UNICEF, the Committee on the Convention on the Rights of the Child, and the UN Secretary-General's Special Representative for Children and Armed Conflict, all in favour of the recruitment age being raised to 18, the U.K Ministry of Defence continues to take on 16-year-olds.<sup>183</sup> The criticism of UK points to the evolving attitude of the international community on the minimum age of recruitment.

The U.S, just like the UK recruits 16 or 17 year-old volunteers into their armed forces under certain conditions.<sup>184</sup> In its recruitment policy the US does not permit compulsory recruitment of any person under 18 for any type of military service, however, with parental consent 17-year-olds are permitted to volunteer for service in its armed forces.<sup>185</sup> Although U.S has been criticised for recruiting children under 18 into its army, it can be noted that U.S. law and policy are consistent with its obligations under the Optional Protocol to Convention on the Rights of the Child, which permits governments to accept 16 or 17 year-old volunteers into their armed forces under certain conditions.<sup>186</sup> It is also vital to point out that despite the criticisms above on US, the U.S in 2007 passed two Acts namely, the Child Soldier Prevention Act of 2008, which bars military aid and arms sales to countries using child soldiers and the Child Soldiers Accountability Act, which criminalizes the use of child soldiers and bars entry into the U.S by anyone using child soldiers.<sup>187</sup> From

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<sup>181</sup> The Use of Children as Soldiers in Africa: A Country Analysis of Child Recruitment and Participation in Armed Conflict.

<sup>182</sup> <http://www.paxchristi.net/news/petition-stop-recruitment-16-year-olds-uk-armed-forces/2906#sthash.UkQSeSBS.dpuf>

<sup>183</sup> [Jonathan Owen](#), (N180 above).

<sup>184</sup> See the conditions on N 139 above, and, [Child Soldiers: U.S. Policy and Action](#), available on [www.2001-2009.state.gov/g/drl/rls/111480.htm](http://www.2001-2009.state.gov/g/drl/rls/111480.htm) ( accessed 5 October 2015).

<sup>185</sup> [Child Soldiers: U.S. Policy and Action](#), available on [www.2001-2009.state.gov/g/drl/rls/111480.htm](http://www.2001-2009.state.gov/g/drl/rls/111480.htm)

<sup>186</sup> See the conditions on N 139 above, and, [Child Soldiers: U.S. Policy and Action](#), available on [www.2001-2009.state.gov/g/drl/rls/111480.htm](http://www.2001-2009.state.gov/g/drl/rls/111480.htm) ( accessed 5 October 2015).

<sup>187</sup> [John Felton](#), ' Child Soldiers', 2008, Volume 2, Issue 7, available on <http://library.cqpress.com/cqresearcher/cqrglobal2008070000> ( accessed 5 October 2015).

another standpoint, though the recruitment policy of U.S is criticised, the two Acts mentioned above reflects U.S commitment to end child soldier recruitment within and outside its jurisdiction.

The U.S and U.K policy and practices on children recruitment explains why the two major powers are amongst those states that ostensibly block international efforts to raise the recruitment age to 18 years. This is, though arguably, done to suit their own domestic policies and priorities of retaining current recruitment strategies. It can also be posited that the social construction of childhood depicted in international instruments to date depicts the stance of these powerful nations.

#### **4.12 CONCLUSION**

In summation, the laws that have been enacted in international law to protect child soldiers are inadequate considering that the legal protection on children from recruitment and participation in armed conflict affords protection to the age group below 15 years and leaves out children between 15 -18 years for states to decide. State practice and principles on child soldiering show that states are drifting towards the attainment of a straight 18 position. This is a clear testimony that the legal protection offered is inadequate, hence, there is need to strengthen mechanisms in place and also extend the threshold of protection so that it covers all children and all scenarios. This is done bearing in mind that though IHRL instruments, like the African Children's Charter, afford better protection their application can be problematic in situations of public emergencies as states can derogate from set standards arguing they are justified. To circumvent such hurdles minimum standards of children protection need to be adopted to cover all situations ranging from armed conflict, internal disturbances and tensions.

## **CHAPTER 5**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **5.1 Introduction**

This dissertation explored the legal regulation of children recruitment and participation in armed conflict under international humanitarian law. At the close of the study some salient conclusions, findings and recommendations can be made on the topic.

#### **5.2 Conclusions and findings**

At the commencement of the research project, it was submitted in Chapter 1 that presently there seems to be no provision in the body of IHL which prohibits a person from recruiting into militia children between 15 and 18 years or making them to participate in hostilities. An outline as to how the research would be explored was given. Chapter 2 explored the problem of child soldiers in international law, the roles played by children and the consequences of their participation in hostilities. This chapter elucidated the problem of child soldiering worldwide and concluded that children participation in war affects all rights that children are entitled to and that regardless of their age, children face hardships as a result of taking part directly or indirectly in hostilities.

Chapter 3 dealt with the IHL instruments regulating children protection from recruitment and participation in armed conflict. The major findings in this chapter were that the four 1949 Geneva Conventions and the two additional protocols are not applicable to internal disturbances and tensions such as riots, isolated or sporadic acts of violence. In addition it was observed that indeed both customary international law and the Additional Protocols to the Geneva Conventions set the minimum age for the children recruitment and participation in armed conflict at 15

years. This observation concurred with the assertion in Chapter 1 that IHL does not criminalise recruitment of children between 15 and 18 years into militia or making them to participate in hostilities since it grants them majority status at 15 years.

Chapter 4 made a comparative analysis between IHL and other legal instruments found in international law regulating children recruitment and their participation in armed conflict. It further scrutinised the attitude of states towards persons who violate the prohibition protecting children from child soldiering and concluded by exploring the practice of United Kingdom (U.K) and United States of America (USA) on recruitment.

In Chapter 4 it was observed that there seem to be no basis for criticising states which recruit children aged between 15 and 18 years since the minimum age of recruitment in terms of customary international law and IHL is staggered at 15 years. It was noted that the ACRWC found in the discourse of IHRL to date stands as the only regional instrument giving better protection to children from recruitment and participation in armed conflict surpassing provisions in international human rights instruments as it is applicable to tensions and internal strife unlike IHL instruments. It was argued that the laws that have been enacted in international law to protect child soldiers are inadequate considering that the legal protection on children from recruitment and participation in armed conflict affords protection to the age group below 15 years and leaves out children between 15 -18 years for states to decide. Furthermore, state practice and principles on child soldiering show that states are drifting towards the attainment of a straight 18 position hence it is evidence or testimony that the legal protection offered is inadequate. Chapter 4 further highlighted the need to extend the threshold of protection so that children in all scenarios are covered considering the application of IHRL instruments can be problematic in situations of public emergencies as States can justify derogation from set standards on children protection. To circumvent this hurdle it was proposed that minimum standards of children protection need to be adopted to cover all situations besides armed conflict.

It is submitted that the foregoing issues strongly underpin and justify the research topic and point to the fact that the protection proffered by IHL on children is inadequate as other fields of international law have been established to close the gap left by IHL. Even though, the provisions in other fields still have some shortcomings. It is in light of these propositions that the author advances the recommendations below in the law regulating children recruitment and participation in armed conflict.

## **5.2 RECOMMENDATIONS**

1. It is recommended that the international community must continue developing the field of international human rights law rather than IHL since IHL instruments are only applicable to armed conflicts and not all situations. The author acknowledges that the IHRL framework has attempted to close the gaps in the applicability of IHL, however, the IHRL framework in existence still lacks minimum standards of protection which cannot be subjected to reservations or derogations by the States during internal disturbances and tensions such as riots, isolated or sporadic acts of violence. In domestic legislation States may put in place claw back clauses to suspend minimum laid down standards on children recruitment and participation in armed conflict. To avert this problem, minimum standards can be put in place to afford children legal protect, however, standards or guidelines are not legally binding or enforceable at law so states can still decide to ignore them.
2. It is recommended that other regional blocks should emulate the African Children's Charter by adopting principles or declarations which raise the minimum age of recruitment from 15 – 18 years before the whole international community embarks on a treaty reflecting the 'straight 18 position. The adoption of a 'straight 18 position' at regional levels in principles, declarations or guidelines will undoubtedly build consensus as the whole international community gears up towards formulating an international convention reflecting that position. However, one can still argue that the problems which were

encountered in the ratification of ACRWC and CRC will be met from the powerful states. Be that as it may, one may still pose that since state practice is evolving towards 'straight 18 position' the adoption of principles and declarations will transform into hard law as time progresses.

3. It is proposed that rather than solely relying on the International Red Cross humanitarian mechanisms and resolutions the U.N Security Council needs to invoke the principle of Responsibility to Protect (R2P) as a measure to punish those who participate in recruiting child soldiers. This use of force by the Security Council will bring action rather than rhetoric in ending child soldiering. In addition, governments which fail to comply with measures aimed at ending child soldiering must face serious consequences in the form of sanctions from the whole international community. The use of UN led mechanisms may, however, be subjected to abuse by the 5 permanent members of the Security Council and imposition of sanctions may not yield the desired outcome since there might be sympathisers aligned to those against whom sanctions are imposed. It is further suggested that the UN Security Council must fully utilise the ICC prosecutor's jurisdiction in the investigation of alleged violations and such cases involving international crimes must be publicised to deter would be offenders. Though using the ICC prosecutor in the investigation might be welcomed by child soldier defenders, there is a sentiment that the ICC is mainly targeted at human rights violations in Africa. The investigation of such cases by a prosecutor from an African Court of Justice, if established, would reduce such negative criticisms and resentments by African states towards the ICC.
4. It is further recommended that for effective implementation of the international law relating both to IHL and international human rights law, there is need to further increase advocacy on the subject matter. In addition, children need to be educated of their human rights so that they can make informed choices. Making children aware of their rights and informing them about life as a child soldier will culminate in a change in children's attitude to violence and recruitment, thus removing their wish to join armed organisations. Though

measures aimed at educating children and changing their perception towards child soldiering are plausible, it is argued that resisting joining the government armies or armed groups would be difficult considering the socio-economic factors children are subjected to during armed conflicts or internal disturbances.

5. Disseminating information about IHL, IHRL and ICL amongst local police and judicial systems will enhance and strengthen their capacity to physically protect civilians and enforce law. There is need for through deployment of qualified and well-trained international civilian police to offer technical assistance for local police to provide and establish mechanisms for effective investigating, monitoring and prosecuting alleged violations pertaining to recruitment and participation in armed conflict.
6. It is recommended that since child soldiering is rampant in Africa, the A.U should consider designating an AU Special Representative on Children and Armed Conflict instead of leaving the U.N mechanism to dealing with the problem of African. The AU should take the lead in dealing with this recurring phenomenon on the African continent. Although this can be viewed as a sound measure, availing financial resources towards this effort by African states can be problematic.
7. There is need for the international community to effectively implement Disarmament Demobilisation and Reintegration (DDR) programmes by availing funding so that child soldiers may be successfully reintegrated into their families and communities. Reintegration programs for ex-child soldiers should not be limited to providing vocational training, instead, these programs must be extended to financial support, psychological and emotional counselling so as to avert re-recruitment of children. Efforts aimed at ending the cycle of violence can be hampered by the continuation of the armed conflict as children undergoing reintegration rejoin the armed forces. From another perspective, it would be useless if funds allocated for DDR are from the same people who financed the armed conflict or acted as commanders in



the rebel groups. The genuineness of the DDR programmes becomes questionable.

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