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**CHILD SOLDIERS:
“LIGHT INEXPENSIVE SMALL ARMS”**

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TABLE OF CONTENTS

<i>Headings</i>	<i>Page</i>
ABSTRACT.....	3
<i>I</i> INTRODUCTION.....	4
<i>II</i> OVERVIEW OF CHILD SOLDIERING.....	5
<i>III</i> RELEVANT ASPECTS OF INTERNATIONAL HUMAN RIGHTS LAW.....	6
A Introduction.....	6
B Convention on the Rights of the Child.....	8
C Optional Protocol.....	25
D Convention 182.....	37
E Regional Responses.....	43
<i>IV</i> RELEVANT ASPECTS OF INTERNATIONAL HUMANITARIAN LAW.....	50
A Introduction.....	50
B Fourth Geneva Convention	51
C Protocols additional to the Geneva Conventions.....	52
1 Additional Protocol I.....	53
2 Additional Protocol II.....	57
<i>V</i> IMPLEMENTATION.....	59
<i>VI</i> CONCLUSION.....	63
<i>VII</i> BIBLIOGRAPHY.....	65

Word Length:

The text of this paper (excluding front sheet, table of contents and footnotes) comprises approximately 1580 words.

CHILD SOLDIERS

TABLE OF CONTENTS

Introduction 1

PART I: THEORETICAL FOUNDATIONS

1. The Nature of the Firm 1

2. The Theory of the Firm 2

3. The Theory of the Firm 3

4. The Theory of the Firm 4

5. The Theory of the Firm 5

6. The Theory of the Firm 6

7. The Theory of the Firm 7

8. The Theory of the Firm 8

9. The Theory of the Firm 9

10. The Theory of the Firm 10

11. The Theory of the Firm 11

12. The Theory of the Firm 12

13. The Theory of the Firm 13

14. The Theory of the Firm 14

15. The Theory of the Firm 15

16. The Theory of the Firm 16

17. The Theory of the Firm 17

18. The Theory of the Firm 18

19. The Theory of the Firm 19

20. The Theory of the Firm 20

21. The Theory of the Firm 21

22. The Theory of the Firm 22

23. The Theory of the Firm 23

24. The Theory of the Firm 24

25. The Theory of the Firm 25

26. The Theory of the Firm 26

27. The Theory of the Firm 27

28. The Theory of the Firm 28

29. The Theory of the Firm 29

30. The Theory of the Firm 30

31. The Theory of the Firm 31

32. The Theory of the Firm 32

33. The Theory of the Firm 33

34. The Theory of the Firm 34

35. The Theory of the Firm 35

36. The Theory of the Firm 36

37. The Theory of the Firm 37

38. The Theory of the Firm 38

39. The Theory of the Firm 39

40. The Theory of the Firm 40

41. The Theory of the Firm 41

42. The Theory of the Firm 42

43. The Theory of the Firm 43

44. The Theory of the Firm 44

45. The Theory of the Firm 45

46. The Theory of the Firm 46

47. The Theory of the Firm 47

48. The Theory of the Firm 48

49. The Theory of the Firm 49

50. The Theory of the Firm 50

51. The Theory of the Firm 51

52. The Theory of the Firm 52

53. The Theory of the Firm 53

54. The Theory of the Firm 54

55. The Theory of the Firm 55

56. The Theory of the Firm 56

57. The Theory of the Firm 57

58. The Theory of the Firm 58

59. The Theory of the Firm 59

60. The Theory of the Firm 60

61. The Theory of the Firm 61

62. The Theory of the Firm 62

63. The Theory of the Firm 63

64. The Theory of the Firm 64

65. The Theory of the Firm 65

66. The Theory of the Firm 66

67. The Theory of the Firm 67

68. The Theory of the Firm 68

69. The Theory of the Firm 69

70. The Theory of the Firm 70

71. The Theory of the Firm 71

72. The Theory of the Firm 72

73. The Theory of the Firm 73

74. The Theory of the Firm 74

75. The Theory of the Firm 75

76. The Theory of the Firm 76

77. The Theory of the Firm 77

78. The Theory of the Firm 78

79. The Theory of the Firm 79

80. The Theory of the Firm 80

81. The Theory of the Firm 81

82. The Theory of the Firm 82

83. The Theory of the Firm 83

84. The Theory of the Firm 84

85. The Theory of the Firm 85

86. The Theory of the Firm 86

87. The Theory of the Firm 87

88. The Theory of the Firm 88

89. The Theory of the Firm 89

90. The Theory of the Firm 90

91. The Theory of the Firm 91

92. The Theory of the Firm 92

93. The Theory of the Firm 93

94. The Theory of the Firm 94

95. The Theory of the Firm 95

96. The Theory of the Firm 96

97. The Theory of the Firm 97

98. The Theory of the Firm 98

99. The Theory of the Firm 99

100. The Theory of the Firm 100

ABSTRACT

This Paper explores relevant aspects of international humanitarian law and human rights instruments that pertain to child in armed conflict, notably the child soldier. Approximately 300,000 children some as young as seven or eight years are involved in armed conflicts in over 30 countries around the world and under harrowing circumstances. The child becomes the combatant and in a fight for survival becomes the perpetrator of the most unspeakable crimes. Children hurt children: one account tells of a two year old girl who lost her arm to a machete wielded by a twelve year old soldier in Sierra Leone's recent civil war. Several factors compound the problem including inadequate international and domestic laws, a lack of implementation, enforcement and application on the ground of those laws as well economic and social factors. This paper explores the history of the development of rights for child soldiers. It identifies political overtones and ambiguous standards heavily influenced by military concerns that have greatly contributed to an escalating international problem. An examination of the resultant laws highlights serious gaps in the protection afforded to child soldiers and a discriminatory hierarchy of rights for child soldiers. The international community has made great strides in more recent times to address the plight of the child soldier but this needs to be strengthened by a strong legal framework, one that yields results and the elimination of all children soldiering. The laws need to be unified and strengthen urgently so that they work in reality for children who tragically find themselves caught up in the midst of conflict.

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¹ Justin Webster "Sierra Leone - Responding to the Crisis, Planning for the Future: The Role of International Justice in the Quest for National and Global Security" (2001) 11 *Int'l & Comp. L. Rev.* 731.

² Clara Orjuela, Special Representative to the Secretary General for Children in Armed Conflict. See <http://www.un.org/News/Press/docs/2004/040401.htm> accessed on 29 September 2004.

I INTRODUCTION

The second half of the Twentieth Century has witnessed a dramatic transformation in conventional warfare in which today's conflicts are often internal and characterised by egregious violations of international humanitarian law.¹ Tragically this has had horrific consequences for children in armed conflict and led to the "child soldier" phenomenon. The increased use of children and the consequential effects of their participation in armed conflict highlight the necessity for a very strong legal framework backed with the requisite application, implementation and enforcement on the ground, not only to provide protection to current children soldiers but to prevent further use of other children in armed conflict. Addressing the issue of child soldiers is a high priority for the international community and the United Nations in view of figures that reflect:²

[i]n the past decade two million children were killed in war torn areas, over one million were made orphans, over 6 million have been seriously injured or permanently disabled and over ten million have been left with severe psychological trauma. Over 300,000 children some as young as seven or eight, girls as well as boys, are taking part in hostilities in over 30 countries.

This paper presents an overview of the background to the development of international human rights instruments and international humanitarian laws which set out the main substantive standards regulating the recruitment and participation of children in armed conflicts. It demonstrates the legal framework is inadequate and failing to provide effective protection for child soldiers. In Part II a brief overview of the problems endured by child soldiers is provided to demonstrate why a strong legal framework is needed. In Parts III and IV, the rights accorded to child soldiers and the obligations imposed on States is

¹ Jeana Webster "Sierra Leone – Responding to the Crisis, Planning for the Future: The Role of International Justice in the Quest for National and Global Security" (2001) 11 *Ind Int'l & Comp L Rev* 731.

² Olara Otunnu, Special Representative to the Secretary General for Children in Armed Conflict. See <<http://www.hr.org>> (last accessed on 29 September 2004).

considered, gaps are identified in the applicable international law. Significant regional responses are also discussed in Part II, while Part III also considers the involvement of the United Nations. The paper concludes that the international laws are insufficient and inadequate to protect child soldiers, they are poorly applied or not at all and offer less protection in different circumstances. An urgent review of the relevant laws is recommended to address the anomalies together with identifying effective enforcement and implementation methods. The paper will not address trafficking and sale of child soldiers, refugee or displacement issues, prosecution of violators or child soldiers nor rehabilitation.

II OVERVIEW OF CHILD SOLDIERING

Children are particularly at risk to child soldiering in view of their physical and emotional immaturity, obedient and compliant drawn into wars they do not understand where invariably many are seriously drugged before being sent into battle. Many children are born into conflict and thus armies serve as substitute families. Technological advances in small arms weaponry makes weapons simple for children to use and for many the possession of a gun means food and thus survival. Participation in warfare may also be a rite of passage or motivated by religion. In many instances poverty, economic or social pressure drives children to "volunteer" although many are often abducted or forcibly recruited.

Once recruited child soldiers are beaten, starved, pressed into combat, used in suicide missions and exploited for labour. Gender violence is a particular feature of modern armed conflict resulting in child soldiers being raped, forced into sexual submission and girls are given to soldiers as wives and sexual slaves. Children soldiers are forced to commit the most unimaginable atrocities against their own families to ensure stigmatisation of the child prevents acceptance back into the community. Child soldiers are either killed in combat or eventually demobilized but so often are severely traumatised by their

harrowing experiences; they often suffer extreme post traumatic stress disorder. This makes attempts for rehabilitation with family members and re-integration into communities difficult if not impossible to achieve. In many instances family and community reunification fails and children are invariably drawn back into conflict. I will discuss the relevant aspects of the international legal framework that exists for the protection of child soldiers below.

III RELEVANT ASPECTS OF INTERNATIONAL HUMAN RIGHTS LAW

A Introduction

Although not specifically designed to protect persons during times of armed conflict, many provisions of the international human rights legal instruments are particularly applicable when considering the issue of child soldiers. International human rights law primarily established rights that every individual should enjoy.³ This section of the paper will address important developments in the area of rights for children in armed conflict commencing with an overview of the development of these rights.

The international law of the child began in 1924 with the League of Nations Declaration on the Rights of the Child which endorsed children were in need of special care and protection⁴ following concerns for children affected by the conflicts in the Balkans.⁵ Although there are no mention of child soldiers in the 1924 Declaration it prepared the way forward for the further development of children's rights and thus, rights for child soldiers.

³ Graca Machel "Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms Graca Machel submitted pursuant to General Assembly Resolution 48/157" P34 UN Doc A/51/306 51st Session (1996) 50

⁴ Declaration on the Rights of the Child (1924). Referred in this paper as the "1924 Declaration."

⁵ Geraldine Van Bueren *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, Dordrecht 1995) 6

When the League of Nations disbanded the UN was formed. After World War II immediate efforts were made by the UN to adopt a revised declaration for the rights of the child.⁶ A number of important regional and global treaties subsequently came into existence in which States agreed an all embracing array of human rights. In 1959, the United Nations adopted the Declaration on the Rights of the Child⁷ based on the form of structure and contents of the 1924 Declaration adding amendments to transform it into a UN declaration.⁸ The 1959 Declaration focused on giving children rights and although no direct mention is made of children soldiers, its provisions would have applied to them as children.

The International Covenant on Civil and Political Rights (ICCPR)⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁰ also include further human rights. Most of the provisions of these two 1966 Covenants have a bearing on or are relevant to children as the rights of children are an intrinsic part of human rights. The human rights in these two Covenants include the inherent right to life, freedom from torture and other inhumane or degrading treatment or punishment, freedom from slavery, education, and adequate standards of living, physical and mental health.

The ICCPR obligates States to respect and to ensure to all individuals the rights recognised in the Covenant,¹¹ which for children additionally includes the right to such measures of protection as are required by his or her status as a minor.¹² The States obligation to "respect and to ensure" under international

⁶ Webster above n 1 discussing Detrick

⁷ Declaration on the Rights of the Child GA Res 1386, UN GAOR 14th Sess., Supp No. 16 at 19 UN Doc A/4354 (1959). Referred in this paper as the "1959 Declaration."

⁸ Van Bueren above n 5, 9 – 10.

⁹ International Covenant on Civil and Political Rights GA Res 2200A (XXI), 21 UN GAOR Supp (No.16) at 52, UN Doc A/6316 (1966) 999 UNTS 171 (entered into force 1976). Referred to in this paper as "ICCPR."

¹⁰ International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No.16) at 49, UN Doc A/6316 (1966), 993 UNTS 3 (entered into force 1976). Referred to in this paper as "ICESC."

¹¹ ICCPR above n 9, art 2.

¹² ICCPR above n 9, art 22.

human rights law is discussed below. The ICESCR only obligates States to progressively achieve the full realization of the rights recognised by the Covenant by all appropriate means including the adoption of legislative measures. The ICESCR guarantees children the right to special measures of protection and assistance on their behalf and for their protection from economic and social exploitation.¹³ Discussion shall now turn below firstly to the CRC Convention which restates most of the general human rights which the ICCPR and ICESCR applied to adults and children.

B Convention on the Rights of the Child

The Convention on the Rights of the Child¹⁴ codifies provisions of international law pertaining to children and upholds the rights of children. The CRC Convention follows and expands the model of the Universal Declaration of Human Rights combining in one treaty civil, political, economic, social and cultural rights.¹⁵ In all actions concerning children the best interests of the child shall be a primary consideration.¹⁶ The CRC Convention is now the most widely ratified human rights treaty.¹⁷ Specific provision has been made for child soldiers, which is discussed in detail below. As a human rights convention, the CRC Convention applies to all conflicts and during peacetime. Notably, unlike many other human rights treaties the CRC Convention does not have a general derogation clause allowing States to suspend certain rights in times of

¹³ ICESCR above n 10, art 10(3).

¹⁴ Convention on the Rights of the Child (20 Nov 1989) GA Res. 44/25 Annex 44 UN GAOR Supp. (no. 49) 167 UN Doc A/44/49 (1989) (CRC Convention). The CRC Convention was adopted in November 1989. Referred to in this paper as the "CRC Convention." As at 22 June 2004, the CRC Convention has been ratified or acceded to by 192 States. See <<http://www.un.org>> (last accessed on 10 September 2004).

¹⁵ Cynthia Price Cohen "The Developing Jurisprudence of the Rights of the Child" (1993) 6 St Thomas L Rev 1, 18; Universal Declaration of Human Rights GA Res 217A (III) UN doc A/810 at 71 (1948).

¹⁶ CRC Convention above n 14, art 3.

¹⁷ Somalia and the United States are the only UN member countries not to have ratified the CRC Convention, although both signed it. Somalia does not have a government that has capacity however to ratify a treaty, the US government claims it has been delayed by procedural and political constraints. See US Fund for UNICEF Convention on the Rights of Child: Frequently Asked Questions. See <<http://www.unicefusa.org>> (last accessed on 30 September 2004).

emergency which means consequently in certain cases the CRC Convention ensures children are better protected than adults.¹⁸

The CRC Convention is the first global instrument to 'directly identify children' as holders of rights which States must respect and ensure.¹⁹ The CRC Convention thus establishes a legal framework that complements existing rights children enjoy under the earlier human rights treaties including those referred to above and acknowledges their distinct legal personality.²⁰ Countries such as Myanmar (Burma) that did not ratify human rights instruments for example the ICCPR or the ICESCR but which ratified the CRC Convention gave children rights they might not otherwise have enjoyed.

However the CRC Convention has been widely criticised for many weaknesses, for being rather loosely if not sloppily, drafted with many provisions being described as 'vague' or 'mushy'.²¹ UNICEF's appraisal of the implementation of the CRC Convention also concluded that article 38 of the CRC Convention had become the weakest provision of the treaty particularly in view of the steep rise in the number of civil conflicts that had occurred in the past decade which had not been anticipated.²² These criticisms are true of the provisions regarding children soldiers set forth in article 38 of the CRC Convention which makes the CRC Convention unqualified and inept to effectively protect children soldiers.

¹⁸ Ilene Cohn and Guy Goodwin-Gill *Study on Behalf of the Henry Dunant Institute Child Soldiers: The Role of Children in Armed Conflict* (Clarendon Press, Oxford 1994), 124.

¹⁹ CRC Convention above n 14, art 2. This follows similar wording in ICESCR above n 10, art 2.

²⁰ Machel above n 3, 64.

²¹ Michael Freeman (ed) *Children's Rights: A Comparative Perspective* (Dartmouth Publishing Company Limited, Aldershot 1996) 43.

²² Report of the Working Group on a draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflict on its fifth session E/CN.4/1999/73 at para 20.

Article 38 of the CRC Convention provides:²³

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. 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.
3. 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.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by armed conflict.

Article 38 of the CRC Convention redefines a “child” who participates in armed conflict at the age of fifteen and therefore establishes a different age for a “child” other than eighteen which is the age of a “child” defined in article 1 of the CRC Convention for the purposes of the rest of the Convention. This anomaly is one of the weaknesses of the CRC Convention and is discussed further below. The drafters of article 38 of the CRC Convention largely confined themselves to repeating existing international humanitarian law. Article 38(2) of the CRC Convention is an innovative provision although also somewhat unusual as it is derived from article 77(2) of Protocol I²⁴ addressed further below. Article 38 of the CRC Convention is also considered to be of major significance as it brings together humanitarian law and human rights law, showing their complementarity.²⁵

²³ CRC Convention above n 14, art 38.

²⁴ Protocol I Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (1977), art 77(2). Referred to in this paper as “Protocol I.”

²⁵ Machel above n 3, 64.

An examination of the major issues negotiated between member States and delegates in the draft CRC convention debates additionally demonstrates that some States were prepared to advance their political position over the inherent rights of the child (for example the right to life and the right to protection from harmful influences, abuse and exploitation) and to ascribe different rights to different age groups of children. The effect of which was a compromise text which weakens the protection for children and qualifies the international humanitarian law protections to extent that they too were weakened. These issues are discussed below in the context of the debates that framed the resultant article 38 of the CRC Convention and to identify the obligations imposed on States, non-State groups and individuals regarding children soldiers.

The CRC Convention owes its inception to Poland who initially proposed to mark the International Year of the Child (1979) with a separate United Nations convention covering the rights of the child. However Poland's draft proposal²⁶ for such a convention was initially met with little enthusiasm from the international community as it was virtually a verbatim replication of the UN Declaration with the addition of an implementation mechanism.²⁷

Ultimately the UN Commission on Human Rights charged a Working Group with the task of reviewing and formulating the text of the proposed CRC Convention.²⁸ The meetings of the Working Group were open to all members of the UN Commission on Human Rights.²⁹ For ten years, the Working Group

²⁶ See UN Economic and Social Council Commission on Human Rights: Question of A Convention on the Rights of the Child – Report of the Working Group on a draft convention on the rights of the child (UN Doc. E/CN.4/1986/39, 42nd Sess., Agenda Item 13) (1986) 27. Referred to in this paper as “UNESCC Working Group Report 1986.”

²⁷ Philip E Veerman *The Rights of the Child and the Changing Image of Childhood* (Martinus Nijhoff Publishers, Dordrecht 1992) 181 referring to observations made by Cynthia Cohen.

²⁸ Veerman above n 27, 182.

²⁹ UN Economic and Social Council Commission on Human Rights: Question of A Convention on the Rights of the Child – Report of the Working Group on a draft convention on the rights of the child (UN Doc. E/CN.4/1984/71, 39th Sess., Agenda Item 13) (1984) 3. Referred to in this paper as “UNESCC Working Group Report 1984.”

met annually.³⁰ From a study of the reports of the meetings of the Working Group reference was made in the reports to specific delegations only when a direct proposal had been made by that delegation or the delegation had expressly asked that a reservation be included in the report.³¹ Thus it has not been possible to examine all of the comments made by the delegates as these have not all been recorded (a feature of many of the UN documents examined) however the predominant speakers and thus the primary issues for debate can be gleaned from the reports and from summaries or individual written submissions prepared by delegates.

From the developing countries only Argentina, Brazil, Central Africa, the Dominican Republic and India sent delegates to all sessions of the Working Group.³² Of the Warsaw Pact States Poland and the Soviet Union kept a high profile and of the Western States, Australia, Canada, France, Norway, the United Kingdom and the United States were always present.³³ The political policies of States that maintained voluntary enlistment of children or permitted their participation in armed conflict sparked many contentious debates. The debates were also marked by misunderstandings created in the main by the translating and interpreting of proposals, religious and cultural differences and the inability of many developing countries to participate given lack of resources and over burdened government departments.³⁴ The Chairman of the Working Group Professor Loptaka also acknowledged the need for the drafters of the CRC Convention to find a way of harmonising the varied and sometimes contradictory values and interests of the world's societies.³⁵

³⁰ Veerman above n 27, 182.

³¹ UN Economic and Social Council Commission on Human Rights (UN Doc. E/CN.4/1988/28, 43rd Sess., Agenda Item 13) (1988) 53. Referred to in this paper as "UNESCC Working Group Report 1987."

³² Veerman above n 27, 182.

³³ Veerman above n 27, 182.

³⁴ See generally Veerman above n 27, 182 - 183

³⁵ UN General Assembly: Summary Record of the 38th Meeting of the Third Committee (UN Doc. A/C.3/44/SR.38) (1989) Introduction

The involvement of non-government organisations (NGOs) in the drafting process of the CRC Convention at the start of the 1980s was sporadic and badly co-ordinated as some NGO's submitted joint or individual reports which were unclear and not unified.³⁶ It was not until 1983 when the NGOs pooled their experience and skills together and became the "Informal NGO Ad Hoc Group"³⁷ that they were able to provide much needed assistance. With the participation of UNICEF in 1985, the CRC convention received the momentum it desperately needed.³⁸

The inclusion of international humanitarian law in the CRC Convention can be traced back to 1984 and 1985, when proposals for an article regarding child soldiers were requested and submitted by delegates as article 20 of the draft CRC convention,³⁹ which in time was renumbered to become article 38 of the CRC Convention. Poland submitted a proposal which is similar to the wording of article 38 of the CRC Convention⁴⁰ and which was taken as the basis for discussion by the Working Party.⁴¹ Previous proposals submitted by Iran and by Iraq were rejected in favour of the better worded Polish Proposal.⁴²

However it seems incongruous for Iran and Iraq to be making statements regarding the protection of children in armed conflict when in practice both countries actively utilised and valued children participating and engaging in combat.⁴³ Iranian children were observed to be propelled into combat with minimal training, seemingly religiously indoctrinated into believing that by wearing khaki jackets bearing the message they had the permission of the Imam to enter heaven along with keys on chains around their necks ensuring such

³⁶ Veerman above n 27, 183.

³⁷ UNESCC Working Group Report 1986 above n26, 28.

³⁸ Veerman above n 27, 183.

³⁹ UNESCC Working Group Report 1986 above n26, 26 – 28.

⁴⁰ UNESCC Working Group Report 1986 above n 26, 27 – 28; UN Doc A/C.3/40.3

⁴¹ UNESCC Working Group Report 1986 above n 26, 28.

⁴² UNESCC Working Group Report 1986 above n 26, 27.

⁴³ Cohn and Goodwin-Gill above n 18, 38.

entry.⁴⁴ Yet one evaluation of Islamic Law finds the use of children in armed conflict in direct contravention of the fundamental sources of Islamic Law.⁴⁵

The first issue for discussion was the Polish proposal that States Parties would undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. The proposal was adopted by the Working Group in 1986 with one minor amendment⁴⁶ and became article 38(1) of the CRC Convention. The ICRC later endorsed article 38(1) as being a reasonable solution having two-fold advantages of removing any ambiguity and avoiding the creation of two standards of conduct.⁴⁷ Whilst article 38(1) of the CRC Convention thus specifically refers to humanitarian law and to affirming a State's duty to protect children during armed conflicts, it does not refer to any "right or rights of the child."⁴⁸ The omission to the inclusion of such rights may arguably mean that the humanitarian law standards referred to in article 38(1) of the CRC Convention stems not a child's right (although article 38 of the CRC Convention is grounded in the principle of humanity) but instead stems from international public order requirements.⁴⁹ As article 38(1) of the CRC Convention incorporates humanitarian law by reference, it has been suggested the Committee on the Rights of the Child may be in a privileged position to assess the applicability of humanitarian law.⁵⁰

⁴⁴ Cohn and Goodwin-Gill above n 18, 38 referring to accounts confirmed by the Centre on War and the Child.

⁴⁵ Alison Dundes Renteln "The Child Soldier: The Challenge of Enforcing International Standards" (1999) 21 Whittier L Rev 191, 202 referring to Maryam Elahi "The Rights of the Child Under Islamic Law: Prohibition of the Child Soldier" (1998) 19 Colum Hum Rts L Rev 259, 277.

⁴⁶ UNESCC Working Group Report 1986 above n 26, 28.

⁴⁷ UN Economic and Social Council Commission on Human Rights Summary Record of the Second Part of the 55th Meeting (UN Doc. E/CN.4/1989/SR.55/Add.1) (1989) 4 recording the views of Françoise Krill on behalf of the ICRC.

⁴⁸ René Provost *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002), 33 – 34.

⁴⁹ See Provost above n 48, 34.

⁵⁰ Provost above n 48, 333 fn 207.

The United States argued the phrase "rules of international humanitarian law applicable in armed conflicts" was ambiguous.⁵¹ The United States wanted it made clear States are not obliged to respect "rules of law" contained in treaties to which they are not a party, unless such "rules" are binding as customary international law.⁵² Thus with a rider that the rules of law were only those applicable to the State in question, article 20(1) of the draft CRC convention was adopted which became article 38(1) of the CRC Convention.

If the State has ratified the CRC Convention then arguably the wording of article 38(1) which is based on article 1 of the Geneva Conventions of 1949 may imply positive and negative obligations on the State not only regarding its own conduct but also that of others.⁵³ Obligations of conduct requires a specifically determined course of conduct and ascertaining whether it has been fulfilled simply turns on whether the State's action or omission is or is not in conformity with the internationally required conduct.⁵⁴ The obligation of a State to respect a convention to which it is a party is inherent in the sovereign act of entering into a treaty.⁵⁵ The obligation "to respect" reflects the convention is not based on reciprocity but imposes unilateral obligations upon the State (includes all levels of civilian and military authority within States' governments) to comply with the convention, and hence is not binding on the other party.⁵⁶

It is argued that Common Article 1 of the Geneva Conventions⁵⁷ implies States parties should ensure respect for the Conventions provisions by their own armed forces and the universal application of underlying humanitarian

⁵¹ UNESCC Working Group Report 1986, 28.

⁵² UNESCC Working Group Report 1986, 28.

⁵³ Detrick above n4, 646.

⁵⁴ Cohn and Goodwin-Gill above n 18, 64 referring to Guy Goodwin-Gill in *The Refugee in International Law* Clarendon Press, Oxford 1983 at 140-148.

⁵⁵ Murphy, Major Thomas J "Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Additional Protocol I of 1977" (1984) 103 *Mil L Rev* 3, 25.

⁵⁶ Murphy above n 56, 25.

⁵⁷ The Four Geneva Conventions of 1949 are the *** Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (1949)

principles.⁵⁸ The obligation “to ensure respect” in international humanitarian law emphasises and strengthens the general obligation of the State to effectively enforce the convention obliging the State to ensure respect for the convention by other persons or entities within its range of authority or influence.⁵⁹ States are further obligated to ensure compliance with the convention by the other party. This is important because if the other party is in violation and the State does not act so as to ensure the violation party’s respect for the convention then the State will also be in violation of the convention.⁶⁰ However these formal obligations are often ignored during conflicts due to States being unwilling or unable to give effect to them, often due to a lack of resources.

By ratifying the CRC Convention, States undertake under its article 4 to take “all appropriate legislative, administrative and with other measures for the implementation of the rights recognised in the CRC Convention.”⁶¹ This imposes on States an obligation to adopt measures in its domestic legislation which in turn creates obligations for individuals through the operation of the domestic law. Article 4 of the CRC Convention expressly directs States to act at the domestic level to enforce the rights entrenched in it through the creation of domestic obligations. In order to discharge this duty, States must enact appropriate legislation and other such measures so as to protect the rights of the child soldier under article 38 of the CRC Convention.

Under general international law also, the State has an obligation of due diligence to protect the enjoyment of the rights of individuals which may involve depending on the circumstances, the imposition of individual obligations through legislation.⁶² Such an obligation also with regard to economic, social and cultural rights that States also undertake to protect, but

⁵⁸ Detrick above n 4, 646.

⁵⁹ Murphy above n 56, 26.

⁶⁰ See Murphy above n 56, 26.

⁶¹ CRC Convention above n 14, art 4.

⁶² Provost above n 48, 60 referring to Ian Brownlie and Theodor Meron.

only such of these measures to the maximum extent of their available resources and where needed within the framework of international co-operation.⁶³

A general duty of due diligence also flows from the provisions in article 38(1) of the CRC Convention which imposes a duty to respect and to ensure respect of humanitarian law rules relevant to the child soldier and from article 38(4) of the CRC Convention to ensure protection and care of children who are affected by armed conflict. The duty to "ensure" full enjoyment of rights was analysed in depth in the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case.⁶⁴ The Court noted that the duty to ensure full enjoyment of rights involves a duty to prevent, investigate and punish any violation, through the enactment of appropriate legislation and the reorganisation of the State apparatus.⁶⁵ Similar reasoning has also been adopted by other human rights bodies with respect to human rights instruments such as the ICCPR⁶⁶ and would be applicable to the international human rights instruments under discussion in this paper including the CRC Convention.

Under article 38(2) of the CRC Convention, States Parties are required to 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.⁶⁷ Further, article 38(3) of the CRC Convention, requires States Parties to refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. These sub-articles were previously paragraph two of Poland's proposal however they departed from the Polish proposal by two critical amendments: the inclusion of a lower age limit of fifteen years and the prohibition of only "direct" participation in hostilities. From an examination of the Working Group reports these two amendments were controversial issues for delegates, equally

⁶³ CRC Convention above n 14, art 4.

⁶⁴ *Velasquez Rodriguez v Honduras* [1988] I/A Court HR, Judgment of 28 July 1988, Ser C No 4; see also Provost above n 48, 60.

⁶⁵ *Velasquez Rodriguez v Honduras* above n 64; see also Provost above n 48, 60.

⁶⁶ Provost above n 48, 61 fn 11.

⁶⁷ CRC Convention above n 14, art 38(2).

as was Poland's proposal that States should be obligated by taking "feasible measures" to ensure a child's non-participation in hostilities.

In the debates focus centred on the age below which children may not be recruited into the armed forces, the ICRC observer drew the attention of the Working Group to article 77 of Additional Protocol I⁶⁸ and to article 4(3)(c) of Additional Protocol II⁶⁹ which both set this age at fifteen. Canada proposed inclusion of the words "who have not attained the age of fifteen years."⁷⁰ The representatives of Finland, the Soviet Union, the United Kingdom and Venezuela who had postulated various proposals were requested by the Chairman of the Working Party to hold informal consultations with a view to drafting a new text for article 20(2) of the draft Convention.⁷¹ The choice of countries undertaking the redrafting reflected countries where child were participating in hostilities and in the case of Finland and the United Kingdom also permitted voluntary enlistment of children.

Algeria opposed the lower age limit and wanted eighteen included because this age appeared in article 1 of the draft Convention which at the time was proposed to reflect that "a child means every human being below the age of eighteen years."⁷² The reports record that many delegates agreed with Algeria although it is difficult to ascertain which delegates. Radda Barnen (Swedish Save the Children) pointed out the formulations put forward by the Soviet Union represented steps backwards and that the only decent provision was that no child be drafted for military combat service.⁷³ However, Algeria's position was opposed by the Netherlands, the United States and the United Kingdom

⁶⁸ Protocol I above n 24, art 77(2).

⁶⁹ Article 4(3)(c) Protocol II Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1125 UNTS 609 (1977).

⁷⁰ UNESCC Working Group Report 1986, 29.

⁷¹ UNESCC Working Group Report 1986, 29.

⁷² UNESCC Working Group Report 1986 above n 26, 29.

⁷³ Veerman above n 27, 207 referring to the written statement of Radda Barnen submitted on behalf of itself and four national organisations of Sweden. See also UN Doc. E/CN.4/1987/WG.1/WP.3 (1987)

who stressed the revised text should remain as reformulated.⁷⁴ One reason given for the support of the United States stand against raising the age limit was because of its support for groups in the Americas.⁷⁵

Article 1 of the CRC Convention now defines a child as meaning "every human being below the age of eighteen years unless, under the law applicable to the child majority is attained earlier." A loop hole or double standard was created in this definition as a State has the ability to singularly enact a law stating children have attained 'majority' at an earlier age. The requirements of the CRC Convention are therefore made applicable to the conduct of States parties and others.⁷⁶ It should not be left to a State to determine or establish a different age for the child as this does little to advance specific recognition of the "child" at age eighteen at international level and arguably is a form of discrimination against children who reside in countries where the age of majority is under eighteen. In a world where the international community promotes rights for all children the ability to discriminate against certain groups of them should be sustained nor tolerated. We should be seeking to harmonise rights for children across the globe not create separate discriminatory hierarchies of rights.

In the meetings of the Working Group, some delegates such as Kuwait and Nepal pointed out that the age of eighteen appeared to be quite late in the light of some national legislation and that a lower age should be recommended.⁷⁷ In a number of developing countries at the time, especially in Africa children of fourteen were already considered by African States to be adults.⁷⁸ Similarly in Judaism and other religions, children are also adults at thirteen and in Islamic law the age of majority tends to be related to puberty.⁷⁹ A proposal for the

⁷⁴ UNESCC Working Group Report 1986 above n 26, 29.

⁷⁵ Veerman above n 27, fn 237 referring to discussions Veerman had with Mike Jupp the Director of the United States Section of Defence for Children International in June 1988.

⁷⁶ Renteln above n 45, 197.

⁷⁷ Veerman above n 27, 186; see also E/CN.4/1989/48 16

⁷⁸ Veerman above n 27, 229 fn 236.

⁷⁹ Cohn and Goodwin-Gill above n 18, 7.

definition of "child" to be dependent on the concept of majority of age was therefore opposed by delegates including Finland, India and the United States who pointed out this varied widely between countries and within national legislations.⁸⁰ It was the Netherlands who proposed the words "majority is attained earlier" be used to reflect the differing concepts of majority.⁸¹ To reach a consensus with participants these words found their way into the final version of article 1 of the CRC Convention. The inclusion of a lower age suggests child soldiers' rights should be less than those of other children and offering them less protection in conflict, which is incredulous. However, the State has an obligation of due diligence to protect those rights and under article 4 of CRC Convention to adopt certain measures including adopting measures in its domestic legislation.

The next controversial issue for debate was the proposal to prohibit only "direct" participation in hostilities.⁸² Algeria remained vehemently opposed to the revised text which departed considerably from the ICRC proposal. However, the text that was finally approved as article 38(2) of the CRC Convention arguably means that voluntary participation by children is not totally prohibited.⁸³ Indirect participation in hostilities such as the gathering and transmitting of military information, transporting weapons, munitions and other supplies is allowed.⁸⁴ The indirect participation of children in hostilities may also be considered also forced labour. The forced or voluntary recruitment of children under the age of fifteen is now one of the worst forms of child labour under the recent Convention 182 (which is discussed below) and which is prohibited.⁸⁵

⁸⁰ Veerman above n 27, 186 – 187; see also E/CN.4/1989/48 16

⁸¹ UNESCC Working Group Report 1984 above n 29, 16.

⁸² UNESCC Working Group Report 1986 above n 26, 29.

⁸³ Veerman above n 27, 206 referring to Françoise Krill of the ICRC.

⁸⁴ Veerman above n 27, 206.

⁸⁵ Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182), 38 I.L.M. 1207 (1999). Referred in this paper as Convention 182.

The following year at the next meeting of the Working Party, both Sweden and Switzerland wanted to reopen discussions on article 20 of the draft convention which was refused by the Chairman.⁸⁶ However in 1988 the UN General Assembly urged Member States when developing new international human rights standards to give consideration to the established international legal framework so as to ensure that such standards were consistent with existing provisions of human rights law.⁸⁷ Sweden brought this to the attention of the Working Party in 1988 and pointed to article 20 of the draft convention adopted two years earlier as undermining existing standards of international humanitarian law.⁸⁸ Thus the heated debates began again. In 1988, the Working Party finally reached agreement that the last sentence in article 38(3) of the CRC Convention would derive from article 77(2) of Protocol I which is set forth and discussed below.

The obligation on States under article 38(3) of the CRC Convention is a general obligation of due diligence to protect the rights of children aged fifteen – eighteen by endeavouring to recruit the oldest children first. There are no such corresponding obligations on other parties to the conflict nor is there a duty on States to prevent the recruitment of children by other parties.

The following year the contentious area for debate was two new proposals: one put forward by UNICEF⁸⁹ and the other by a drafting group consisting of the United States and other delegates.⁹⁰ The United States stood fast refusing to accept any substitutes for the lower standard but gave few reasons for this position, asserting instead that to adopt the higher standard

⁸⁶ UNESCC Working Group Report 1987 above n ***, 41 – 42.

⁸⁷ UNESCC Working Group Report 1988 above n 31, 19.

⁸⁸ UNESCC Working Group Report 1988 above n 31, 19.

⁸⁹ United Nations Economic and Social Council Commission on Human Rights: "Question of A Convention on the Rights of the Child – Report of the Working Group on a Draft Convention on the Rights of the Child" (UN Doc. E/CN.4/1989/48, 45th Sess., 1989) 110. Referred to as "UNESCC Optional Protocol Report 1989."

⁹⁰ The other delegates were Angola, Australia, Austria, France, India, Italy, Mozambique, the Netherlands, Norway, Sweden, UNHCR, ICRC, Friends World Committees for Consultation (Quakers) and Radden Barnen. See generally UNESCC Optional Protocol Report 1989 above n 89.

might even oblige an invaded State to renounce self-defence.⁹¹ Consensus could not be agreed on which standard should apply which became the central issue for debate.

Many delegates were also keen not to undermine existing standards regarding children involved in armed conflicts and therefore supported the UNICEF proposal to use the words "necessary measures" so that this was more in line with the absolute nature of current international standards concerning civilians in armed conflicts.⁹² On debates regarding article 38(2) of the CRC Convention, the United States argued the imposition of necessary measures on States would represent an impossible standard for any State Party to implement. It was more important for the CRC Convention to enforce existing standards rather than to create new ones which would not be obeyed.⁹³ Implicit in such a statement was the suggestion that the United States would not obey or comply with a lower standard.

Ultimately the standard came down to this: the Chairman observed that during the debate no participant had expressed opposition to the adoption of the word "feasible" and indeed some had indicated their willingness to support such a word and thus he felt that it might be a solution for the Working Group to adopt "feasible."⁹⁴ And that's exactly what happened.

The United States also argued since international humanitarian law already mandated fifteen years as the minimum age for recruitment and participation this was not the time or the place to alter existing international

⁹¹See generally Cohn and Goodwin-Gill above note 18, 69; UNESCC Optional Protocol Report 1989 above n 89.

⁹²These delegations included Algeria, Angola, Argentina, Australia, Austria, Canada, China, Finland, the German Democratic Republic, the Holy See, Italy, Mexico, Mozambique, the Netherlands, Norway, Senegal, Spain, Sweden, Switzerland, Venezuela and the ICRC. See generally UNESCC Optional Protocol Report 1989 above n 89.

⁹³UNESCC Optional Protocol Report 1989 above n89, 112.

⁹⁴UNESCC Optional Protocol Report 1989 above n 89, 116.

humanitarian standards.⁹⁵ Specifically the United States argued that its proposed text for article 20 of the draft CRC convention also adhered to the language of article 77 of Protocol I and notably that the Working Group was not an appropriate forum to revise existing international humanitarian law in this area.⁹⁶ No account was mentioned that the language of article 38(2) of the CRC Convention is in fact weaker than the protection afforded to children in non-international conflict under Protocol II⁹⁷ which is considered below.

While incorporating article 77(2) of Protocol I⁹⁸ article 38 of the CRC Convention actually qualifies article 4(3)(c) of Additional Protocol II by requiring States to take "all feasible measures" to prevent only the child's "direct participation in hostilities."⁹⁹ The importance of this is that contrary to the assertions made by the United States, the Working Party did and indeed it would appear at the behest of the United States revise existing international humanitarian law in this area. In consequence of which children in internal armed conflicts under article 38 of the CRC Convention may indirectly participate in the conflict even if they are under the age of fifteen (which is prohibited under Protocol II) and States are obliged only to take feasible measures to ensure children under fifteen do not actively take part in hostilities. Article 38 of the CRC Convention should be amended to correct this.

Finally the United States backed by the Federal Republic of Germany threatened that if no consensus text for article 20 of the draft convention could be reached they proposed the whole article be deleted.¹⁰⁰ Such a threat belies the influential and dominant power the United States exerts. The United States simply would not compromise its stance and instead potentially jeopardised the negotiations for the protection of child soldiers with such a threat. This naturally

⁹⁵ Hackenberg, Marsha L "Can the Optional Protocol for the Convention on the Rights of the Child Soldier protect the Ugandan Child Soldier"? (2000) 10 *Ind Intl & Comp L Rev* 417, fn 51.

⁹⁶ UNESCC Optional Protocol Report 1989 above n 89, 112.

⁹⁷ Protocol II above n 69.

⁹⁸ Protocol I above n 24.

⁹⁹ Cohn and Goodwin-Gill above n 18, 56.

¹⁰⁰ UNESCC Optional Protocol Report 1989 above n 89, 112.

drew numerous responses from the other delegations keen to retain protection for children in armed conflict under the auspices of article 20 of the draft convention. The debates continued until the United States and other countries that supported voluntary enlistment such as New Zealand, Australia, Canada and the United Kingdom were able to retain voluntary enlistment, the lower age, and the use of "feasible measures" in article 38 of the CRC Convention.¹⁰¹

Sweden proposed the inclusion of a provision¹⁰² under which it was proposed States could make reservations intended to lead to the improvement of national laws to comply with international standards.¹⁰³ This was supported by the Working Group providing reservations were not incompatible with the object of the CRC Convention. The Working Party consequently adopted article 28 of the Convention on the Elimination of All Forms of Discrimination Against Women¹⁰⁴ which became article 51 of the CRC Convention. However reservations have been entered by States are incompatible with the object of the CRC Convention, rather they weaken and undermine protection for child soldiers.¹⁰⁵

The CRC Convention also established a new human rights standard both in its substantive content and in its implementation procedure.¹⁰⁶ Article 45 of the CRC Convention expands the usual human rights implementation mechanism by granting a special role to NGOs whilst articles 43 and 44 follow the usual format for setting up a United Nations human rights treaty monitoring

¹⁰¹ Veerman above n 1 at 184

¹⁰² United Nations Economic and Social Council Commission on Human Rights: "Question of A Convention on the Rights of the Child – Report of the Working Group on a Draft Convention on the Rights of the Child" (UN Doc. E/CN.4/1988/28, 44th Sess., 1988). Referred to in paper as the "UNESCC Optional Report 1988."

¹⁰³ UNESCC Optional Report 1988, 43.

¹⁰⁴ UNESCC Optional Report 1988, 43.

¹⁰⁵ See generally United Nations Secretary General "Report of the Secretary General on the Status of the Convention on the Rights of the Child" 59th Sess., A/59/190 (2004).

¹⁰⁶ Cohn and Goodwin-Gill above n 18, 1.

body.¹⁰⁷ A committee of experts is also established, the Committee on the Rights of the Child which is mandated to review reservations and monitor implementation (it has no ability to enforce) of the CRC Convention through the examination of periodic State reports.¹⁰⁸

Of significance and bearing in mind the extensive participation of the United States and the watering down of provisions for children in armed conflict at its insistence; to date the United States will not ratify the CRC Convention, when virtually all other UN member States bar one have done so. If the United States was to ratify the instrument, it would be entitled to appoint an expert to the CRC Committee, which monitors compliance with the CRC Convention.¹⁰⁹ This would enable it to influence the jurisprudence of the CRC Convention as the CRC Committee issues general comments that are policy statements interpreting the treaty's various articles.¹¹⁰ If children are to continue to have rights, given the United States standpoint in the debates, the advancement and enhancement of those rights applicable to child soldiering may be better advanced without the influence of the United States, even if its non-ratification conceivably undermines the efficacy of the CRC Convention. I shall discuss the Optional Protocol which seeks to increase protection for child soldier and is discussed below.

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

The Optional Protocol to the Convention on the Rights of the Child In Armed Conflict¹¹¹ represents a further attempt and a significant step by the

¹⁰⁷ Cohen above n 15, 20.

¹⁰⁸ CRC Convention above n 14, art 43.

¹⁰⁹ Renteln above n 45, 197.

¹¹⁰ Renteln above n 45, 197.

¹¹¹ Optional Protocol on the Rights of the Child on the Involvement of Children in Armed Conflict Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000) Referred to in this paper as "Optional Protocol." As at 22

International community to collectively address the widespread recruitment and use of children in armed conflict. A positive aspect of the Optional Protocol as with the CRC Convention is its applicability to all levels of conflict thus increasing the protection in terms of recruitment for children but crucially also applies when Protocol II cannot protect them.¹¹²

Discussion on the Optional Protocol started by the CRC Convention in its second session in 1992 following a special appeal by the World Conference on Human Rights.¹¹³ In 1993, the Committee on the Rights of the Child considered article 38 of the CRC Convention discriminated against children aged between fifteen and eighteen years in relation to the right to life and survival which are rights guaranteed to children under the CRC Convention. A need to improve the existing standards was recommended together with an optional protocol to increase the age of recruitment of children into the armed forces to eighteen years. Such a recommendation accorded with the Machel Report. The Optional Protocol was intended to contribute effectively to the implementation of the CRC principle that the best interests of the children are to be a primary consideration in all actions concerning children.¹¹⁴ Thus the CRC Committee was in effect seeking to address the weaknesses of the CRC Convention relative to the child soldier which had been identified and debated in the CRC Convention debates.

In 1994 the CRC Committee took the initiative to draw up such a draft optional protocol.¹¹⁵ It was intended that the protocol under discussion would be

June 2004, the Optional Protocol has been ratified by 73 member States and signed by 115 member States.

¹¹² Rachel Harvey "Recruitment and Deployment of Child Soldiers – The Beginning of the End?" (2000) See <<http://www.essex.ac.uk>> (last accessed on 15 July 2004), 3.

¹¹³ United Nations Economic and Social Council Commission on Human Rights Report of the Working Group on a draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflict on its fifth session (UN Doc. E/CN.4/1999/73) 8. Referred to in this paper as the "UNESCC Working Group Report 1999."

¹¹⁴ Optional Protocol above n 111, preambular para 8; CRC Convention above n 14, art 3(1).

¹¹⁵ United Nations Economic and Social Council, Commission on Human Rights: Comments on the Preliminary Draft Optional Protocol, Report of the Secretary General (UN Doc. E.CN.4/1994/WG.13/2 1994) Referred to as "UNESCC Working Group Report 1994."

optional in nature, hence its title and form in order that States did not block a consensus being reached by the vast majority of States who supported what had become known as the "straight eighteen" position.¹¹⁶ The function of optional protocols is to promote the progressive development of international law by enabling States to adopt higher standards¹¹⁷ consistent with the aim of the CRC Convention to improve standards for child soldiers. It was the hope of the CRC Committee that States which were not in a position to accept a minimum age of eighteen years would not prevent the adoption of the optional protocol by others.¹¹⁸ The preliminary draft optional protocol was drawn up and later transmitted to the Commission of Human Rights following a special appeal made by the World Conference on Human Rights.¹¹⁹

In 1994 the Commission on Human Rights established an Open Ended Working Group on a draft optional protocol.¹²⁰ The purpose of the Working Group was to elaborate as a matter of priority a legal instrument in the form of a draft optional protocol to the CRC Convention, to achieve a universal agreement on raising the minimum age for recruitment and participation in hostilities from fifteen.¹²¹ Through out the debates of the draft optional protocol however, the negotiations were difficult reflecting the disparate views¹²² held by forty countries and thirty United Nations bodies and agencies, international organisations and NGOs who participated.¹²³ The Optional Protocol that

¹¹⁶ United Nations Economic and Social Council, Commission on Human Rights: Report of the Working Group on a draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts on its sixth session, (UN Doc. E/CN.4/2000/74 2000) para 23 referring to the UN High Commissioner for Human Rights, Mrs Mary Robinson. Referred to as the "UNESCC Working Group Report 2000."

¹¹⁷ UNESCC Working Group Report 2000 above n 116, para 8.

¹¹⁸ UNESCC Working Group Report 2000 above n 116, para 8.

¹¹⁹ See UNESCC Working Group Report 1994 above n 115.

¹²⁰ UNESCC Working Group Report 1994, para 9 referring to UN Resolution 1994/91.

¹²¹ United Nations Economic and Social Council, Commission for Human Rights: Report of the Working Group on a draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflict on its fifth session (UN Doc. E/CN.4/1999/73), para 10. Referred to as "UNESCC Working Group Report 1999."

¹²² UNESCC Working Group Report 2000 above n 166, para 151.

¹²³ United Nations Economic and Social Council Commission on Human Rights: Report of the Chairman of the working group prepared pursuant to Commission Resolution 1998/76, (UN Doc. E/CN.4/1999/WG.13/3 1999) para 13.

resulted from these debates constituted a significant compromise between divergent positions. Thus the major issues were unsurprisingly those that had surfaced in the CRC Convention debates (all of which had political overtones): minimum age, recruitment, level of participation in hostilities and the position of non-State groups. These issues are addressed below.

The pertinent articles of the Optional Protocol are set forth below:

1. States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of eighteen years do not take a direct part in hostilities;
2. States Parties shall ensure that persons who have not attained the age of eighteen years are not compulsorily recruited into their armed forces;
- 3.1. States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3 of the Convention on the Rights of the Child, taking into account of the principles contained in that article and recognising that under the Convention persons under eighteen are entitled to special protection.
- 3.2. Each State Party shall deposit a binding declaration upon ratification of or accession to this Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced.
- 4.1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of eighteen years.
- 4.2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalise such practices.

Article 1 of the Optional Protocol replicates article 38(2) of the CRC Convention but crucially raises the age from fifteen to eighteen years. However the Optional Protocol does not explicitly prohibit indirect participation (neither does the CRC Convention) which it should have as it might equally be as dangerous for children and it can be difficult in the field to determine the line

between what constitutes direct or indirect participation.¹²⁴ The words “participation in hostilities” has now been clarified in the Rome Statute of the International Criminal Court¹²⁵ as covering (amongst other matters) “the use of children as decoys, couriers or at military checkpoints.”¹²⁶ As regards the scope of the obligation contained in article 1 of the Optional Protocol, it has significant weaknesses. Article 3(1) of the Optional Protocol additionally obliges States to raise the minimum age for voluntary recruitment into their forces to at least sixteen and thus increases the minimum age set forth in article 38(3) of the CRC Convention by one year. Under article 2 of the Optional Protocol, States are also obliged to ensure children are not compulsorily recruited into their forces. One such weakness relates to the nature of the obligation imposed on States which is one of conduct rather than of result, namely the requirement to take all feasible measures to ensure non-participation.¹²⁷ Obligations of result implicitly recognises principle choice of means especially in standard setting contexts where States are required to bring about a certain situation and enjoy a measure of discretion in determining both what is required and how to achieve that result.¹²⁸

The ICRC considered that better protection for children would have been provided if States had undertaken to “take all necessary measures” to this end or even better if they had a duty “to ensure” that such participation does not take place.¹²⁹ The duty to ensure the rights to child soldiers is as discussed earlier one which would have obligated States to prevent participation of children in hostilities, to investigate and to punish any violations through the enactment of domestic legislation as provided for and required by articles 4(1) and 6 of the CRC Convention.

¹²⁴ UNESCC Working Group Report 2000 above n 116.

¹²⁵ Rome Statute of the International Criminal Court 2187 UNTS 3 (1998)

¹²⁶ Rome Statute above n 125.

¹²⁷ Daniel Helle “Optional Protocol on the Involvement of Children in Armed Conflict to the Convention on the Rights of the Child” (2000) *International Review of the Red Cross* No. 839, 797; see <<http://www.icrc.org>> (last accessed on 31 August 2004), 2.

¹²⁸ Cohn and Goodwin-Gill above n 18, 56.

¹²⁹ Helle above n 127, 2.

The words "all feasible measures" are drawn from article 38(2) of the CRC Convention and article 77(2) of Protocol I. The deliberate vagueness of this provision enables States to determine the meaning of words and to set the standards by which they are judged and consequently States may easily escape the scrutiny of the international community.¹³⁰ This vague wording has allowed States to deposit declarations pursuant to article 3(3) of the Optional Protocol interpreting the word "feasible" so as to weaken their obligation to ensure children do not take a direct part in hostilities.

In the debates of the delegates on the draft protocol, States recruitment of children came under the spotlight again with the majority of States wanting to raise the minimum age for volunteers into States armed forces to be set at eighteen. Few African States actually participated in the Working Group sessions. Many delegations including NGOs, ICRC, and the UN High Commissioner for Human Rights and the Special Representative of the Secretary General urged for a blanket prohibition of any military service by those under eighteen. This blanket prohibition is the "straight 18" position that had been previously argued in the CRC Convention debates. However countries that permitted voluntary recruitment were not prepared to accept a blanket prohibition and instead effectively were able to turn the debate into one which focused on the minimum age yet again at which States would be permitted to voluntarily recruit children. Australia and New Zealand, for example proposed that the minimum age for recruitment for States would be seventeen whereas Belgium proposed eighteen years.¹³¹

It was pointed out however that the question was not one as to how much difference it made between sixteen, seventeen or eighteen; but that the fundamental point was for the United Nations to make a clear distinction

¹³⁰ See Shara Abraham "Child Soldiers and the Capacity of the Optional Protocol to Protect Children in Conflict" (2003) 10 Hum Rts Br 15, 17.

¹³¹ UNESCC Working Group Report 2000 above n 116, para 60.

between children and adults.¹³² To do otherwise, was to compound the original failure of the CRC Convention in this regard.¹³³ The counter argument was that the real problem lay not in the debate about the higher standard but in the lack of implementation of existing standards.¹³⁴ Arguably adopting even higher standards when existing treaty prohibitions banning the use of fifteen year olds were not being respected, was in the view of the United States unlikely to increase respect for international norms.¹³⁵

The Working Group was unable to agree eighteen would be the minimum age for volunteers into States armed forces. The resultant regime for voluntary recruitment in article 3(1) of the Optional Protocol reflects therefore yet another compromise but at least the age was in fact raised from the lower age in the CRC Convention. The Optional Protocol unfortunately contains an inherent weakness as its article 3 in effect introduces an open provision that could mean quite different age limits for recruitment over fifteen depending on the practice of the State concerned.¹³⁶ The text became so watered down that it unfortunately lends itself to different interpretations and use.

At the time of its drafting, it was hoped that States would use the binding declaration as an opportunity to commit themselves to the highest possible level of protection of children's rights (that is by increasing the minimum age to eighteen) thus consolidating the process many of them had started at national

¹³²United Nations Economic and Social Council Commission on Human Rights, Inter-sessional open ended working group on a draft optional protocol to the

¹³³United Nations Convention on the Rights of the Child on involvement of children in Armed Conflicts "Comments on the Report of the Working Group – Report of the Secretary General" (UN Doc. E/CN.4/2000/WG.13/2, 6th Sess., 1999) 3.

¹³⁴United Nations Economic and Social Council Commission on Human Rights "Rights of the Child – Report of the Working Group on a draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts on its fourth session" (UN Doc. E/CN.4/1998/102, 54th Sess., 1998) para 22. Referred to as "UNESCC Working Report 1998."

¹³⁵UNESCC Working Report 1998 above n 134, para 65.

¹³⁶UNESCC Working Report 2000 above n 116, para 136.

level.¹³⁷ Countries such as Andorra, Democratic of Congo, Panama, Portugal, Sri Lanka and Vietnam have used Declarations to affirm a higher age of eighteen.¹³⁸ During the negotiations, Portugal (and other States) also changed its position from supporting voluntary recruitment under eighteen to the straight eighteen position adopting new legislation to this effect and increasing in the minimum age for voluntary recruitment to eighteen.¹³⁹

However, the requirement to raise the age to a minimum age of sixteen years for voluntary recruitment set out in article 3(1) of the Optional Protocol does not apply to schools operated by or under the control of States armed forces under the Optional Protocol. Protection for children in these schools aged fifteen upwards is omitted. Thus a State can arguably and effectively get around age limits set for recruitment and pupils therefore become members of States armed forces which make them legitimate subjects of attack. This further weakens the international movement to prevent all recruitment and participation of children in hostilities. The imposition of an eighteen year old limit was argued in the debates by States such as the United States in favour of a lower age as undermining an important accessory of military service, which is educating people.¹⁴⁰

The omission of voluntary recruitment of children under eighteen can largely be attributed to the resistance of the United States,¹⁴¹ which has the biggest annual recruitment of children aged between fifteen and eighteen and which allows voluntary recruitment at seventeen. Article 3 was essential for the United States military which currently recruits into active duty service approximately fifty thousand volunteers at age seventeen each year.¹⁴² The

¹³⁷ UNESCC Working Report 2000 above n 116, para 136 referring to UNICEF.

¹³⁸ See UN Treaty Collection <<http://www.unhchr.ch>> (last accessed 17 March 2004.)

¹³⁹ UNESCC Working Report 2000 above n 116, para 148 referring to the Law on the Military Service (Law 174/99 of 21 September 1999).

¹⁴⁰ UNESCC Working Report 2000 above n 116, para 37.

¹⁴¹ See Harvey above n 112.

¹⁴² Michael Dennis "Newly Adopted Protocols to the Convention on the Rights of the Child" (2000) 94 AJIL 789, 791.

obligations in articles 1 and 2 of the Optional Protocol are the same as those in article 38(2) of the CRC Convention and thus the same points are referred to but are not repeated here.

Article 3(3) of the Optional Protocol also obligates States Parties to maintain certain safeguards required to be adopted to ensure the recruitment of the child is not forced or coerced.¹⁴³ As with article 4 of the CRC Convention, article 6 of the Optional Protocol impose obligations on States to enact domestic legislation to raise the minimum age referred to in article 3(1) of the Optional Protocol. Unlike article 4 of the CRC Convention, article 6 makes no mention of a State's resources but obligates States to take all necessary, legal and administrative and other measures to ensure effective implementation of the Optional Protocol provisions. The State discharges its duties once it has undertaken these measures.

Predictably and in contrast to their own position, States bound "armed groups" distinct from their own national armed forces with stronger obligations than themselves, agreeing to stricter recruitment and deployment standards for rebel groups in article 4 of the Optional Protocol.¹⁴⁴ The term "national armed forces" or "government armed forces" applies to all regular governmental, irregular governmental, government-supported or condoned forces, armed police or internal security forces, militias and self defence groups, whereas "non-governmental armed groups" or "armed groups" refers to all other armed groups.¹⁴⁵

One positive aspect of article 4 of the Optional Protocol is that it indicates the willingness of States to regulate the behaviour of non-State groups and thus

¹⁴³ Optional Protocol above n 111, art 3(2).

¹⁴⁴ See Harvey above n 112, 28.

¹⁴⁵ Sandrine Valentine "Trafficking of Child Soldiers: Expanding the UN Convention on the Rights of the Child and its Optional Protocol on the involvement of Children in Armed Conflict" (2003) 9 *New Eng J Int'l & Comp L* 109, fn 33.

also to address situations of non-international armed conflict.¹⁴⁶ However conversely a weakness of article 4 of the Optional Protocol is in regulating such behaviour, it only imposes a moral obligation (as opposed to a legal obligation) under international law.¹⁴⁷ In this regard the wording chosen seems to be motivated by the concern of many States not to depart from the classical approach of international human rights law according to which the broad rule is that only States have an obligation whereas the behaviour of non-State groups is to be regulated by domestic law.¹⁴⁸

The language of article 4(1) of the Optional Protocol makes it very clear that armed groups shall not under any circumstances recruit or use in hostilities persons under the age of eighteen years.¹⁴⁹ It was uncertain whether non-State actors would feel bound by a norm which was different from that imposed on States and whether it would be respected.¹⁵⁰

Under article 4(2) of the Optional Protocol, States are further obliged to take "feasible measures" to prevent such recruitment and use, including the "adoption of legal measures" necessary to prohibit and criminalise such activities.¹⁵¹ Taking legal measures is mentioned also in article 6(1) of Optional Protocol. The requirement for States to take all feasible measures was intended to include the adoption of legal measures necessary to prohibit such recruitment and to make a criminal offence under national law.¹⁵² Some delegates argued non-State parties could not be bound by an inter-State treaty and that it was therefore a matter to be dealt with through domestic law.¹⁵³ The drafters of the Optional Protocol used the phrase "all feasible measures" in recognition that States frequently lacked control or influence over armed groups operating in

¹⁴⁶ Helle above n 127, 4 -5.

¹⁴⁷ UNESCC Working Report 2000 above n 116, para 108 referring to the comments of the ICRC.

¹⁴⁸ Helle above n127, 5.

¹⁴⁹ Optional Protocol above n 123, art 4(1).

¹⁵⁰ UNESCC Working Report 2000 above n 116, para 108.

¹⁵¹ Optional Protocol above n 123, art 4(2).

¹⁵² Optional Protocol above n 123, arts 4(2) and 6(1).

¹⁵³ UNESCC Working Report 2000 above n 116, para 37.

their territory.¹⁵⁴ This was recognised by governments that in some cases other States provide support for, or exert influence over, such groups. In certain situations armed groups recruit from the territory of States that are not parties to the conflict.¹⁵⁵ For example, armed opposition groups in Burundi have recruited children from refugee camps in the western part of Tanzania and in Liberia; children were also recruited from refugee camps in Cote d'Ivoire and Guinea and from displaced camps in Guinea.¹⁵⁶

Another weakness of article 4 of the Optional Protocol lies in the obligation of States to adopt legal measures under article 4(2) to prohibit and criminalise recruitment of children under eighteen by armed forces. However, criminal repression under domestic law is likely to be of limited effect due to the limited capacity of a government to enforce its own laws in internal conflicts and those taking up arms against the government have already exposed themselves to the most severe penalties of the law.¹⁵⁷ Additionally the Optional Protocol fails to delineate a means for encouraging adherence on the part of non-State groups and as non-State groups did not participate in drafting the content of the Optional Protocol, potentially this also renders it difficult to persuade their adherence.¹⁵⁸

In contrast, it has been suggested that provision could have been made for a direct obligation of non-State groups by defining in the Optional Protocol the recruitment and use in hostilities of under eighteen year olds as a crime under international law.¹⁵⁹ Another suggestion is for international humanitarian law to have been incorporated in the Optional Protocol for example by drafting a text such as one which stated that "in situations covered by Common Articles 2 and 3 to the Geneva Conventions of 1949, persons under the age of eighteen years

¹⁵⁴ See Dennis above n 142, 793.

¹⁵⁵ Dennis above n 142, 793.

¹⁵⁶ United Nations General Assembly and Security Council: "Report of the Secretary General Corrigendum" (UN Doc. A/59/546/Corr.1-S/2003/1053/Corr.1 58th Sess., 2003) 8.

¹⁵⁷ UNESCC Working Report 2000 above n 116, para 108.

¹⁵⁸ Abraham above n 130, 17.

¹⁵⁹ Helle above n 127, 5.

shall neither be recruited into the armed forces or other armed groups not allowed to take part in hostilities.”¹⁶⁰ Such suggestions enable obligations to be imposed on individuals for example in an internal armed conflict, at least one party if not all parties are non-state actors. Perhaps a third suggestion may have been for international humanitarian law to have applied in situations covered by Common Article 3 and Protocol II. Protocol II makes no mention of grave breaches or violations as customary concepts of war crimes did not extend to offences committed in internal armed conflicts.¹⁶¹

The suggestion of criminalising the recruitment and use of children has already happened under the Rome Statute for the International Criminal Court.¹⁶² This is consistent with recent trends to extend war crimes in internal armed conflicts to International Tribunals and as such also complements article 4(2) of the Optional Protocol. The Rome Statute gave jurisdiction over the recruitment or use of child soldiers in armed conflict which has raised the profile of the Optional Protocol and of child soldiers.

It is a crime under article 8(2)(b)(xxvi) of the Rome Statute to conscript or enlist children under fifteen into armed forces or groups or to use them to participate actively in hostilities during international armed conflict. Article 8(2)(e)(vii) of the Rome Statute contains a similar prohibition during internal armed conflicts. This reflects a newly emerging principle of international individual criminal responsibility for violations of humanitarian law during armed conflict.¹⁶³ Until recently generally the consensus was that “war crime” was a notion applicable only in international armed conflicts (reflected in Common Article 3) and that customary concepts of war crimes did not extend to offences committed in internal armed conflicts.¹⁶⁴ However there is now a loop hole as the Optional Protocol provides the minimum age for recruitment and

¹⁶⁰ Helle above n 127, 5.

¹⁶¹ Provost above n 48, 95.

¹⁶² Rome Statute above n 125.

¹⁶³ See Provost above n 48, 94 – 95.

¹⁶⁴ Provost above n 48, 95.

participation by non-State armed forces is eighteen and for government armed forces, sixteen is the minimum age for voluntary recruitment and eighteen for direct participation. The International Criminal Court should ensure its laws are consistent with the current position under the Optional Protocol. I shall now discuss the recent Convention 182 which prohibits certain kinds of labour performed by child soldiers.

D Convention 182

A year after the CRC Convention came in force Convention 182¹⁶⁵ came into force and is enjoying the fastest pace of ratifications in the ILO's history.¹⁶⁶ This attests to the growing global awareness of the injustice of child labour amidst estimates that an alarming 179 million girls and boys under eighteen are victims of labour exploitation¹⁶⁷ which includes the labour performed by child soldiers. As with the CRC Convention, a child is defined in Convention 182 as a person under eighteen years.¹⁶⁸

Convention 182 prohibits certain categories of child labour relative to child soldiers. Article 3(a) of Convention 182 provides:¹⁶⁹

3. For the purposes of this Convention the term the worst forms of child labour comprises:
 - (a) all forms of slavery, or practices similar to slavery, such as the sale and trafficking of children, debt bondage or serfdom and forced or compulsory labour including forced or compulsory recruitment of children for use in armed conflict.

¹⁶⁵ International Labour Organisation Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) No. 182. Referred to within this paper as "Convention 182." The International Labour Organisation is referred also as "ILO." As at September 2004, of the 177 member states, 150 had ratified or acceded to Convention 182.

¹⁶⁶ Information taken from the website of the ILO. See <<http://www.ilo.org>> (last accessed on 25 September 2004.)

¹⁶⁷ Information taken from the website of the ILO. See <<http://www.ilo.org>> (last accessed on 25 September 2004.)

¹⁶⁸ Convention 182 above n 165, art 1.

¹⁶⁹ Convention 182 above n 165, art 3(a)

The prohibition is reinforced by the requirement that children under eighteen may not be engaged in "work that by its nature or the conditions in which it is carried out is likely to harm the health, safety or morals of the child."¹⁷⁰ This would include work performed by child soldiers who sweep roads with tree branches or brooms to detect or detonate mines.¹⁷¹ Another common task assigned to children in conflicts is to serve as porters often carrying very heavy loads of up to 60 kilograms including ammunition or injured soldiers.¹⁷² Children too weak to carry their loads are liable to be savagely beaten or even shot.¹⁷³

Under article 1 of Convention 182, each ratifying member State is obliged to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency." This provision is another example of a general obligation of due diligence imposed on State parties.

The recent involvement of the ILO and Convention 182 in the area of child soldiering further strengthens the protection of children in armed conflict. The ILO is the UN specialised agency which seeks the promotion of social justice and internationally recognized human and labour rights.¹⁷⁴ The Committee of Experts for the Application of Conventions and Recommendations of the ILO also addresses the issue of forced child soldier labour.¹⁷⁵

¹⁷⁰ Convention 182 above n 165, art 3(d).

¹⁷¹ Worldwide Report on Child Soldiers: Global March Against Child Labour (2001). Available at <<http://www.globalmarch.org>> (last accessed on 11 September 2004) citing report of ILO Commission of Enquiry 2001, 12 and referring to reports in Myanmar where children as young as ten are forced to undertake such work.

¹⁷² Machel Report above n 3, 13.

¹⁷³ Machel Report above n 3, 13.

¹⁷⁴ Information taken from the website of the ILO. See <<http://www.ilo.org>> (last accessed on 25 September 2004). The ILO is a tripartite body made up of government, business and labour representatives from 177 member States.

¹⁷⁵ International Labour Office *Wounded Childhood: The Use of Children in Armed Conflict in Central Africa* (Vanguard Communications, Washington, 2003), 1.1 fn 5. This is done within the framework of the ILO Convention on Forced Labour, 1930 (No. 29)

Child labour laws are intended to reinforce and complement socio-economic changes wherever possible, to deal with the worst forms of the exploitation of children wherever they exist and to provide minimum levels of protection wherever such labour is unavoidable.¹⁷⁶ The interest of the ILO in child soldiering began in 1996 when the Governing Body of the ILO decided to place child labour on the agenda of the 1998 International Labour Conference. This was done with a view to the adoption of new international labour standards to place priority on immediate action to stop the intolerable exploitation of children in hazardous work and activities.¹⁷⁷ Bearing in mind that the CRC Convention and other international instruments contained relevant provisions (the Optional Protocol was not yet in force), it was none the less felt by the ILO that a new ILO instrument specifically aimed at preventing and stopping the worst forms of child labour could enhance national and international action.¹⁷⁸ Importantly it would also bring the weight of the ILO's supervisory machinery to bear on compliance and ensure a fuller integration of the priorities of the ILO's International Programme on the Elimination of Child Labour in ILO standards.¹⁷⁹

Convention 182 was also intended to complement an earlier 1973 ILO Convention, the Minimum Age Convention.¹⁸⁰ In 1973 the ILO re-examined the problem of children and decided to lay down new comprehensive standards aimed at the protection of working children and the elimination of child labour.¹⁸¹

¹⁷⁶ Veerman above n 27, 315 referring to Assefa Bequele in *Child Labour: A Framework for Policies and Programmes in Child Labour, A Briefing Manual* (1986) (International Labour Office, Geneva, Switzerland) 17.

¹⁷⁷ ILO Questionnaire Report VI (1) submitted to the 86th Session (1998) of the International Labour Conference. Referred to as "ILO Report." See <<http://www.ilo.org>>(last accessed 22 September 2004).

¹⁷⁸ See ILO Report above n 177.

¹⁷⁹ ILO Report VI above n 177.

¹⁸⁰ ILO Convention No. 138 Convention Concerning Minimum Age for Admission to Employment (1973). In this paper ILO Convention No. 138 is cited as the "Minimum Age Convention."

¹⁸¹ Veerman above n 27, 314 - 315

At the ILO Conference in 1998 when the subject of child soldiering was first mentioned, the issue of explicitly mentioning children in armed conflicts as constituting one of the worst forms of child labour became a major issue.¹⁸² Notably, by this time however African States where child soldiering is a major problem had decided to adopt a common African position. In the ILO debates, the African States confirmed the disturbing trend of recruiting and using children particularly in armed hostilities in Africa.¹⁸³ However in contrast, yet again, the United States endeavoured to “block efforts to include explicit language prohibiting the recruitment of children into the military.”¹⁸⁴ The United States did not want the inclusion of military service as a form of prohibited child labour in view of its current practice of voluntary enlistment of children. The United States expressed its view that the intention of the new ILO instrument was not to limit traditional national military training and voluntary service consistent with current international law.¹⁸⁵ Whilst admitting the current international legal obligations that set an age limit of fifteen years was low (yet without acknowledging its role in the CRC Convention debates ensuring this lower age remained) the United States in seeking a compromise wanted the emphasis placed on the abduction, coercion, and forced or involuntary recruitment of children for use as participants in armed conflict.¹⁸⁶ The United States reiterated the arguments it raised in the debates on the Optional Protocol in this regard which were running in parallel with the ILO debates. Similarly, the United Kingdom insisted the new ILO Convention should permit voluntary enlistment by States.¹⁸⁷

The United States did not believe that “voluntary enlistment in lawful national military service” was a basis for international concern or that it had

¹⁸² International Labour Organisation Child Labour: 86th Session (1998) Report of the International Labour Conference. See <<http://www.ilo.org>>(last accessed 22 September 2004).

¹⁸³ International Labour Organisation Child Labour: 87th Session (1999) Report of the International Labour Conference. See <<http://www.ilo.org>>(last accessed 22 September 2004).

¹⁸⁴ See generally Renteln above n 45, 198.

¹⁸⁵ ILO Child Labour: 87th Session Report above n 183.

¹⁸⁶ ILO Child Labour: 87th Session Report above n 183.

¹⁸⁷ Sean Murphy “Contemporary Practice of the United States Relating to International Law” (1999) 94 AJIL 879, 897.

resulted in the suggestion to include child soldiering as one of the worse forms of child labour. It's difficult to understand or give credence to the rationale of such beliefs in view of the work a child soldier would perform in any military service (whether voluntarily or compulsorily recruited by States or armed groups) which would invariably be the same and would undoubtedly be hazardous work.

Equally what is difficult to reconcile are the statements made by the United States representatives in the various debates discussed thus far and statements made by the United States Secretary, Elaine Chao on behalf of the Bush Administration and United States Department of Labour in 2003. Mrs. Chao is quoted as saying "If we are to prevent one of the worst forms of abusive child labour today – the use of children as combatants, we must follow through on these and similar recommendations."¹⁸⁸ If Mrs. Chao and the United States Department of Labour had taken an active role in the CRC Convention, Optional Protocol and ILO debates one wonders whether the protection for child soldiers would have been far greater.

Unlike the United Nations consensus decision making process, under the ILO procedures, the tripartite national delegations have independent voting rights which are weighted differently. This voting process could not be blocked by the United States but it still yielded significant influence over the drafting of the provision for child soldiers. When the United States refused to support the ILO's proposed convention if it contained a blanket prohibition on recruitment of all children under eighteen, it was the ILO who conceded and agreed to change the wording to that contained in the final draft to gain the support of the United Nations.¹⁸⁹ Thus the inclusion of "forced or compulsory recruitment of children for use in armed conflict" under the age of eighteen was then voted into Convention 182.

¹⁸⁸ ILO *Wounded Childhood* above n 175, foreword.

¹⁸⁹ ILO Child Labour: 87th Session Report above n 183.

The ILO also adopted a number of proposals with regard to child labour which took the form of Recommendation 190¹⁹⁰ to accompany the Worst Forms of Child Labour Convention. R190 recommends that member States should provide that forced or compulsory recruitment of children for use in armed conflict is a criminal offence.¹⁹¹ This should assist in curbing and preventing the potential global spread of the practice of civilian "soldier brokers" who have emerged in the longstanding Myanmar civil war where numbers of child soldiers are estimated at 70,000 and who are paid 4,000 kyat (\$1,033 NZD) and one sack of rice per recruit.¹⁹²

Whilst these are positive signals and significant steps towards the protection of children in armed conflict and the strengthening of the ILO's mandate on child soldiering, simply ratifying a treaty is not enough. For example, Burundi has ratified Convention 182 yet during the ILO study in Central Africa in 2003, the ILO ascertained underage Burundi children were being used for labour initially by the State army in a less formal way. Such children are called the "doriyas" ("look-out" or literally "ear agents"), doing small domestic jobs, acting as guards, carrying arms or ammunition or serving as spies.¹⁹³

Similar obligations to those found to exist in the CRC Convention and Optional Protocol are also reiterated in Convention 182. In addition to the obligation in article 1 of Convention 182, States are obliged to design, implement and monitor programmes of action and designate mechanisms to monitor implementation.¹⁹⁴ States are also obliged to assist one another in

¹⁹⁰ International Labour Organisation Recommendation 190 concerning the prohibition and immediate elimination of the worst forms of child labour (1999). This is referred to within this paper as "R190."

¹⁹¹ R190 see above n 190, para 12(a).

¹⁹² Human Rights Watch *My Gun Was As Tall As Me: Child Soldiers in Burma* (2002) (Human Rights Watch, New York, United States) 28

¹⁹³ ILO *Wounded Childhood*, above n 175, 1.2.

¹⁹⁴ Convention 182 above n 165, arts 5, 6(1).

giving effect to Convention 182 including support for social and economic development, poverty eradication programmes and universal education.¹⁹⁵

States are also obliged to take all "necessary measures to ensure the effective implementation and enforcement of the provisions ... including penal sanctions or as appropriate other sanctions."¹⁹⁶ R190 usefully identifies and proposes a number of possible measures to assist States to meet their obligations under Convention 182¹⁹⁷ which are not binding on States moreover they are guidelines to assist governments and not part of the ILO's system of international labour law standards.

E Regional Responses

The African Charter on the Rights and Welfare of the Child¹⁹⁸ has a direct bearing on the problem of child soldiers. There have been several other regional developments which address child soldiers and these are considered below.

The African Charter was adopted by the Member States of the Organisation of African Unity (now the African Union).¹⁹⁹ The preamble to the African Charter notes with concern that the situation of most African children remains critical due to unique factors including armed conflicts (amongst others) with African States recognising appropriate measures are required to promote and protect their children. Thus the African Charter provides African children with unique protection and to new or otherwise different rights which

¹⁹⁵ Convention 182 above n 165, art 8.

¹⁹⁶ Convention 182 above n 165, art 7(1).

¹⁹⁷ R190 above n 190 sets out suggested measures including (among others): collecting detailed information and statistical data on child labour; mobilising public opinion and involving employers and workers organisations and civic organisations; monitoring and publicising best practices on the elimination of child labour; creating jobs and providing skills training for parents and adult family members of concerned children.

¹⁹⁸ The African Charter on the Rights and Welfare of the Child 1990 OAU Doc. CAB/LEG/24.9/49 (1990). Referred to as "African Charter." The African Charter came into force in November 1999.

¹⁹⁹ The Organisation of African Unity is referred as OAU in this paper which is used in the African Charter. The African Union has 53 member states. See <<http://www.africa-union.org>> (last accessed on 18 September 2040).

relate specifically to African concerns.²⁰⁰ This is particularly important and a positive development in a continent at a time when “more than 4 million children under the age of five years die annually due to malnutrition and ill health”²⁰¹ and estimates put child soldiers in Africa at more than 120,000.²⁰²

The African Charter reaffirms its adherence to the CRC Convention which strengthens rights for African child soldiers and making them more pertinent. There are several important differences for child soldiers in the African Charter from those in the CRC Convention and I shall refer to several pertinent to child soldiers to demonstrate these. It should also be noted that the African Charter is more expansive in its scope for child soldiers than the CRC Convention or the Optional Protocol, the latter which was not in force at the time the African Charter was agreed.

Article 22 of the African Charter provides:

1. States Parties to this Charter shall undertake to respect and to ensure the rules of international humanitarian law applicable in armed conflicts which affect the child.”
2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and to refrain in particular, from recruiting any child.
3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

The obligation on States in article 22(1) of the African Charter is the same as that in article 38(1) of the CRC Convention; equally as is the obligation in

²⁰⁰ Cohen above n 15, 60. For example, protection against harmful social and cultural practices (article 21), protection for refugee children (article 23), protection against apartheid (article 26).

²⁰¹ Veerman above n 27, 273 referring to advice of Amos Wako.

²⁰² ILO *Wounded Childhood* above n 175, 1.1.

article 22(3) of the African Charter with article 38(3) of the CRC Convention. Where they differ is that article 22(2) of the African Charter imposes a higher standard and obligates States to ensure no child under eighteen takes a direct part in hostilities and imposes an express obligation on States to refrain from recruiting children under eighteen. Article 22(3) of the African Charter focuses more on seeking to protect and care for all children in armed conflicts, which includes the child soldiers. It expands the applicability of article 22 of the African Charter to situations of armed conflict as well recognising conditions in Africa extends to internal armed conflicts, tension and strife which may not be covered by other international instruments notably Protocol II which is discussed below.

Article 1(1) of the African Charter is derived from article 1 of the CRC Convention. As discussed above in the CRC Convention earlier, the obligation in both of these articles 1 is for States to adopt such legislative or other measures as may be necessary to give effect to the provisions of the African Charter.

Article 2 of the African Charter defines a child as every human below the age of eighteen years making the age of eighteen absolute as the measure for the end of childhood, rather than conditioning it by the incorporation of a reference to national legislation regarding the age of majority.²⁰³ This harmonises the age of the child at eighteen across the African States regardless of religious or cultural practices and custom or national legislation which may determine the age of majority at a younger age. The African Charter's definition of child also accords with the fact that the national legislation of the overwhelming majority of African States sets eighteen years as the minimum age for military recruitment²⁰⁴ with some exceptions.

²⁰³ See generally Cohen above n 15, 61.

²⁰⁴ Maputo Declaration on the Use of Children as Soldiers (1999), Preamble.

The African Charter also recognises “custom, tradition, cultural or religious practice” in its article 1(3). Some of these practices may in reality be inconsistent with the rights, duties and obligations in the African Charter. These inconsistencies are to be discouraged.²⁰⁵ For example, in Sierra Leone it is often difficult to distinguish between recruitment into armed conflict versus the initiation process young boys undergo to mark entry as an adult into societies of traditional hunters and for some, the recruitment for example by the pro-government militia group, the Civil Defense Forces would not be prevented or opposed by parents or boys due to the traditional status associated with the membership in such a group.²⁰⁶ In such cases, it must be determined whether the Charter should override beliefs and if so what considerations must be taken into account when making this decision.²⁰⁷ Under article 42(c) of the African Charter, the African Committee of Experts on the Rights and Welfare of the Child (established within the OAU) is mandated to interpret provisions of the Charter. In light of which interpretations of provisions, determinations or considerations relative to “custom, tradition, cultural or religious practice” should be determined by this Committee. This is an important function as continuations of such practices in violation of the African Charter will only serve to weaken its effectiveness not only for African children, but for child soldiers in Africa also.

Protection for African children soldiers was additionally strengthened in 1999 at an African Conference on the Use of Children as Soldiers held in Mozambique. This Conference unanimously adopted the Maputo Declaration on the Use of Children as Soldiers and calls on States to adopt and to adhere to

²⁰⁵ African Charter above n 198, art 1(3).

²⁰⁶ Coalition to Stop the Child Soldier Asia – Pacific Conference on the Use of Children as Soldiers Report (2000) available at <<http://www.child-soldiers.org>> (last accessed on 15 April 2004) 6. See Coalition to Stop the Use of Child Soldiers: <<http://child-soldiers.org>>; see also generally Bald, Stephanie H “Searching for a Lost Childhood: Will the Special Court of Sierra Leone Find Justice for its Children?” (2002) 18 Am U Int’l L Rev 537.

²⁰⁷ Hackenberg above n 95, fn 69.

the African Charter.²⁰⁸ The Maputo Declaration calls on all African States to put an end to the use of children as soldiers and “to take all the necessary measures to ensure no child under eighteen participates in armed conflict.”²⁰⁹ However, unlike the African Charter, the Maputo Declaration declares a straight eighteen position, that is a blanket prohibition on the use of children under eighteen in conflict by any armed force or group even where the child volunteers. The reference to armed force or group appears from a reading of the Maputo Declaration to be to States armed forces. In the preamble to the Maputo Declaration, there would seem to be some drafting errors or oversights as it recalls “...the African Charter on the Rights and Welfare of the Child prohibits the recruitment and use as soldiers of children under eighteen.”²¹⁰ However, the African Charter only prohibits direct participation and recruitment by States of children under eighteen.

The Maputo Declaration also declares the use of any child in any armed force or armed group as wholly unacceptable even where the child claims or is claimed to be a volunteer. This is important in an African context as voluntary recruitment is misleading as the choice to volunteer is often not exercised freely.²¹¹ For example children may be driven by any of several forces including cultural, social, economic or political pressures to volunteer.²¹² A number of measures are suggested by the Maputo Declaration to ensure no child under eighteen takes part in armed conflict which if implemented and enforced are significant steps towards achieving the elimination and prohibition of child soldiering in Africa. The Maputo Declaration also encourages respect of and ratification of pertinent international humanitarian and human rights instruments

²⁰⁸ Maputo Declaration above n 204.

²⁰⁹ Maputo Declaration above n 204.

²¹⁰ Maputo Declaration above n 204, preambular para 7.

²¹¹ Machel Report above n 3, 12.

²¹² Machel Report above n 3, 12.

and for sanctions to be imposed on offending States such as the withholding of arms, military equipment and the like.²¹³

Over the past few years the Economic Community of West African States (ECOWAS) has also progressively integrated child protection into its policies and institutions, including the adoption of the Accra Declaration and Plan of Action on War-Affected Children in 2000 and the establishment of a Child Protection Unit in the ECOWAS secretariat in 2002.²¹⁴ In 2003 the ECOWAS summit endorsed an agenda for action for war-affected children in West Africa.²¹⁵

Other regional Declarations followed after the Maputo Declaration both in form and content (with a few exceptions), namely the Montevideo (1999); Berlin (1999); Kathmandu – Asia and Pacific (2000) and Amman – Arab States (2001) Declarations on the Use of Children as Soldiers.

The Kathmandu Declaration is worthy of mention as the region it covers comes second to Africa in the very high numbers of children soldiers. At the time of the Kathmandu Declaration being agreed some 75,000 children under fifteen were believed to be engaged in conflicts across the Asian – Pacific region from Afghanistan to the Philippines.²¹⁶ One country, Myanmar is believed to be one of the largest users of child soldiers in the world.²¹⁷ The serious issue of child soldiers in Myanmar finally came to the attention of the international community in 2000 when the Christian Karen militia “God’s Army” led by twelve year old twins Johnny and Luther Htoo who had already

²¹³ Maputo Declaration above n 204, paras 4,5,9,10.

²¹⁴ Report of the Secretary General above n 156, 15.

²¹⁵ Report of the Secretary General above n 156, 15.

²¹⁶ Coalition to Stop the Child Soldier Report above n 206, 1.

²¹⁷ Coalition to Stop the Child Soldier Report above n 206; see also Human Rights Watch *My Gun Was as Tall as Me* above n 192.

been fighting for three years took over a hospital in Thailand taking 700 people hostage.²¹⁸

Promotion and respect for children's rights is also a priority of the European Union's human rights policy.²¹⁹ The EU recently has adopted the EU Guidelines on Children Affected by Armed Conflict which are intended to highlight this problem and give more prominence to EU actions in this area.²²⁰ Austria stimulated debate within the EU that ultimately led to the adoption of these Guidelines.²²¹ The objective of the EU is to persuade non EU-countries and non-State actors to implement international law and to take effective measures to protect children from the effects of armed conflict. The implementation of these Guidelines and their immediate effective and sustained mainstreaming through out all relevant EU policies and actions is now a priority for all members of the EU.²²²

These regional developments are a powerful argument against those who suggest the recruitment and use of child soldiers is a matter of cultural relativism and so being should be regulated by national standards.²²³ They clearly fulfil a need and while international standards are made and or approved by international bodies, national and regional charters are often tuned in with specific cultural settings.²²⁴ The African Charter and the Maputo Declaration are examples of this. If therefore the international standards for child soldiers continue to be expanded and translated into national and regional standards, the

²¹⁸ Worldwide Report On Child Soldiers see above n 171, 13 citing CSUCS Global Report on Child Soldiers 2001.

²¹⁹ European Union "Children and Armed Conflict" (2003). See <<http://europa.eu.int>> (last accessed on 18 September 2004)

²²⁰ See generally European Union above n 219. The European Guidelines adopted 8 December 2003

²²¹ United Nations Economic and Social Council Commission on Human Rights: Rights of the Child: S41 Report of Austria (UN doc. CRC/C/OPAC/AUT.1) 9. Referred to as "UNESCC Austria Report."

²²² UNESCC Austria Report above n 221, 9.

²²³ Harvey above n 112, 31.

²²⁴ Veerman above n 27, 273.

international standards will continue to be strengthened providing the higher standards apply.²²⁵

III RELEVANT ASPECTS OF INTERNATIONAL HUMANITARIAN LAW

A Introduction

International humanitarian law regulates the conduct of hostilities.²²⁶ It covers the protection of fundamental rights for humans during international and internal armed conflicts. International humanitarian law represents a compromise between humanitarian considerations and military necessity which gives it the advantage of being pragmatic and whilst also acknowledging military necessity, it also obliges armed groups to protect children²²⁷ although it falters when in this latter regard which I discuss below. International humanitarian law also creates obligations for individuals in times of armed conflicts.²²⁸

After the cessation of World War II, in 1946 a draft Convention for the Protection of Children in the event of International Conflict or Civil War was prepared by the Bolivian Red Cross.²²⁹ The impetus for this proposed draft Convention arose out of the extensive use of children in World War II which was the first widespread use of children in modern conflict.²³⁰ At that time, the use of children was viewed as an aberration from the traditional status of

²²⁵ Veerman above n 27, 273.

²²⁶ Shaw, Malcolm N *International Law* (5 ed Cambridge University Press, Cambridge 2003), 1054.

²²⁷ Machel Report above n 3, 62.

²²⁸ Provost above n 48, 98.

²²⁹ Van Bueren above n 5, 332, 329.

²³⁰ Colleen Maher "The Protection of Children in Armed Conflict: A Human Rights Analysis of the Protection Afforded to Children in Wartime" (1989) 9 BC Third World LJ 297, 302; see also Sarah Wells "Crimes against Child Soldiers in Armed Conflict Situations: Application and Limits of International Humanitarian Law" (2004) 12 Tul J Int'l & Comp L 287, 290.

children as non-combatants in war.²³¹ The following year provisions of the Red Cross draft Convention were approved to be incorporated into the fourth future Geneva Convention.²³²

C. Protocols additional to the Geneva Conventions

Primarily, the important humanitarian law treaties that give protection to children in times of war are the Fourth Geneva Convention²³³ and Additional Protocols I and II²³⁴ which are universal in their application. The foundation of the Geneva Conventions system is the principle that persons not actively engaged in warfare should be treated humanely.²³⁵ Even where a State has not ratified or consented to any particular treaty, it may still be bound by rules that have acquired the status of customary international law, for example because of the convergence of the practice of States over time and the accompanying sense of legal obligation.²³⁶

B. Fourth Geneva Convention

The Fourth Geneva Convention was the first treaty to provide for the protection of civilian persons under Common Article 3 including limited protection²³⁷ for children in times of war but only where they are victims or in opposition hands.²³⁸ The majority of the Fourth Geneva Convention's provisions do not afford specific protection to children aged under eighteen years as the concept that such persons are "children" and entitled to special protection did not exist in 1949.²³⁹ With regard to non-international armed conflicts, Common Article 3 of the four Geneva Conventions of 1949 affords some protection but only extends fundamental humanitarian protections to

²³¹ Wells above n 230, 290.

²³² See generally Van Bueren, above n 5, 329.

²³³ Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (1949). Referred to in this paper as the "Fourth Geneva Convention."

²³⁴ Protocol I above n 24; Protocol II above n 69.

²³⁵ Shaw above n 226, 1055.

²³⁶ Cohn and Goodwin-Gill above n 18, 55; see also generally Hackenberg above n [] at 438.

²³⁷ For example, the provision of medicine, hospitals, clothing, food. See Fourth Geneva Convention arts 13–26.

²³⁸ Geneva Convention IV above n 223.

²³⁹ See generally Harvey above n 112.

children as non-combatants.²⁴⁰ The view of children simply as civilians at this time stemmed from the belief that children were incapable of evil.²⁴¹

C Protocols additional to the Geneva Conventions

The “child soldier” as a concept in international humanitarian treaty law was addressed in the Protocol I²⁴² and Protocol II²⁴³ with two distinct categories of children: those under fifteen and those aged between fifteen and under eighteen years. The provisions of the two Protocols built upon and developed the earlier Geneva Conventions.²⁴⁴ After the adoption of the 1949 Geneva Conventions, a proliferation of new nations entered the world community, a multitude of armed conflicts took place under a variety of conditions and marked changes occurred in the nature of hostilities.²⁴⁵ These factors amongst others contributed to widespread views that the body of traditional law for the protection of civilians including children in armed conflicts was not adequate to fulfil its purpose in the modern age.²⁴⁶ Thus the ICRC began studies and consultations in the 1960’s and 1970’s to improve Common Article 3 to reflect the changing nature of war thereby affording much needed protection also for children.²⁴⁷ In 1974, the Declaration of the Protection of Women and Children in Emergency and Armed Conflict reinforced the need to safeguard the civilian population²⁴⁸ but no mention was made of child soldiers.

The conferences held by the ICRC and government experts in the 1970s resulted in Common Article 3 remaining unchanged and it kept its autonomous

²⁴⁰ Renteln above n 45, at 192.

²⁴¹ Matthew Happold “Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention” (2002) 17 Am U Int’l L Rev 1131, 1147.

²⁴² Protocol I above n 24.

²⁴³ Protocol II above n 69.

²⁴⁴ Shaw above n 226, 1056.

²⁴⁵ See Murphy above n 56, 46-48.

²⁴⁶ See generally Murphy, above n 56, 46-48.

²⁴⁷ See Shaw above n 226, 1056

²⁴⁸ Renteln above n 45, 192.

existence.²⁴⁹ In debates on draft Protocol II and the proposed criteria for armed conflicts Protocol II would apply to, it was identified that draft Protocol II may reduce the scope of Common Article 3.²⁵⁰ Thus Common Article 3 was not changed as there was a need to safeguard what it had already achieved and it needed therefore to remain applicable to all armed conflicts other than those subject to Common Article 2 (international armed conflicts).²⁵¹ Instead two new draft protocols resulted and were drafted by separate committees of the UN Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.²⁵² I discuss the provisions for child soldiers in the two Protocols below.

I Additional Protocol I

Generally, Protocol I expanded the concept of international armed conflict and extended protection of civilians and children to international conflicts.²⁵³ The relevant protections for children soldiers are set out in article 77 of Protocol I which is essentially about limiting the freedom of parties to conflicts to recruit or involve children, whilst recognising a child who participates in hostilities as a member of the armed forces should not lose combatant status and its consequential entitlements.²⁵⁴ Article 77(2) of Protocol I is pertinent to the issue of child soldiering and provides:

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 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

²⁴⁹ Sylvie Junod "International Humanitarian and Human Rights Law in Non-International Armed Conflicts: Additional Protocol II: History and Scope" (1983) 33 Am. UL Rev. 29, 31.

²⁵⁰ Junod above n 249, 32.

²⁵¹ See Junod above n 249, 32.

²⁵² Levie, Howard *Protection of War Victims: Protocol I to the 1949 Geneva Conventions* (Oceana Publications, New York, 1985)

²⁵³ Protocol I above n 24.

²⁵⁴ Cohn and Goodwin-Gill above n 18, 63.

who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.

A number of States included a definition of the term "feasible" in the understandings that accompanied their instruments of ratification to Protocol I.²⁵⁵ While much of the points made earlier apply when considering article 77(2) of Additional Protocol I regarding the standard of measures to be taken and the minimum age, it should be observed that it has weaker obligations.

As discussed earlier this obligation is weaker than the "all feasible measures" provision. Whilst this may give States, the ICRC and concerned outsiders a legal basis for recommendatory interventions it will stand for little more unless strengthened from other quarters such as national legislation and practice of States.²⁵⁶ Van Bueren considers this obligation to be an additional safeguard.²⁵⁷ In the context of international armed conflict and international humanitarian law therefore children aged between fifteen and eighteen years who are recruited into the armed forces are not entitled to protection against the effects of hostilities.²⁵⁸

At the 1974 Diplomatic Conference Brazil submitted a proposal to prohibit the recruitment of persons less than eighteen years of age into the armed forces.²⁵⁹ Brazil's proposal was rejected and a compromise reached between member States which resulted in Article 77(2) of Protocol I. Article 77 of Protocol I instead has its origins in a draft prepared by the ICRC which had initially proposed that States should not only refrain from recruiting children under fifteen in their armed forces but also from accepting their voluntary

²⁵⁵ Dennis above n 142, 791 cites for example, Canada, Germany, Ireland, Italy, the Netherlands, Spain and the United Kingdom.

²⁵⁶ Cohn and Goodwin-Gill above n 18, 63.

²⁵⁷ Van Bueren above n 5, at 131.

²⁵⁸ United Nations Economic and Social Council Commission on Human Rights, Inter-sessional open ended working group on a draft optional protocol to the Convention on the Rights of the Child on involvement of children in Armed Conflicts "Comments on the Report of the Working Group – Report of the Secretary General" (UN Doc. E/CN.4/1998/WG.13/2, 4th Sess., 1997) 58. Referred to as "UNESCC Working Report 1997."

²⁵⁹ UNESCC Working Report 1997, 57.

recruitment.²⁶⁰ At the time of its initial drafting, article 77(2) of Protocol I was article 68(2) of draft Protocol I introduced by the ICRC in these terms:

“The Parties to the conflict shall take all necessary measures in order that children aged under fifteen years shall not take and part in hostilities and, in particular, they shall refrain from recruiting them in their armed forces or accepting their voluntary recruitment.”²⁶¹

In May 1976 the ICRC draft text was finally referred to a Working Group.²⁶² Dr. Surbeck speaking for the ICRC felt that warfare was a matter for adults alone and for this reason article 68(2) of draft Protocol I was required and was of paramount importance for the protection of children.²⁶³ The ICRC proposal was supported in principle either as the preferred text or as the basis of further discussion by a number of delegates.²⁶⁴ In response Brazil wanted to set the age limit to eighteen years as a general condemnation of the policy of using children for military purposes²⁶⁵ which reflected its earlier proposal in 1974. Brazil pointed to the difficulty of establishing the age of adolescents and was equally concerned that the ICRC text did not categorically prohibit the possible presence of minors in military activities.²⁶⁶ Other States including Japan, Canada, the United Kingdom and Greece who recruited children over the age of fifteen either voluntarily or compulsorily argued eighteen was too high.²⁶⁷ Other

²⁶⁰ Kalshoven, Frits (ed) *Assisting the Victims of Armed Conflict and Other Disasters* (Martinus Nijhoff Publishers, Dordrecht 1989), 131. Geraldine Van Bueren referring to Official Records Vol. 1, Part III, p 22.

²⁶¹ UN Respect for Human Rights in Armed Conflicts: Third Session of the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Report of the Secretary-General, (UNGA UN Doc A/31.163, 3rd Sess. 1976)

²⁶² UN Respect for Human Rights in Armed Conflicts: Third Session of the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Meeting Report of Committee III, 5 May 1976 CDDH/III/SR.45; XV, 63 UN Doc A/31/163 3rd Sess. Referred to as the “UN Committee III Report 1976. and see also Levie above n 284, 94- 95.

²⁶³ Levie above n 284, 96, paras 3 – 8.

²⁶⁴ Levie above n 284, 94 – 101.

²⁶⁵ Levie above n 284, at 96 and UN. Doc. CDDH/III/325 for Brazil’s amendment to article 68(2) of Protocol I above n 24 and CDDH/III.328 for the same amendment Brazil was proposing be made to article 32 of draft Protocol II. Paras 11 - 12

²⁶⁶ Levie above n 284, 96 – 97.

²⁶⁷ Levie above n 284, 98 paras 16, 21 – 24, 33 – 36.

States pointed to differences in national legislation which permitted the enlistment of children under the age of eighteen.²⁶⁸

When the Working Group met in May 1977²⁶⁹ a revised draft article 68(2) was proposed in response to the ICRC text to create standards that would apply to children in participating in armed conflicts rather than ban all participation of children in armed conflicts.²⁷⁰ These appeared to decrease the actual protection afforded to children but were an attempt to insure some adherence by the participating nations which were later rejected in favour of the present form.²⁷¹ Article 77(2) of Protocol I was a compromise in many respects and not completely satisfactory to a number of representatives.²⁷² Part of Brazil's original proposal was taken into account, with the provision that in the event of recruitment of persons aged between fifteen and eighteen years priority should be given to the oldest.²⁷³ The Working Group recognised that sometimes, particularly in occupied territories and in wars of national liberation, a total prohibition on the voluntary participation of children under fifteen would be unrealistic.²⁷⁴

However as Dutli has observed the formulation of article 77(2) of Protocol I is less mandatory than that proposed by the ICRC which would have obliged the parties to have taken all necessary measures to prevent the

²⁶⁸ Levie above n 284 at 100 para 33 - 36

²⁶⁹ UN Respect for Human Rights in Armed Conflicts: Third Session of the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Meeting Report of Committee III, Working Group Committee III 3 May 1977 (CDDH/III/376), Levie above n 284, 101.

²⁷⁰ See Dennis above n 142.

²⁷¹ See Dennis above n 142.

²⁷² UN Respect for Human Rights in Armed Conflicts: Third Session of the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Report to the Third Committee on the Work of the Working Group 9 May 1977 (CDDH/III/391; XV, 517) Referred to as "UN Third Committee Report 1977"; Levie above n 284, 101.

²⁷³ See UN Third Committee Report 1977 above n 272.

²⁷⁴ See UN Third Committee Report 1977 above n 272; Levie above n 142, 102.

participation of children.²⁷⁵ Instead, the text reflects the desire of governments to avoid entering into "absolute obligations" in connection with child soldiering.

Under article 1 of Protocol I which is also common to the four Geneva Conventions of 1949, the High Contracting Parties (the ratifying States) undertake to respect and to ensure respect for those treaties in all circumstances. Article 1(4) of Protocol I offers an opportunity by way of unilateral act (as opposed to an obligation) for armed forces opposing States in an internal conflict to declare their adherence to the Geneva Conventions and Protocol I.²⁷⁶ For this reason article 77 in Protocol I relative to the issue of child soldiers binds "all parties to the conflict."²⁷⁷

2 Protocol II

Protocol II was also the first treaty to address in detail conduct in non-international (internal) armed conflicts provided the conflict fulfilled certain criteria set out in article 1 and which arguably may not apply to the majority of current civil wars.²⁷⁸ Many States also deny Protocol II applies to its internal conflicts which they claim are merely internal disturbances, tensions such as riots, isolated and sporadic acts of violence which are not armed conflicts.²⁷⁹ The African Charter aims to extend protection for children soldiers to these situations which do not meet the criteria in Protocol II. In addition, Protocol II is often not ratified by States and many situations may therefore be governed by Common Article 3 or by the Optional Protocol as discussed earlier. Thus a gradation in the legal norms applicable to child soldiers exists. The relevant norms are not considered part of customary international law.²⁸⁰

²⁷⁵ Cohn and Goodwin-Gill above n 18, 61 discussing Maria Teresa Dutli.

²⁷⁶ Cohn and Goodwin-Gill above n 18, 123.

²⁷⁷ Cohn and Goodwin-Gill above n 18, 123.

²⁷⁸ Protocol II above n 45, 194.

²⁷⁹ Renteln above n 45, 194.

²⁸⁰ See Renteln above n 45, 195.

Protocol II does not contain a provision similar to that of article 77(2) of Protocol I.²⁸¹ At the time of debating Protocol II, the ICRC offered a simplified version of Protocol I adapted to the special conditions prevailing in internal conflicts which defined its field of application restrictively.²⁸² Pictet comments this version was a totally unexpected and disappointing development.²⁸³ As a result of strong opposition by certain Third World countries, the draft protocol II was stripped at the last minute of about half its provisions and the other delegations yielded without much of a struggle.²⁸⁴ Thus, although it lost a great deal though the summary and ill-considered mutilation, Protocol II did however stand as a considerable advance in humanitarian law.²⁸⁵ The African Charter may well have addressed this. The guarantees applicable to child soldiers are set forth in article 4(3)(c) of Protocol II:

4. Children shall be provided with the care and aid they require in particular:
 - (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities

Unlike article 77(2) of Protocol I, a total prohibition on recruitment and participation exists under article 4(3)(c) of Protocol II. Article 4(3)(c) of Protocol II is an innovative provision because it contains a total prohibition of participation including even voluntary enlistment.²⁸⁶ Children are not to be involved in any military operations including transporting ammunition and foodstuffs, or acts of sabotage.²⁸⁷

²⁸¹ UNESCC Working Report 1997 above n 258, 59.

²⁸² Pictet, Jean *Commentary on the IV Geneva Convention* (International Committee of the Red Cross, Geneva 1958) 47 - 48

²⁸³ Pictet above n 282, 48.

²⁸⁴ Pictet above n 282, 48.

²⁸⁵ Pictet above n 282, 48.

²⁸⁶ Renteln above n 45, 194

²⁸⁷ Chen Reis "Trying the Future, Avenging the Past: Implications of Prosecuting Children For Participation in Internal Armed Conflict" 28 Colum Hum Rts L Rev, 629, 641.

Unfortunately a gap for non-international conflicts is created as Protocol II contains no article calling on States to respect and ensure respect for its provisions and consequently does not advance on the standards of protection afforded by humanitarian law under Protocol I.

Protocol II offers no explicit opportunity for armed opposition groups formally to declare their adherence to it but opposition groups can give notice of their intention to abide by Protocol II.²⁸⁸ Under Protocol II, two distinct obligations of conduct apply (neither be recruited nor participation) and voluntary participation of children under the age of fifteen years which are equally ruled out.²⁸⁹ The phrase "obligations of conduct" calls for action at the level of direct relations between States; the obligation requires a specifically determined course of conduct, and ascertaining whether it has been fulfilled simply turns on whether the State's action or omission is or is not in conformity with the internationally required conduct.²⁹⁰ Obligations of conduct and result have been discussed earlier but it seems illogical to have obligations of conduct in an internal conflict for the reasons previously stated. Non-State actors are notoriously difficult to hold accountable and the obligation can only apply other than where it is the State that recruits children in violation of Protocol II.

IV IMPLEMENTATION

Over the last decade the issue of the protection of children in armed conflicts has attracted growing attention and importance on the international stage.²⁹¹ In addition to the regional developments and the collective efforts of NGOs, the UN has been rather proactive in the area of child soldiering. This is

²⁸⁸ Cohn and Goodwin-Gill above n 18, 124.

²⁸⁹ Cohn and Goodwin-Gill above n 18, 64.

²⁹⁰ Cohn and Goodwin-Gill above n 18, fn 25.

²⁹¹ Harvey above n 112, 13.

crucial as the United Nations activities remain a first step in the uphill struggle to reduce human rights violations in the world.²⁹²

Mrs. Graca Machel²⁹³ was appointed by the Secretary General in 1993 to undertake the study using the CRC Convention as her framework and was requested to present a report on the impact of armed conflict on children.²⁹⁴ The Machel Report was published in 1996 and was the first comprehensive human rights assessment of war affected children.²⁹⁵ The Report recommends the minimum age for recruitment and participation of children in armed conflict to be set at eighteen. The effective protection of children from the impact of armed conflict is also stated as requiring an unqualified legal and moral commitment which acknowledges that children have no part in armed conflict.²⁹⁶ Rape was also identified as a continual threat for child soldiers as it is used as a tactical weapon of war to humiliate and weaken the morale of the enemy. In the conflict in Bosnia and Herzegovina for example, sons and fathers were forced to commit sexual atrocities against each other.²⁹⁷

The Machel Report is an excellent example of the type of report that should have been commissioned and available to delegates prior to the CRC Convention debates on child soldiering together with relevant empirical data. A comprehensive agenda focusing on the issues and findings Machel highlights in her report would have assisted the delegates to have debated and formulated workable provisions for the protection of children soldiers.

Whilst the Machel Report has been influential in the international arena and of immense benefit for children, it has also impacted greatly on the

²⁹² Thomas Buergenthal "International Human Rights Law and Institutions: Accomplishments and Prospects (1988) 63 Wash. L. Rev. 1

²⁹³ Graca Machel was the former Education Minister of Mozambique and widow of the former President of Mozambique.

²⁹⁴ Mrs Machel's appointment was made pursuant to General Assembly Resolution 48/157 (20 December 1993).

²⁹⁵ Harvey above n 112, 14.

²⁹⁶ Machel Report above n 3, 52.

²⁹⁷ Machel report above n 3, 22 - 23.

activities of the UN including its specialised agencies. For example, The Machel Report included a proposal for the appointment of a special representative for children and armed conflict.²⁹⁸ Thus, in 1997 the Secretary General Mr. Kofi Annan appointed Mr. Olara Otunnu as the Special Representative for Children and Armed Conflict. Mr. Otunnu's role has successfully raised the profile internationally of children soldiers. Significantly, Mr. Otunnu developed a systematic practice of eliciting and obtaining concrete commitments from parties in conflict: from States and insurgency groups.²⁹⁹ For example in Colombia in 1999, during Mr. Otunnu's visit the President announced an immediate end to all recruitment and discharge of soldiers under eighteen; by the end of that year, this was, in fact, realized.³⁰⁰ Working with State governments and NGOs, Mr. Otunnu has also developed important dialogue and co-operation with regional organisations, resulting in the integration of child protection into their advocacy, policies and programmes.³⁰¹ In the context of European Union institutions, this co-operation has led to several important initiatives, including funding of projects for the benefit of war affected children, guidelines for action on children and armed conflict and specific provisions for child protection and post-conflict rehabilitation in the Cotonou 2000 Partnership Agreement between the African, Caribbean and Pacific Group of States and the States members of the European Union.³⁰² Amongst many other matters, Mr. Otunnu has also found time to successfully canvas African governments to promote ratification of the African Charter.

During the past six years, another important advance has been made to improve the plight of the child soldier with the extensive involvement of the UN Security Council. More recently the Security Council has been dealing with human rights problems. In the area of child soldiers, examples of the involvement of the Security Council includes its annual debate and review; the

²⁹⁸ Machel report above n 3, 22.

²⁹⁹ Secretary General Report above n 156, para 74.

³⁰⁰ Secretary General Report above n 156, para 75.

³⁰¹ Secretary General Report above n 156, 13.

³⁰² Secretary General Report above n 156, 14.

submission of an annual report from the Secretary General; the incorporation of child specific concerns into the briefs of Security Council fact finding missions; listing of parties to conflict that violate the rights of children in its reports (which contributes to monitoring and accountability) and a stipulation for the systematic inclusion of sections devoted to children in country-specific reports.³⁰³ Further the inclusion in the resolutions lends legitimacy to campaigning, fundraising and programming on these issues.³⁰⁴

The extensive involvement of the Security Council commenced in 1998 when the issue of war affected children was formally placed on its agenda resulting in its progressive engagement and yielding significant gains for these children.³⁰⁵ The harmful and widespread impact of armed conflict on children and the consequences of this for durable peace, security and development were of grave concern to the Security Council when it first met in 1999.³⁰⁶ In 2002, the Secretary General called for “an era of application” of international norms and standards for the protection of children affected by armed conflict which the Security Council endorsed.

At the request of the Security Council, the Secretary General identified parties using child soldiers in conflicts taking place in Afghanistan, Burundi, Democratic Republic of Congo, Liberia and Somalia, joined by Cote d’Ivoire the following year.³⁰⁷ The Security Council is determined “to ensure respect” for its resolutions and other international norms and standards for the protection of children affected by armed conflict.³⁰⁸ It has recently called for the recruitment and use of children in armed conflict to be halted within three

³⁰³ See Secretary General Report above n 156, para 4.

³⁰⁴ Harvey above n 112, 17.

³⁰⁵ Secretary General Report above n 156, para 3.

³⁰⁶ UN Security Council Resolution 1261 (1999) S/RES/1261 (1999) para 1. Five Security Council resolutions have been devoted to the issue of child soldiers (Security Council resolutions 1261 (1999), 1314 (2000), 1379 (2001) 1460 (2003) and 1539 (2004)).

³⁰⁷ Secretary General Report above n 156, para 3.

³⁰⁸ Security Council Resolution 1539 (2004) preambular para 9,

months.³⁰⁹

The Security Council has made it clear that it intends to consider imposing targeted and graduated measures on these parties through country specific resolutions such as bans on exports or supplies of small arms, light weapons and other military equipment or assistance if parties fail to develop an action plan or to meet its commitments to halt child soldiering.³¹⁰ These are similar sanctions to those suggested in the Maputo Declaration. If the Security Council proceeds with such bans, it will need to have assessed and planned such a regime to ensure that any impact on child soldiers is minimised. The proposed bans appear to be appropriately targeted at the vulnerabilities of those parties who recruit and use children in armed conflict in violation of laws applicable to them. They may not however go far enough but they are at least a step in the right direction. Equally the Security Council must continue its involvement and ensure its bans are monitored and amended appropriately if they cause undue suffering to child soldiers or are ineffective. It is hoped the heightened profile and pressure the Security Council brings to the issue of child soldiers will have a profound effect on the elimination and prevention of all children in conflict.

V CONCLUSION

At the end of the day, there are two ways child soldiering will be eliminated and prohibited: either we end all wars or all parties to conflicts agree to abide by improved international humanitarian laws and human rights instruments that ban (rather than regulate) children from participating in war. Neither of which seems realistic in a world bent on fighting and where poverty, economic and social factors draw children daily into the fray. In consequence it is recommended that the international community and the United Nations continue their impressive attempts to eliminate and prohibit the participation

³⁰⁹ Security Council Resolution 1539 (2004) para 5(a).

³¹⁰ The Secretary General has been mandated to report by 31 October 2004 on the compliance and progress made by parties in this regard. Security Council Resolution 1539 (2004) para 5(c)

and recruitment of children into conflicts. An urgent review of the pertinent international laws discussed in this paper is required to achieve workable provisions to assist in effecting immediate change on the ground for children in armed conflict. Child soldiers and their rights to protected war must be improved and applied without hesitation otherwise we will be doing nothing more for child soldiers than paying lip service to their plight and even less for them as children.

Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182), 38 ILM 1207 (1999)

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (1953)

Convention on Forced Labour (1930) No. 29

Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979) G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/830 (1979) reprinted in 19 ILM 33 (1980)

Convention on the Rights of the Child (20 Nov 1989) GA Res. 44/25 Annex 44 UN GAOR Supp. (no. 49) 167 UN Doc A/44/49 (1989)

Declaration on the Protection of Women and Children in Emergency and Armed Conflict, GA Res 3318 (xxxix) 29 UN GAOR Supp (no 31) at 146, UN Doc A/9631 (1974)

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International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No.16) at 49, UN Doc A/6316 (1966), 993 UNTS 3

International Labour Organisation Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) No. 182

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