

2005

The International Legal Standards Adopted to Stop the Participation of Children in Armed Conflicts

Joseph N. Madubuike-Ekwe

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/annlsurvey>



Part of the [Other Law Commons](#)

Recommended Citation

Madubuike-Ekwe, Joseph N. (2005) "The International Legal Standards Adopted to Stop the Participation of Children in Armed Conflicts," *Annual Survey of International & Comparative Law*: Vol. 11: Iss. 1, Article 3.
Available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol11/iss1/3>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Annual Survey of International & Comparative Law by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

THE INTERNATIONAL LEGAL STANDARDS ADOPTED TO STOP THE PARTICIPATION OF CHILDREN IN ARMED CONFLICTS

JOSEPH N. MADUBUIKE-EKWE*

I. INTRODUCTION

In the past century, the face of warfare has changed drastically, making it exceedingly difficult to distinguish between civilians and soldiers on the one hand, and children and adults on the other.¹ Over the last decade, two million children have been made orphans, over six million have been seriously injured, or permanently disabled, and over ten million have been left with grave psychological trauma.² A large number of children especially young women have been made targets of rape and other forms

* Doctor of Juridical Science (S.J.D) Candidate, Golden Gate University School of Law, San Francisco; LL.M (Ile-Ife) 1995; LL.B (Hons) University of Nigeria, Nsukka, 1990; Admitted to practice law in Nigeria (1991) and Republic of Fiji Islands(1997);Lecturer, College of Legal Studies, Abia State University, Uturu, Nigeria (1996-1997); Legal Officer, Attorney-General's Chambers, Suva, Fiji Islands (1997-1999). I would like to express my appreciation to the Dean and Distinguished Professor Sompong Sucharitkul, Professor Christian Okeke and Professor Warren Small for their help, guidance and encouragement. I also wish to thank Christopher Jones, Admin. Officer, LL.M (international Legal Studies) Golden Gate University School of Law, San Francisco, California.

1. See Amy Beth Abbott, Note, *Child Soldiers-The use of children as instruments of war*, 23 SUFFOLK TRANSNAT'L L. REV. 499, 509 (2000) discussing that wars have moved from well defined battlefields to populated areas such as villages.

2. *Id.*; see also, Olara Otunnu, Special Representative of the Secretary-General of the UN for Children and Armed Conflict, at a press briefing on the Protection of Iraqi Children during Conflict (March 21, 2003), (visited March 24, 2003) <<http://157.150.184.6/0SRSGCAAC/East.cfm?>>; see also, speech of His Holiness Pope John Paul II for the celebration of World day of Peace (Jan. 1, 1999); see also, Norimitsu Onishi, *Children of War in Sierra Leone Try to Start Over*, N.Y TIMES, May 9, 2000, at A14, available at <<http://www.crin.org/resources/infodetail.org>>.

of sexual violence as a deliberate instrument of war. At present, there are over twenty million children who have been displaced by war within and outside their countries.³ Some three hundred thousand young persons under the age of eighteen are currently serving in armed conflicts around the world.⁴ Despite the United Nations' achievements with peacekeeping missions, ethnic conflicts continue to rise and new states continue to expand the international community. The global community must work collectively to establish a legal framework regarding the increased use or participation of children in armed conflicts.

The aim of this paper is to discuss the participation of children in armed conflicts around the world and the various international legal standards adopted to stop it. The paper will first describe the factors that contribute to the involvement of children in armed conflicts. It will examine the relevant international armed conflict (humanitarian) laws and other legal standards governing the use of children in armed conflicts and their effectiveness. The paper will also discuss the United States position on the Global efforts to ban the use of children in armed conflicts. Finally, the paper will discuss the problems of implementation, compliance and enforcement of the various laws governing the use of children in armed conflicts and make recommendations on how to make the laws more effective in protecting the children from participating in armed conflicts.

II. FACTORS THAT CONTRIBUTE TO THE PARTICIPATION OF CHILDREN IN ARMED CONFLICT

There are two categories of children in armed conflicts: child soldiers and civilian children. Throughout history, military groups have used children as soldiers, but in recent years, the deliberate recruitment of child soldiers has dramatically increased in many global conflicts.⁵ Since the end of the cold war, protecting children from grave human rights abuse has been extremely difficult because the nature of the world's conflict have become increasingly internalized, localized, and grounded in nationalistic, ethnic and religious dissension.⁶ In these localized conflicts, opposing sides do not distinguish between children and adults. Militia groups directly target and exploit children rather than

3. See Otunnu, *supra* note 2. See also, Graca Machel, *Child soldiers: An affront to humanity*, (visited Apr. 2, 2003) <<http://www.un.org/rights/concerns.htm>>, discussing that child soldiers are an affront to humanity [hereinafter *Machel Study*].

4. See Abbott, *supra* note 1.

5. *Id.*

6. See, *When Children are Soldiers*, N.Y. TIMES, July 5, 1998, analyzing the changing dynamic and method of warfare.

respecting International Humanitarian Law and protecting the children from threats of armed conflict.⁷

Nowadays, wars are no longer confined to well-defined battlefields, rather they occur in populated areas where recruiters can easily take children out of buses, schools, and churches and away from their villages.⁸ Distinguishing between civilian and combatant becomes difficult as wars progress because the soldiers take over civilian territory blurring the lines between civilians and combatants.⁹ Military groups employ the battle's location for their benefit by exploiting children's presumed innocence through the utilization of children as spies and messengers.¹⁰ Such an environment fosters mistrust and suspicion of all children, furthering the difficulty child soldiers face when attempting to reintegrate into their community.

Technological developments have also contributed to the problem of child soldiers. Inexpensive new lightweight weapons have made it tragically easy to use children as cannon fodder in modern warfare.¹¹ In Uganda, for instance, an AK-47 which is simple enough for a child of ten to strip and reassemble, can be bought for the same price as a chicken and, in Mozambique, for a bag of maize.¹² This newfound ease of arming children, coupled with drugs and alcohol given to children by military leaders, transform these young boys and girls into executioners, assassins and combatants.¹³

Military leaders recruit children when there is a shortage of adult soldiers.¹⁴ As time passes, increasing casualties and escalating conflicts lead to a desperate search for new recruits. To alleviate the manpower shortage, rebel and government forces look to the nation's youth to fill

7. *Id.* "Wars today are... fought by warlords who have little interest in the Geneva Convention and may view even infants as enemies." See also Abbott, *supra* note 1.

8. See Jimmy Carter, *Kid Soldiers, War's most tragic Victim*, USA TODAY, June 30, 1998, at 11A, discussing factors leading to the increase in Child Soldiers. See also ILENE COHN & GUY GOODWIN-GILL, *CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICTS* (1994).

9. See, *Machel Study*, *supra* note 3. See also William Branigin, *Gruesome scene: Edgy Soldiers Fire on Car and Kill Civilians*, S.F. CHRONICLE, April 1, 2003 at A1, reporting the shooting by US Marines of a four-wheel drive vehicle full of women and children at a checkpoint in Iraq during the conflict between the U.S. and Iraq.

10. See UNICEF, *Patterns in Conflict: Civilians are now the Target* (visited Jan.30, 2003) <<http://www.unicef.org/graca/patterns.htm>>; see also Abbott, *supra* note 1.

11. See Abbott, *supra* note 1; see also, *Machel Study*, *supra* note 3.

12. See Abbott, *supra* note 1

13. See Allison Dundes Renteln, *The Child Soldiers: The Challenge of Enforcing International Standards*, 21 WHITTIER L.REV.191 (1999).

14. See, *Machel Study*, *supra* note 9; see also Abbott, *supra* note 1. For example in Angola, the civil war spanned over thirty years, making volunteers difficult to find especially after witnessing the effects of war on their predecessors.

their army ranks.¹⁵ The children most likely to become soldiers are from impoverished and marginalized backgrounds or separated from their families.¹⁶ Children from wealthier and more educated families are often left undisturbed or released if their parents can ransom them back.¹⁷

III. RECRUITMENT OF CHILD SOLDIERS

Child soldiers are “recruited” in different ways.¹⁸ Some are conscripted, others are press-ganged or kidnapped and still others are forced to join armed groups to defend their families.¹⁹ Some join the army voluntarily.

A. VOLUNTARY RECRUITMENT

In most cases, children voluntarily enlist in the armed forces. There are few, if any, known instances of a military group denying participation to underage volunteers. There are many cultural, economic, social, ideological and security reasons for volunteering. Often the culture of violence, the desperation for food, the need for security or the drive to avenge the death of family members prompts such unforced recruitment.²⁰

Children who grow up in a war-torn environment may feel obliged to join the military regime out of a sense of loyalty, ethnic grievance,²¹ or merely in an attempt to survive.²² For these children, the lack of an alternative means to fulfill basic needs such as food and shelter is likely to lead to their participation in armed conflict. As such, any “choice” these children may have as to whether or not to enlist is illusory. In some cases, participating in war is glorified by their culture or held up as a sign of masculinity.²³

15. See, *Machel Study*, *supra* note 9; see also UNESCO; *Global Perspectives-Human profile cases: Who are child and young adult soldiers?* (visited 3/25/2003) <http://ginie1.sched.pitt.edu/ginie-crises-links/child_soldiers/human.html> [hereinafter *Human profile cases*].

16. See, *Machel Study*, *supra* note 3.

17. *Id.*

18. “Recruitment” covers any means (formal or de facto) by which a person becomes a member of the armed forces or of an armed group, so it includes conscription (compulsory/obligatory military service), voluntary enlistment, and forced recruitment.

19. See UNICEF, *Child Soldier Projects; The case of Sierra Leone* (visited 2/25/2003) <http://ginie.sched.pitt.edu/ginie-crises-links/child_soldiers/sierra_Leone_1.html>, discussing children who have been abducted and conscripted into the various warring factions.

20. *Id.*, see also Abbott, *supra* note 1.

21. See UNICEF, *supra* note 19.

22. See, *Machel Study*, *supra* note 3.

23. See Rohan Gunaratna, *LTTE Child Combatants* (visited Jan. 27, 2005) <<http://ourworld.comuserve.com/homepages/sinhala/child.htm>>, noting that children were attracted

B. FORCED RECRUITMENT

Most armed groups recruit children by force. Armed groups use force to take children from schools, public places and even their own homes.²⁴ During these abductions, armed groups may compel children to follow orders by threatening death or by forcing the children to commit atrocities against family members and friends so that they become hardened to violence.²⁵

Forced recruitment occurs even in states where legislation is in place to prohibit compulsory military service before the age of eighteen.²⁶ The non-existence of identification papers stating an individual's name and age, for instance, often facilitates the recruitment of minors. In these situations, even if minimum age requirements are in place, without identification papers recruiters may evade the law. As evidenced by the abuses committed in Sierra Leone, forced recruitment often becomes systematic due to the lack of serious legal ramifications which armed groups face.²⁷

The most common form of forced recruitment is called press-ganging, where armed militia groups or police roam the streets and public gathering places, including school gates, to round up individuals they come across.²⁸ Forced recruitment may also be accomplished through intimidation to make it appear voluntary. Some children receive military indoctrination in school programs, through the integration of military life into the general curricula.²⁹ Due to their young age, children cannot dif-

to the LTTE guerillas by the glamour and perceived respect it was paid by society. *See also* Abbott, *supra* note 1, at 4.

24. *See* AMNESTY INT'L U.K., IN THE FIRING LINE - WAR AND CHILDREN RIGHTS 61(1991) (hereinafter FIRING LINE) explaining that minors are recruited when the number of adult soldiers is insufficient. *See also* Stephanie H. Bald, *Searching for a Lost Childhood: Will the Special Court of Sierra Leone Find Justice for Its Children?* 18 AM.U. INT'L L. REV. 537.

25. *See* FIRING LINE, *supra* note 24, explaining that armed groups force children to take part in gruesome initiation ceremonies. *See also* Bald, *supra* note 24, describing the recruitment of child soldiers.

26. *See* FIRING LINE, *supra* note 24, noting that "inefficiency, corruption or structural inadequacies" inhibit the effectiveness of legislation setting an age limit of eighteen for participation in armed conflicts.

27. *See* Bald, *supra* note 24. *See also*, *Hearings on U.S Ratification of the Optional protocols to the Convention of the Rights of the Child before the Senate Foreign Relations Comm.*, 107th Congress (2002) (testimony of Jo Becker, advocacy Director Children's Rights Division, Human Rights Watch, discussing the plight of Child Soldiers in more than thirty different world conflicts) (visited Jan. 31, 2003) <<http://www/hrw.org/press/2002/03/childsoldiers0307.htm>> [hereinafter *Becker Hearings*].

28. *See*, *Human Profile cases*, *supra* note 15.

29. *Id.*; *see also* Bald, *supra* note 24.

ferentiate between competing ideologies or fully appreciate the implications of their decisions and actions.³⁰

C. EFFECT OF RECRUITMENT

Armed groups treat child soldiers the same as adult recruits and do not afford children special treatment because of their age.³¹ In some cases, children are viewed as possessing special attributes for high-risk functions. They are forced to undertake more dangerous missions such as entering minefields before older troops or being sent on suicide missions.³²

Once recruited into the military units, especially those of non-governmental rebel groups, children face a life of violence and danger for which they are ill prepared.³³ As combatants,³⁴ they stand to lose their civilian status and thus the protection that they would normally enjoy under humanitarian law.³⁵ They are presented to the enemy as legitimate targets of war.³⁶ The child soldier, like any other member of an armed force,³⁷ is exposed to the traditional aims of warfare: the death and disablement of enemy personnel.³⁸

The consequence of all these practices is death, permanent injury, psychological trauma and social dislocation of the children.³⁹ If children are to be spared this fate, they must be excluded from any form of participation in armed conflicts. As will be discussed later, several rules have been made to achieve this goal. The sources for these rules lie, among others, in humanitarian law and human rights law. While humanitarian law has a long tradition of protecting civilians (and by implication children) from the effects of war, its field of application is restricted to

30. See Bald, *supra* note 24.

31. See *id.*, (discussing how child soldiers in Sierra Leone during their civil war experienced beatings, forced marches carrying heavy loads, and separation from family).

32. See, *Becker Hearings*, *supra* note 27, discussing how children are forced into hazardous roles.

33. See, *Criminalizing the Recruitment of Child Soldiers-Using Children in Armed Conflicts*, in MONOGRAPH NO.32: USING CHILDREN IN ARMED CONFLICT: A LEGITIMATE AFRICAN TRADITION? (Dec. 1998) (visited April 6, 2003) <<http://www.iss.co.za/Pubs/Monographs/No32/Criminalising.html>> [hereinafter MONOGRAPH NO.32].

34. "Combatants" are members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces; see LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT*, 108 (Manchester Univ. Press, 2nd ed., 2000).

35. "Humanitarian Law" is also called the "Laws of Armed conflict" or the "Laws of War."

36. See MONOGRAPH NO 32, *supra* note 33.

37. *Id.*

38. *Id.*

39. See *id.*; see also, *Machel Study*, *supra* note 3.

armed conflicts. On the other hand, human rights law has the advantage of being more general since it is applicable at all times and in all places but until recently, it was not specifically concerned with the problem of child soldiers.⁴⁰

Most of the laws concerning child soldiers are international and not municipal or national laws.⁴¹ Yet, international law governs the relationship of states, and this is the main obstacle to the effective application of rules of international law intended to protect the interest of individual human beings. Those most likely to be responsible for recruiting child soldiers are rebel groups. Rules of international law, however, are addressed to states with the result that non-governmental entities such as rebels, irregular militias and armed insurgents are not bound, and the beneficiaries of the rules - children - have no enforceable rights.⁴²

IV. INTERNATIONAL LEGAL STANDARDS GOVERNING CHILD SOLDIERS

There are four kinds of international law in relation to child soldiers: International Humanitarian Law (otherwise known as the “Laws of Armed Conflict”), International Human Rights Law, International Criminal Law and the International Labour Law.⁴³

A. INTERNATIONAL HUMANITARIAN LAW

International Humanitarian Law (IHL), also known as the “Laws of Armed Conflict,” is the body of law which aims to regulate the conduct of armed conflict by establishing rules regarding methods of warfare and protection of victims.⁴⁴ During medieval times, the general principles of humanitarian law restricted the ways in which warfare may be conducted.⁴⁵ The principle of ‘humanity’ limited the choice of means to that most humane; the principle of ‘necessity’ permitted only a minimal amount of force to be used; and the principle of ‘discrimination’ stipulated that only military targets could be attacked.⁴⁶ Children, together with the sick, the elderly, and mothers of children (an especially vulner-

40. See MONOGRAPH NO. 32, *supra* note 33.

41. “Municipal or National Laws” are the legal systems applied internally by states to those living within their borders under their national legal systems.

42. See MONOGRAPH NO.32, *supra* note 33.

43. See, *Human Rights Watch: Child Soldiers: International Legal Standards Governing Child Soldiers* (visited March 25, 2003) <<http://www.hrw.org/campaigns/crp/int-law.htm>> [hereinafter *Child Soldiers*].

44. See MONOGRAPH NO.32, *supra* note 33.

45. See Green, *supra* note 34.

46. *Id.*

able category of civilians), derived their greatest measure of protection from the requirement that civilians and military targets were to be distinguished.⁴⁷ Yet even in 17th century Europe, established custom kept children under twelve out of areas of conflict.⁴⁸ IHL therefore has afforded some degree of protection to children, but initially treated them only as civilians.⁴⁹

Humanitarian law first protected children, though indirectly, by promoting family life under the Hague Convention.⁵⁰ After World War II, the customs, treaties and declarations governing the conduct of hostilities were defined, extended and codified in Four Conventions. These, and their subsequent protocols, are collectively known as the "GENEVA RULES." They are now synonymous with Humanitarian Law.⁵¹ The Geneva Conventions did not set out to guarantee non-combatants immunity from violence of war. Rather, the goal was to protect certain categories of persons who fell into the hands of an adversary during an armed conflict.⁵² The Geneva Convention applies only to conflicts of international character.⁵³ With regard to non-international armed conflicts, Article 3, which is common to all four of the Conventions extends certain minimum humanitarian protection to non-combatants and to the sick and the wounded.⁵⁴ Common Article 3 relates to treatment of non-combatants and does not explicitly deal with the issue of child combatants. Consequently, international law did not address the question of children participating in war.

To address this question, two 'Additional Protocols' were adopted in 1977 to supplement the four Geneva Conventions. The two protocols finally dealt directly with the role of children in armed conflicts, regulat-

47. See Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, and annexed Regulations Respecting the Laws and Customs of War on Land, Oct.18, 1907, 36 Stat. 2277, T.S. No.539. [hereinafter Hague Convention] see also Hans-Peter Gasser, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: An Appeal for Ratification by the United States*, 81 AM. J. INT'L. L. 912, 915 (1987).

48. See MONOGRAPH NO.32, *supra* note 33.

49. See JENNY KUPER, INTERNATIONAL LAW CONCERNING CHILD CIVILIANS IN ARMED CONFLICT, chap. 4 (1997).

50. See Hague Convention, *supra* note 47.

51. See MONOGRAPH NO.32, *supra* note 33.

52. See Convention Relative to the Protection of Civilian Persons in Time of War, Aug.12, 1949, No.973, 6 U.S.T. 3516, 75 U.N.T.S 287 [hereinafter Geneva Convention IV].

53. "Conflicts of International Character" refer to wars, or armed conflicts between states through the medium of their armed forces. See, Green, *supra* note 34 at 54.

54. Common Article 3 does not specify the Law of War for non-international Conflict and does not contain a "grave breaches" provision mandating criminal punishment.

ing this phenomenon for the first time.⁵⁵ Article 77 of Protocol I provides that:

(2) The parties to the conflict shall take all feasible measures in order that children who have not attained the age of 15 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 15 years but who have not attained the age of 18 years, the parties to the conflict shall endeavor to give priority to those who are oldest.

(3) If, in exceptional cases, despite the provisions of paragraph 2, Children who have not attained the age of 15 years take a direct part in hostilities and fall into the power of an adverse party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.⁵⁶

This protocol has been criticized for requiring States to “take all feasible measures” to protect children from warfare. Such a low standard will allow a state party considerable freedom to evade the general prohibition. No minimum age limit was attached to the term “children” in Article 77(2). This omission left an ambiguity that states could exploit to their advantage.⁵⁷ The Parties to the Protocol were obliged only to ensure that children did not take a “direct” part in hostilities. Qualifying the nature of participation in this manner fostered ambiguity and invited subjective interpretation by states.⁵⁸

It is also futile to protect children only in cases of direct participation. Recent evidence shows that children who start their military engagement in a support role usually become active combatants.⁵⁹ Furthermore, permitting any degree of participation undermines the principle at stake. Whether children participate directly or indirectly, they are in danger.⁶⁰ Even low level involvement, such as a messenger or menial camp attendant, exposes the individual to attack by the enemy. Association with a

55. See Renteln, *supra* note 13; see also MONOGRAPH NO. 32, *supra* note 33.

56. See Protocol Additional to the Geneva Convention of Aug. 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflict, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; see also Renteln, *supra* note 13; see MONOGRAPH NO.32, *supra* note 33.

57. See MONOGRAPH NO 32, *supra* note 33.

58. *Id.*

59. See R. Brett, *Child Soldiers: Law, Politics and Practice*, 4 INT'L J. CHILDREN'S RTS 115, 124, (Netherlands 1996).

60. See MONOGRAPH NO 32, *supra* note 33.

war effort means that if captured, a child could be treated as a spy, saboteur or illegal combatant.⁶¹

To avoid the last possibility, paragraph (3) was added to Article 77. Without this addition, children under 15 who participate directly in hostilities would stand to lose their entitlement to prisoner of war status under the Third Geneva Convention. Hence Article 77(3) provided that for the purposes of the Fourth Convention, such children would still be deemed "protected persons."⁶²

Although Additional Protocol II, like Protocol I, was intended to supplement the Common Article 3 provision in the four Geneva Conventions on "non-international" armed conflicts, it also applies to conflicts not covered in Protocol I.⁶³ These are defined in Article 1(1) of Protocol II as conflicts between state armies and "organized armed groups" which operate under a responsible command structure and exercise sufficient control over a portion of a state's territory to enable them to carry out sustained military operations.⁶⁴ Although Protocol II regulates the most serious and prevalent type of internal conflict, it does not apply to lesser forms of disorder, such as internal disturbances and tensions, including riots and isolated or sporadic acts of violence.⁶⁵ Article 4(3)(c) of Protocol II provides that in non-international armed conflicts, "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." This is an innovative provision because it contains a total prohibition on participation, including even voluntary enlistment. Children are not to be involved in any military operation, including transportation of ammunition and foodstuffs or acts of sabotage.⁶⁶ The language of the Protocol ascribes responsibility to those who allow children to participate rather than to the children themselves.⁶⁷

61. *Id.*

62. *See id.*

63. *See id.*; see also Chen Reis, *Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participating in Internal Armed Conflict*, 28 COLUM. HUMAN RIGHTS L. REV. 629 (1997).

64. See MONOGRAPH NO32, *supra* note 33; see also Theodore Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589, 599 (1983); see also George H. Aldrich, *Some Reflections on the Origins of the 1977 Geneva Protocols*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES 129 (Swinarski ed., 1984).

65. Protocol Additional to the Geneva Convention of Aug. 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflict opened for signature Dec. 12, 1977, art. 1(2), 1125 U.N.T.S. 609, 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

66. Protocol II, *supra* note 65, art. 4(3)(c); see also Reis, *supra* note 63.

67. See Renteln, *supra* note 13.

It is noteworthy that Protocol II is binding on states as well as armed opposition groups.⁶⁸ Protocol II was intended to expand the scope of protection for victims in internal armed conflicts; unfortunately many states have not ratified it. Many states also deny that it applies to the conflicts in which they are involved because they claim that the conflicts are merely internal disturbances.⁶⁹ For example, the conflicts in Somalia, Afghanistan (under the Taliban), and Myanmar do not meet the threshold requirement of Protocol II. As such, children are being lost in gaps of existing international laws of war.⁷⁰ Since, there is also no body with authoritative power to declare what is a non-international armed conflict as opposed to a disturbance. It appears that the determination is left to the state party.⁷¹

The four Geneva Conventions and the two protocols afford protection to children in armed conflict in part by specifying age limits. They prohibit participation by those under fifteen and with regard to fifteen-to-eighteen-year-olds, mandate enlisting older children first.⁷² International usage has now settled on an age limit of fifteen as defining what "children" mean when no further description is given.⁷³ Although these rules are widely supported, they have not achieved the status of customary international law. The consensus is not sufficient for purposes of *opinio juris*.⁷⁴

IHL as defined in the four Geneva Conventions and the two protocols fails to protect many children from the tragedies of war. Many reasons account for this failure. First, most of the conflicts involving children are internal armed conflicts.⁷⁵ Second, many states have failed to ratify Protocol II. And last, the relevant norms are not considered part of custom-

68. See Protocol II, *supra* note 65, art. 4(3)(c).

69. Because Protocol II uses a high threshold of application it enables states to deny that their internal conflicts are covered. They assert that their conflicts are merely riots or separate acts of violence. See GUY GOODWIN-GILL & ILENE COHN, *CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICTS* (1994).

70. See Abbott, *supra* note 1; see also MONOGRAPH NO. 32, *supra* note 33.

71. See Reis, *supra* note 63.

72. See Protocol I, *supra* note 56; see also Protocol II, *supra* note 65, the protocols specify that those under 15 should not take a direct part in hostilities or be recruited. Existing standards differ on whether there should be prohibition of any participation in hostilities by children or whether they should proscribe only taking a direct part in hostilities. For example, Protocol II, art. 4(3)(c) prohibits any participation. On the other hand, Protocol I, art. 77(2) and the Convention on the Rights of the Child, art. 38(2) forbid only taking a direct part in hostilities.

73. See JEAN PICTET, *COMMENTARY ON THE IV GENEVA CONVENTION* 395(1958); see also Alex Obote-Odora, *Legal Problems of Children in Armed Conflict*, (visited April 1, 2003) <http://www.murdoch.edu.au/elaw/issues/v6n2/obote-Odora62_text.html>.

74. "Opinio juris" is a subjective component necessary for a usage or practice of States to rise to the level of international customary law, it must be shown that the usage or practice is adopted as a matter of legal obligation, rather than prompted by moral rectitude or by force of habit.

75. See Abbott, *supra* note 1.

ary international law.⁷⁶ These shortcomings of IHL, especially with reference to internal conflicts, have been acknowledged in the international community and have led to the development of global standards in other areas.⁷⁷

B. THE CONVENTION ON THE RIGHTS OF THE CHILD

Article 38 of the U.N. Convention on the Rights of the Child (CRC)⁷⁸ addresses recruitment of child soldiers. It provides that:

- (1) State Parties undertake to respect and to ensure respect for the rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
- (2) State Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a part in hostilities.
- (3) State Parties shall refrain from recruiting any person who has not attained the age of 15 years into their armed forces. In recruiting among those persons who have attained the age of 15 years but who have not attained the age of 18 years, states parties shall endeavor to give priority to those who are oldest.

Clearly, Article 38(2) can hardly be said to have settled the problem of children becoming involved in hostilities. It merely repeats the terms of article 77(2), with all the ambiguities and failings of that article.⁷⁹ Article 38 has been described as an anomaly in using a 15-year age minimum for child soldiers while in all other respects the CRC's general definitions of a child is any person below the age of 18.⁸⁰ However, states in favour of the age 18 definition are free to interpret Article 38(2) in light of Article 41 of the CRC, which provides that any conflict between the provisions of the Convention and obligations under municipal or international law must be settled in favour of whichever rule gives the child the greatest

76. Customary international law is that part of international law which is based on the practice of States, general and consistent, fortified by "opinio juris" as a necessary component, and serves to complement norms codified in Conventions or Treaties.

77. See, *Machel Study*, *supra* note 3.

78. See Convention on the Rights of the Child, G.A. Res. 44/25, 44 U.N. GAOR Supp. No.49, U.N. Doc. A/44/73 [hereinafter CRC].

79. If a state is also a party to Protocol II, the Protocol obligations prevail over art. 38 of the CRC, since art. 41 of the CRC provides that "nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child..." CRC, *supra* note 78.

80. See *Renteln*, *supra* note 13.

protection.⁸¹ To this end, when certain states such as Argentina and Austria ratified the CRC, they made special declarations that they would enforce the age of 18. As such, Article 38 of CRC was considered an innovation because it based human rights law on humanitarian law. The CRC applies to all children in all circumstances with the exception only of the United States and Somalia - the two countries not yet parties to it.⁸²

The CRC has two main limitations. First, it generally limits only the conduct of states while leaving out non-state actors. Secondly, the failure of the United States to ratify the Convention, when virtually all the other countries in the world have done so, undermines its efficacy.⁸³

C. THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

The African Charter on the Rights and Welfare of the Child is the only regional treaty in the world which addresses the issues of child soldiers. It was adopted by the Organization of African Unity (OAU) in 1990 and came into force in November 1999.⁸⁴ It is clear and specific. It defines a "child" as anyone below 18 years of age without exception.⁸⁵ Article 22(2) which forbids child soldiers provides:

States parties to the present charter shall take all necessary steps to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.⁸⁶

It should be noted that the African Charter has stronger language - "take all necessary steps"⁸⁷ - than the CRC, which merely asks states to "take all feasible measures."⁸⁸

D. THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The Statute of the International Criminal Court established a permanent International Criminal Court (ICC) to try persons charged with commit-

81. See MONOGRAPH NO.32, *supra* note 33.

82. See, *Child Soldiers*, *supra* note 43.

83. See Renteln, *supra* note 13.

84. See Charter on The Rights and Welfare of the African Child, July 11, 1990, art. 22(2), OAU Doc., CAB/LEG./24.9/49 (1990) [hereinafter African Charter].

85. See African Charter, *supra* note 84, art. 2.

86. See African Charter, *supra* note 84.

87. *Id.*

88. See CRC, *supra* note 78.

ting war crimes, crimes against humanity, and genocide.⁸⁹ The treaty gives the ICC jurisdiction over the war crimes of conscripting children under the age of fifteen into the national armed forces or armed groups, or using them to participate actively in hostilities.⁹⁰ In drafting the treaty, the delegates agreed that the terms “using” and “participate” would prohibit not only children’s direct participation in combat, but also their active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, as couriers, or at military checkpoints.⁹¹ Also prohibited is the use of children in “direct” support functions such as carrying supplies to the front line.⁹²

The ICC treaty substantially advances international law relating to the protection of children in armed conflict and the prosecution of violence against children. The treaty’s list of war crimes includes intentional attacks on educational institutions and schools, among other civilian buildings which have been frequently targeted in recruitment drives or as part of campaigns to terrorize civilian populations.⁹³

E. THE INTERNATIONAL LABOUR ORGANIZATION

The International Labour Organization (ILO) adopted Convention 182, in June 1999, concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour.⁹⁴ The Convention commits each state which ratifies it to “take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.”⁹⁵ The term “child” applies to all persons under 18 years⁹⁶ and “the worst forms of child labour” includes, inter alia, “forced or compulsory recruitment of children for use in armed conflict.”⁹⁷

Recommendation 190, accompanying Convention 182, encourages states to make such recruitment a criminal offense. This was the first time that

89. See UN Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9, 37 I.L.M. 999 [hereinafter ICC].

90. See *id.* art. 2.

91. See Human Rights Watch, *Promises Broken: The International Criminal Court* (visited march 25, 2003) <<http://www.hrw.org/campaigns/crp/promises/icc.html>> [hereinafter *HRW: Promises Broken*].

92. *Id.*

93. See *id.*; In Uganda, the lord’s resistance Army, “abducted children from their schools, communities and homes to camps in Sudan... forcing them to commit atrocities and become sexual slaves”.

94. See International Labour Organization Convention 182 Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour (1999) (entry into force Nov.19, 2000) [hereinafter Convention 182].

95. See *id.*, *supra* note 94, art. 1.

96. See *id.* art. 2.

97. See *id.* art. 3(a).

an 18-year minimum age limit was set in relation to child soldiering in an international treaty. It was also the first specific, legal recognition of child soldiering as a form of child labour.⁹⁸

F. THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT

The United Nations General Assembly adopted the Optional Protocol to the Convention on the Rights of the Child on May 25, 2000.⁹⁹ It entered into force on February 12, 2002.¹⁰⁰ The Convention raised the minimum age from 15 to 18 for direct participation in hostilities, for all recruitment into armed groups, and for compulsory recruitment by governments.¹⁰¹ However, states may continue to accept volunteers from the age of 16.¹⁰²

On becoming parties to the Protocol, states have to deposit a binding declaration setting out their minimum voluntary recruitment age and the safeguards they have adopted to ensure that such recruitment is not forced or coerced.¹⁰³ They also have to maintain standards to ensure as a minimum, that the recruitment is genuinely voluntary, with the informed consent of the recruits' parents or legal guardians, and that the recruit is fully informed of the duties involved in the military service and provides reliable proof of age prior to acceptance into national military service.¹⁰⁴ These declarations may be strengthened at any time but not weakened. In other words, a declaration can only be withdrawn in favour of a declaration specifying a higher minimum voluntary recruitment age into the government armed forces, and not a lower one.¹⁰⁵

In relation to armed groups, there is no requirement in the Optional Protocol that such groups are involved in armed conflict. This means that

98. See Appendix 3, International Legal Protection for Children in Armed Conflict, (visited April 3, 2003) <<http://www.child-soldiers.org/cs/childsoldiers.nsf/f30d8b5e33403a18025ae500381213/7945ef>> [hereinafter Appendix 3].

99. See Human Rights Watch, *Child Soldiers and the Child Labor Convention* (background briefing) (June 15, 1999) (visited Mar. 15, 2003) <<http://www.hrw.org/background/crp/labor615.htm>> [hereinafter *HRW Child Soldiers*]; see also Human Rights Watch, *Status of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (visited Jan. 27, 2005) <<http://www.hrw.org/campaigns/crp/ratifications.htm>>; see also, *Child Soldiers*, *supra* note 43.

100. See *HRW Child Soldiers*, *supra* note 99.

101. See, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts*, U.N. Doc. A/RES/54/263 (2000) [hereinafter *Optional Protocol*].

102. See Appendix 3, *supra* note 98.

103. See *Optional Protocol*, *supra* note 101, art. 3(2).

104. See *id.* art. 3(3).

105. See *id.*; see also *HRW Child Soldiers*, *supra* note 99.

questions about whether or not a situation amounts to an armed conflict are irrelevant and that recruitment prior to the start of a conflict is covered. Furthermore, there is an obligation incumbent on all state parties to the Protocol to take all feasible measures to prevent recruitment and use of children under the age of 18 by armed groups including legal measures to prohibit and criminalize such practices.¹⁰⁶

V. THE UNITED STATES POSITION

The United States opposes international efforts to raise the minimum age for recruitment and participation in armed conflict from the current fifteen to eighteen.¹⁰⁷ The U.S. position is based on U.S. recruitment practices, which allows seventeen-year-olds to enlist voluntarily for military service with parental permission.¹⁰⁸ The U.S. position also stems from its reluctance to amend U.S. domestic laws and practice into compliance with the provisions of the Geneva Conventions and the two Additional Protocols along with the CRC. The U.S. also fears that establishing eighteen as the minimum age for participation in hostilities would provide evidence of customary international law because of the consistency with existing international norms.¹⁰⁹

The United States further opposes the establishment of the International Criminal Court (ICC)¹¹⁰ on the grounds that it may exercise its jurisdiction to conduct politically motivated investigations and prosecution of the U.S. military and political officials and personnel.¹¹¹ The U.S. specifically opposed the inclusion of the use of child soldiers in international armed conflict as a war crime under the jurisdiction of the ICC.¹¹² Instead of supporting an effective international court that will punish violators for crimes against humanity and for war crimes, the U.S. continues

106. See Optional Protocol, *supra* note 101, art. 3(2).

107. The United States ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict on December 23, 2002; see Amnesty International, *Child Soldiers and the West Asian Crisis* (2001) (visited April 1, 2003) <<http://www.amnestyusa.org/children/soldiers/wesasiancrisis.html>> (discussing that the U.S. accepts volunteers from the age of 17 years and until now has deployed 17 year olds in operations such as the Gulf War 1991, Somalia, and Bosnia).

108. See Abbott, *supra* note 1; see also HRW: *Child Soldiers*, *supra* note 99 (stating that according to Department of Defense Statistics, there are less than 7000 minors in the U.S. armed services, making up less than one-half of one percent of the total 1.5 million active duty force, and only 45 of new active duty recruits each year).

109. See Abbott, *supra* note 1.

110. See ICC, *supra* note 89; see also, HRW: *Promise Broken*, *supra* note 91.

111. See Philippe J. Sands, *The Future of International Adjudication*, 14 CONN. J. INT'L L. 1, 4; see also Human Rights Watch, *ICC: The United States and the International Criminal Court*, (visited April 14, 2003) <<http://www.hrw.org/campaigns/icc/us.htm>> [hereinafter *HRW: The U.S. and ICC*].

112. See Abbott, *supra* note 1.

to undermine international efforts to provide special protection for children. Consequently, on May 6, 2002, the U.S. withdrew its signature on the ICC treaty.¹¹³

However, the U.S. Congress recently adopted a congressional resolution condemning the use of child soldiers in its Defense Appropriation Authorization Act of 1999.¹¹⁴ The U.S. Senate also, by a unanimous consent, voted to support ratification of the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict¹¹⁵ and consequently, ratified it on December 23, 2002.¹¹⁶ Although the resolution does not bind the U.S., it constitutes a significant step in the right direction. Yet, it should be noted that the US failure to ratify Protocol I, CRC and the ICC deprived the world of a common framework for humanitarian rules governing armed conflicts.

VI. IMPLEMENTATION, COMPLIANCE AND ENFORCEMENT OF THE INTERNATIONAL LEGAL RULES GOVERNING CHILD SOLDIERS

It is clear from the foregoing analysis that, there exist various treaties that prohibit the use of children in armed conflict. Unfortunately, problems remain with the effectiveness and enforceability of these rules of law. As a consequence, children remain vulnerable to the tragic effects of armed conflict.

The problem is compounded by the inability of the international community to agree on the age of recruitment and participation of a child in armed conflict. This allows states to pick and choose when a young person is a child or an adult, for a purpose subjectively determined by the state. Their purpose is “good” or “bad” depending on which side you are on.

The Geneva Convention obliges State parties to prosecute violators of the Convention. However, the Fourth Geneva Convention does not specifically provide for a crime that would cover the recruitment of child soldiers.¹¹⁷ Protocol I does regulate recruitment of children but the activity is not mentioned in the description of “grave breaches.”¹¹⁸ As such, the use of children as combatants is clearly in breach of Protocol I, but is

113. See, *HRW: The US and ICC*, *supra* note 111.

114. See Abbott, *supra* note 1.

115. See Amnesty International, *supra* note 107.

116. See *id.*

117. See Protocol I, *supra* note 56.

118. See *id.* art. 85.

not a criminal action attracting individual liability. For example, The Democratic Republic of Congo is a party to the Fourth Geneva Convention and Protocol I, but the government can not prosecute individuals responsible for recruiting child soldiers. This is because the treaties do not contemplate this practice as a "grave breach" and therefore an international crime. In addition, neither the Convention nor Protocol I apply to the type of internal struggle being waged in the country. The Fourth Convention applies only to International Conflicts, and Protocol I to struggles of self-determination.¹¹⁹ Furthermore, some states are reluctant to prosecute or extradite suspects in their territories. There is no international police force with authority to arrest offenders hiding in such states and the principle Sovereignty of States precludes any concerned state from making the arrest itself.¹²⁰

The cultural difference in the conceptualization of childhood further hinders the ban on the use of children in armed conflict.¹²¹ In many societies the distinction between childhood and adulthood is not clearcut. In some parts of Africa, 16 and 17 year old children from pastoral culture are expected to bear arms and fight - that being the only way to be initiated into adulthood.¹²² This rite of passage takes place soon after puberty. In this culture, with or without law, children will always bear arms and join national armies or guerilla groups.¹²³ In other states, such as Rwanda, 17 year olds are no longer considered children. Individuals marry younger and are expected to contribute to the survival of the family from an early age.¹²⁴

The problem of implementation, enforcement and compliance with international rule is exacerbated where United Nations Peacekeepers are deployed to stabilize conflict situations and to enforce compliance with international law.¹²⁵ Instead of protecting children, the United Nations Peacekeepers exchange money, employment, goods or services for sex with girls they were meant to protect.¹²⁶

119. See MONOGRAPH NO. 32, *supra* note 33.

120. See *id.*

121. See Obote-Odora, *supra* note 73.

122. See *id.*

123. See *id.*

124. See *id.*

125. See United Nations Department of Peacekeeping Operations, Mission Statement (visited Jan. 27, 2005) <<http://www.U.N.org/depts/dpko/dpko/info/page 3.htm>>.

126. See Jonathan Wald, *U.N. Accuses Force of Sex Abuse, Sexual Abuse of Girls in Congo Continues*, (visited Jan. 27, 2005) <<http://cnn.com/2005/world/africa/01/08/congo.peacekeeper.sex/>>; see Marc Lacey, *In Congo War, Even Peacekeepers Add to Horror*, N.Y. TIMES (Dec.28, 2004) (visited on Jan. 12, 2005) <<http://www.Nytimes.com/>> (portraying how a young girl, a frail fifth grader describes the tent

VII. CONCLUSION

Given the obstacles to enforcement of humanitarian and human rights laws with regard to the use of children in armed conflicts, the establishment of the ICC would help in discouraging individuals from recruiting underage children into the army and hopefully minimize the participation of children in armed conflict.¹²⁷ Since most states are already in breach of the age limit on recruitment provided in the Optional Protocol to the Convention on the Rights of the Child¹²⁸ and there are no "police" to enforce these international rules, the international community should direct their efforts to the issue of forced recruitment of children. This is more fundamental than the issue of age limit as it cuts across both sides of the divide. Even if the states insist on using children in armed conflicts, the children should, at least, not be forced to fight.¹²⁹

The international community should address the root causes of conflicts more than the instruments used in the conflict. If the root cause of a conflict is identified and settled, the problem of child soldiers will be solved. But if the root cause of the conflict is not identified and solved, the conflict will crop up again and children may be forced to fight again.¹³⁰

The international community must work collectively to update existing rules of international law to reflect the increased participation of children in hostilities and to initiate the necessary enforcement and rehabilitation mechanisms.¹³¹ The first step is to increase the visibility of the problem.¹³² In the case of child soldiers, the United Nations Security Council

where a UN peacekeeper had forced himself on her. The UN soldier had used a cup of milk to lure her into bed.); *see also* Susannah Price, *DR Congo Sex Abuse Claims Upheld* (visited Jan. 19, 2005) <<http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/africa/4>> (explaining how the UN watchdog, the office of Oversight Services, investigated the allegations of sexual abuse in the Northeast Congolese town of Bunya. The probe found a pattern of sexual exploitation of women and children, which it said was continuing. The report also said that many of the victims were under 18 with some as young as 13. They were usually given food or small sums of money in return for sex).

127. The first ever war crimes prosecution for using child soldiers was launched in June 2004 by the international tribunal in Sierra Leone. Prosecutors for the International Criminal Court in The Hague are also investigating the use of child soldiers in Uganda and Congo, but charges have yet to be laid. *See* Mike Crawley, *New Push to Stop Child Soldiers*, (visited on Jan.12, 2005) <<http://www.Csmonitor.com/2004/1118/p06s02-woaf.htm>>.

128. *See id.* (governments that use child soldiers include Burma, Burundi, Congo, Guinea, Ivory Coast, Liberia, Rwanda, Sudan, and Uganda).

129. *See id.* (stating that the United States has used 17-year-olds in Iraq, but later withdrew them).

130. Some of the root causes of conflicts are ethnic rivalry, political power struggle, self-determination, resource control, genocide, religious differences etc.

131. *See, Isebill v. Gruhn, Human Rights Abuses in Africa: Local Problems, Global Obligations*, 1 HUMAN RIGHTS REVIEW 73 (Oct.-Dec. 1999).

132. *See id.*

has passed a series of resolutions condemning the recruitment and use of children in hostilities.¹³³ The appointment of Olara Otunnu, as the United Nations Special Representative on Children and Armed Conflict is a step in the right direction.¹³⁴ Hopefully, increased visibility will help shape public opinion to change the climate and reduce outside assistance to groups that use child soldiers.¹³⁵ It could also put their victories at risk because of outside pressure and lack of support and recognition.¹³⁶ Finally, the international community should also prohibit or sanction companies or states that sell arms to conflict zones.¹³⁷ Restricting arms supplies to conflict zones will no doubt reduce armed conflict and encourage negotiations to end the conflict.¹³⁸

133. The UN Security Council passed resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003) and 1539 (2004) on children and armed conflict. These resolutions can be found at the UN Security Council website.

134. See Olara Otunnu, *supra* note 2.

135. See Gruhn, *supra* note 131.

136. See *id.*

137. See THE SMALL ARMS SURVEY 2004: RIGHTS AT RISK, A PROJECT OF THE GRADUATE INSTITUTE OF INTERNATIONAL STUDIES, GENEVA. The survey explores the linkages between the abuse of human rights and the widespread proliferation, availability, and use of small arms. It examines the impact of arms exports to states that violate human rights, the role of weapons in violence and crime around the world, and the implementation of human rights standards by police forces around the world.

138. See Amnesty International and Oxfam, *Shattered Lives: The case for Tough Arms Control* (visited Jan. 27, 2005) <http://www.amnestyusa.org/arms_trade/controlarms_summary.html> (explaining that uncontrolled proliferation and misuse of arms by government forces and armed groups takes a massive human toll in lost lives, lost livelihoods, and lost opportunities to escape poverty).