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**CHILD SOLDIERS - THEORY AND REALITY OF THEIR
EXISTENCE : THE QUESTION OF INTERNATIONAL
PROTECTION AVAILABLE TO THEM IN CONTEMPORARY
TIMES**

BY

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Abstract

Children are regarded as holders of specific rights and special privileges, and yet more and more children continue to be abused in one form or the another. One of the worst forms of abuse is the willingness of adults today to use children on the numerous frontlines of the world. This aim of this thesis is to develop an argument **against** the practice of child recruitment and participation and for the practice of non-recruitment and hence non-participation in any form of all children under 18 in armed conflicts.

Chapter One introduces the problem, it reflects on the impact and effect of armed conflict on Children, Chapters Two and Three present the moral arguments and the legal basis for extending protection to children from this form of abuse. Chapters Four and Five considers the issues of recruitment and subsequent treatment on capture for these child soldiers. Chapter Six is a case study of Uganda. This case study attempts to answer questions that might help in reaching out realistically to help children in this situation. Chapter Seven emphasises on the right to rehabilitation. Chapter Eight analyses the response of the international Community to the problem of Child Soldiers and Chapter Nine in the form of concluding remarks summaries the conclusions of this thesis, that it is possible to stop this practice but we need a stronger and united political stand for this purpose. It presses for the adoption and enforcement of a Optional Protocol to the Convention on the Rights of the Child which will establish a flat ban on all forms of participation by all children under 18.

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Chapter One

INTRODUCTORY REMARKS

1. Introduction

A child dies every two seconds in today's world. In the 1996 report of UNICEF's *State of the World's Children*, it states that children have suffered by being targeted specifically, entire generations growing up in war. War has resulted in food shortage and water contamination and the exposure to violence has affected entire generations. During the last decade, figures of child victims are "2 million killed, 4-5 million disabled, 12 million left homeless, more than a million separated and some 10 million psychologically traumatised".¹ How does one reach out to help a child or children around the world? How can we change the situation of the thousands of children the world over faced with *war, fear, hunger and despair* ?

States are also guilty of depriving children of their liberty and imprisoning them and hence exposing them to further violations and abuse. "There is no form of (state) repression that children have been spared. Torture, disappearances, summary executions, incommunicado detention, death in custody".² Anti-Slavery International defines child labour as when children are employed under conditions harmful to their maturing processes.³ The International Labour Organisation (ILO) and many other organisations have expressed the need and urgency to have explicit rules to avoid this abuse of children. Armed conflict can be viewed no differently as there is no reason or school of thought that can claim that participation in armed conflict is of any benefit to mankind in general or in particular to individuals.⁴ An individual may not marry or vote before the age of 18

¹ UNICEF figures compiled from a variety of sources, cited in *The State of the Worlds Children, 1996*, New York: Oxford University Press, 1996, p 13.

² Alston P., Tomsevski, K. (eds.) *The Right to Food*, SIM, Martinus Nijhoff : Dordrecht, 1986.

³ See note prepared by Anti-Slavery International for the United Nations' Working Group on Contemporary Forms of Slavery, in June 1995, "Contemporary Forms of Slavery Requiring Action by Governments : Examples of a Large- Scale and Persisting Problem in the 1990's." p 2 and p 8.

⁴ Attitudes that war is a necessary evil and will continue be a part of our existence no doubt are present, but there is no justification either by military necessity or logic that should allow the use or exploitation of

in a majority of countries, as they are considered too young or inexperienced or immature to do so, yet they are considered mature enough to go and fight, maim and kill. Children below this age i.e. 18 are not allowed for example to marry, vote to make a political choice, donate blood or take control of their inheritance for similar reasons. There seems to be a consensus on the age of 18 as the age of legal majority. The worst example of exploitation suffered by children is in the willingness of adults to use them in war. It is the opinion of this author that the international community should establish two principles: in order to honour our commitments to the rights of the child, all efforts should be concentrated to save the world's children; and that providing the basic needs of all human children is the responsibility of all humanity.⁵

The suffering of children and women in armed conflict is immense, for example in the former Yugoslavia, it has been estimated⁶ that by the end of 1993, 281,000 children lived in besieged enclaves and war zones, 620,000 were either refugees or displaced, over 15,000 had been killed and 35,000 wounded; During 1994 in Rwanda⁷ one-third of the 800,000 thousand people killed were children and 120,000 children became separated from their families.

According to the UN Report, *Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children*⁸ of August 1996, the international community must take steps to stop wars.⁹ It is strongly critical of the complacency and cynicism of the world which has allowed two million children to die in armed conflicts in the last ten years alone and more than another 6 million to be injured and or disabled. The Machel report

children in such a dehumanising manner. See, Calvocoressi, P., "Attitudes to War: Is the Twentieth Century Different?", 9 *International Relations*, No. 6, 1989, p 475- 484.

⁵ Labouisse, Henry R., Executive Director, UNICEF (1965-79) in his acceptance speech of the Nobel Peace Prize in 1965 for UNICEF said that "the welfare of today's children is inseparably linked with the peace of tomorrow's world."

⁶ UK Committee for UNICEF, "Former Yugoslavia", *News in Brief*, December 1993.p3.

⁷ Block, R., "Saving Rwanda's Lost Children", *Independent on Sunday*, Published from London, UK, 18 December 1994.

⁸ UN Doc A/51/306, *Promotion and Protection of The Rights of Children: Impact of Armed Conflict on Children*, 26 August 1996. [hereinafter Machel Report]

⁹ *ibid*, para 253.

states: "our children have a right to peace". The field studies and research conducted by the Machel report stress the importance of education, vocational training and economic security of the families of child combatants for the benefit of the children themselves. Lack of education facilities has been a major reason for volunteering as the various case studies conducted by different NGOs on Sudan, Ethiopia, Afghanistan, Chechnya, Columbia, Lebanon, Mozambique, Nicaragua, Philippines, South Africa and Sierra Leone prove. The Machel report establishes the fact of the immense brutality towards children that governments and individuals are capable of. *The use of children in armed conflict is a violation of universal values and should evoke the highest moral outrage.*¹⁰ Action to protect children can be successful only if accompanied by a universal and sustained outpouring of moral outrage and that is the primary responsibility of all governments and policy makers. The arms trade should be a specific target for its role in catalysing aggression and violence. It remains a distressing and hard reality that governments seem more concerned with supporting arms deals than with protecting the rights of people and children.¹¹ In the view of the then Secretary-General Boutros Boutros Ghali this study "demonstrated the centrality of children and their human rights to the peace and security agenda. It posed a fundamental challenge to the way the United Nations system and especially the humanitarian community responded to violations of children's rights in armed conflict".¹² These violations and abuses reflect a "political, moral and legal vacuum" throughout the world.¹³ They occur not because of the absence of legal protection, but because of lack of governmental will to implement the protection.¹⁴

ii. Children And Armed Conflict: A Contemporary Problem

Children have long been used in wars to fight as soldiers. Some of the early recorded use of children as soldiers in history can be found in the wars conducted by the Ottoman

¹⁰ Machel Report, paras 316-318.

¹¹ Razali Ismail (Malaysia) President of the GA, in meeting of 8 November 1996. Press release GA/SHC/3382 30th meeting.

¹² GA/SHC/3382, 30th Meeting (PM) 8 November 1996.

¹³ Machel Report, paras 3, 33, 313-318 and Carol Bellamy.

¹⁴ Francesca Pometta, Vice-President of the ICRC in GA/SHC/3382, 30th Meeting (PM) 8 November 1996.

Empire, militarily one of the strongest power of its time (1453).¹⁵ The Ottomans had a permanent army of highly disciplined professionals (yeniceri or the new army). But after some time their ranks contained *boys* recruited forcibly and forced to practise the Muslim faith and become professional soldiers. Child ratings¹⁶ aboard warships and drummer boys on the battlefields of Europe have been recorded often in history. However protection extended to children can be found in many cultures across the globe, for example in treaties like that between France and the Netherlands in 1675 and the Cartel between Denmark and Sweden in 1777.¹⁷ That children were and continue to be the holders of the right to special protection and care is a universally accepted fact. Yet, children continue to be exploited and suffer abuse in various forms. Since the 1980's there has been an alarming increase in the number of child soldiers.

The use of children in war was in previous centuries a last resort, and a rare occurrence. In the present day it is a *first resort*, and very common as they are supposed to be more efficient and malleable!¹⁸ In 1988 an estimate of soldiers younger than 15 was 200, 000. According to Mann, half a million children under the age of 15 have been killed in action during the last two decades.¹⁹ According to the Brett and McCallin report²⁰ an estimated 250,000 children under 18 are serving in government and armed opposition groups, some as young as seven. In 1998-99 there were more than an estimated quarter million children participating actively in at least 33 armed conflicts.²¹ In 2000 it was estimated that at least

¹⁵ Harris, WH., & Levey, J S., *The New Columbia Encyclopaedia*, Columbia University Press: New York, 1975 and Runciman, S. *The Fall of Constantinople*, Cambridge University Press: London, 1965.

¹⁶ for e.g. See Phillipson, D, *Band of Brothers: Boy Seamen in the Royal Navy 1800-1956*, Sutton: 1996, for recruitment practises and treatment received by boy - seamen.

¹⁷ Van Beuren, *The International Law on the Rights of the Child*, M Nijhoff and Save the Children: The Hague, 1995, p 333. [hereinafter Van Beuren, *International Law on the Rights of the Child*, 1995].

¹⁸ See case studies on pp 9-10 in this chapter.

¹⁹ Mann, "International Law and the Child Soldier", 36 *ICLQ* 1987. p 33.

²⁰ Brett, R., McCallin, M., O'Shea, R., *Children: The Invisible Soldiers, Report of the Participation of Children in Armed Conflicts and Internal Disturbances and Tensions for the United Nations Study on the Impact of Armed Conflict on Children*, April 1996. Since published by Radda Barnen: Sweden, as Brett, R and McCallin, M., *Children: the Invisible Soldiers*. October 1996. [hereinafter Brett, McCallin, O'Shea, *The Invisible Soldiers*, 1996]

²¹ Radda Barnen, *Children of War*, No 5, December 1996, p 4-5.

300,000 children under 18 were fighting in some 35 conflicts around the world a large number of them as young as 7.²²

The exact number of children playing a direct and indirect role in armed conflict remains “unknowable”²³ for a number of reasons, the major ones being that children are growing up fighting and become adult soldiers over a period of time. Another category are children that are fighting, give it up and then go back or are forced to go back. A third category would be the casualties. Children die on the battlefield, they are not taken into account because no formal records exist of them enlisting in the first instance.

One reason that children are being used more now than in previous times is advances in weapon technology, which have lead to the production of lighter and less complex weapons. Earlier lethal weapons were cumbersome and heavy and hence children could not effectively use this hardware. In medieval England an individual had to be 21 before he could become a knight as the armour was so heavy. Now light weapons are proliferating and so is the number of child combatants. Today an AK-47 or an M-16 is so light and easy to use that a 10 year old can easily strip, re-assemble and manipulate these weapons with fearsome effects. AK-47's are very cheap and easily available. In many countries they are so easily available, they can be obtained/ exchanged for the cost of a chicken or a goat.²⁴ In others it costs US \$6.²⁵ The M-16 is just as ubiquitous. It has been described as the “transistor radio of modern warfare”.²⁶ Also, it has been asserted that

²²figures from the office of the SRSG. See also Brett, McCallin, O'Shea, *The Invisible Soldiers*, 1996 for Chart of Lowest Ages Recorded: p 35.

²³ Many children are growing up in war zones, they join as minors, attain majority and continue fighting until they either die or and invalidated out of the army or the war stops.

²⁴See Renner, Michael, *Small Arms, Big Impact: The Next Challenge of Disarmament*, WorldWatch Paper No: 137, Washington DC, October 1997 p 20. See also Thalif Deen, “Child Soldier Ranks Rise with Cheap, Easy Arms”, in *Jane's Defence Weekly*, 20 November 1996. UN Doc A/51/306, of 26 August 1996 and Brett, McCallin, O'Shea, *The Invisible Soldiers*, Radda Barnen, 1996. Machel Report - para 27 reports that in Uganda, you can buy an AK-47 for the cost of a chicken and in northern Kenya for the price of a goat.

²⁵ United Nations Research Institute for Social Development, *States of Disarray: The Social Effects of Globalization*, UNRISD, 1995, p 113.

²⁶ Stanley, A., “Child Warriors”, *Time*, 18 June 1990.

children find it easier to kill than adults because,²⁷ though children remain conscious of the event they diminish the pain and trauma by use of “denial-in-fantasy or avoidance”.²⁸

²⁹ In some countries it has been reported that the fact that the army was not well paid, meant that adults did not wish to enlist. Another reason reported has been that as minors are not subject to the death penalty forces find this an incentive to recruit them³⁰ as perhaps this means that the training imparted is not wasted as these recruits can be re-drafted.³¹ In most instances it has been established that children are being used as they are expendable.

Children have been reported to have been forcibly recruited;³² methods used include torture and intimidation. Boys were told they or their families would be killed if they did not join the faction and fight. Some claim that the child soldiers are volunteers; reasons for volunteering include food, revenge, education or being an orphan and having no one to look after them.³³

Among the many roles that children play in armed conflict the most common ones are running errands, carrying ammunition, acting as bodyguards and as spies, carrying out reconnaissance, being informants, manning checkpoints, conducting and participating in ambushes, serving as executioners and fighting on the front line. The child soldier has reportedly been treated very harshly, almost always to the point of cruel, inhuman

²⁷ ICRC, “Optional Protocol to the Convention on the Rights of the Child Concerning Involvement of Children in Armed Conflict: Position of the International Committee of the Red Cross, Geneva, 27 October 1997”, in 322 *IRRC*, 1 March 1998, pp 107-125. para 23.

²⁸ Pynoos RS., and Eth S., “Witness to Violence: The Child Interview” in 25 *Journal of the American Academy of Child Psychiatry*, 1986, p 315.

²⁹ Many child combatants that I spoke to in Uganda, said that they did not kill, but that they merely pressed the trigger and the person fell down.

³⁰ CRC/C/SR.39 p 5, paragraph 18.

³¹ this would be in violation of art 117 of GCIII which reads “No repatriated person may be employed on active military service”.

³² Most wars/conflicts today are internal or civil wars and forced recruitment is one characteristic of these wars. Among many national armies the option to enlist with or without parental consent at an earlier age than 18 exists under their national legislation’s. The emphasis in this thesis is on the recruitment policies in these internal wars and secondly at national legislation’s that allow individuals below the age of 18 to enlist and fight.

³³ A UN Official has been quoted as saying that “Children joined for survival and protection”, another as: “Children went to fight because their economic condition was so bad.”

treatment and outright torture. For example, in Ethiopia *Tabay* is a commonly used form of torture to punish the children; the person undergoing tabay has his/her elbows tied behind his/her back and the rope is pulled tighter until the rib cage separates. Flogging is common for minor offences. Children are supplied with drugs to keep them malleable and ready to kill and torture. Children are physically and sexually abused. Reintegrating these children into society is a major difficulty. In the words of Maris (age 14) from Mostar, Bosnia "We are just like other kids, but inside of us the child is gone. The war and grenades destroyed us and we are growing up too fast....We want to feel the joy of life again. We are trying with all our strength to be like everyone else".³⁴ Their experiences are horrendous. They have seen parents and relatives, tortured to death, raped and killed. They have in turn suffered torture, rape and been forced to commit the same atrocities on community members and strangers. These children have been programmed to kill. They have been tutored in the art of taking by violence and force. In non-international armed conflicts the status of *combatant* does not exist and hence neither does the status of a *prisoner of war*. In such a situation child combatants may be punished regardless of their participation in the conflict under national laws.³⁵

It should be noted that though a majority of children conscripted are male, female children have also been forcibly conscripted. In most non-governmental groups and a few governmental forces, these children come from the poor and disadvantaged classes, from conflict zones and backgrounds of disrupted family ties.³⁶ A particularly vulnerable group is refugee children and internally displaced children.³⁷ Children serving in these factions have little or absolutely no education. They are given basic military training (taking apart weapons, putting them together, walking with heavy loads, ambushing etc.) Children in armed opposition groups are normally beaten or flogged; torture is frequently used and

³⁴ See generally *Children First*, Issue 31, April 1996. pp. 6-19, for these interviews see p 9.

³⁵ Dutli, MT., "Captured Child Combatants", 278 *IRRC*, 1990, p 433.

³⁶ Unaccompanied children continue to remain at risk, for e.g. Most Rwandan Child Soldiers were found to be children separated from their families. In May 1995 UNICEF aided 3, 500 such children between the ages of 10-17 during their demobilisation program.

³⁷ Brett, McCallin, O'Shea, *Children: The Invisible Soldier: Report on the Participation of Children in Armed Conflicts and Internal Disturbances and Tensions for the United Nations Study on the Impact of Armed Conflict on Children*, QUNO & ICCB: Geneva, 1996, p41.

children are kept in a semi-drugged³⁸ state. They are given “bubbles,” an amphetamine which is a mixture of cane juice and gun powder for Dutch courage. The sexual abuse of boys has been reported, though girls are more prone to sexual abuse by the forces. The initiation of children into the forces (normally non-governmental) is almost always cruel. A child is either forced to kill or commit an atrocity in front of the forces and civilians, generally on people known to the child thereby making it impossible for the child to return to the same community. For example, in Colombia little boys were forced to kill boys of their age to save their own lives and then become a part of the military.³⁹ Similar experiences have been repeated in almost every instance. Because fear plays such a predominant role in their lives, seconded only by guilt and helplessness to their situation they become what they are forced to become. Rehabilitating and reintegrating these children remains an enormous task as these children continue to suffer both mentally and physically. The children are traumatised so deeply that it takes a very long time for them to face the reality of the terrible things they have done. Children lose out on their childhood and a compounding factor in re-integration is the rejection that they face from the community and families who are aware that these children have committed atrocities. For children who have had these experiences, it becomes very difficult to be a child again. The longer the time they spend fighting, the more difficult it becomes for them to go back to being children or to civilian life.

Children have been recognised as beneficiaries of special care but as their abuse shows they are denied even their basic rights. The human person as we all accept is “the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realisation of these rights and freedoms”.⁴⁰ For children, such participation in armed conflict violates their human person and right to life, liberty, the right not to be tortured or suffer inhuman and degrading treatment; the essence of childhood is to live in a secure, protected, happy

³⁸ drugs given to children include hard drugs like cocaine and marijuana.

³⁹ *Supra* fn 37, pp 47-49.

⁴⁰ Vienna Declaration and Programme of Action adopted at the World Conference of Human Rights, June 1993, Doc: A/CONF.157/24/25. Preamble, para 2 .

environment where one's rights are secure. In armed conflicts, this very normalcy has been annihilated. Because of the atrocities that these children have suffered, witnessed or perpetrated, they are no longer normal. They carry both psychological and physical scars.⁴¹ It has been established that the "lack of fulfilment in any one domain can imply a negative outcome for overall development".⁴² There are eight major domains of psychological maltreatment⁴³ - mental cruelty, sexual abuse and exploitation, living in dangerous and unstable environments, drug and substance abuse, influence by negative and limiting models, cultural bias and prejudice, emotional neglect and stimulation deprivation and institutional abuse. Children in armed conflict and specifically child soldiers⁴⁴ undergo all of these.

Besides this forced method there are reports of appeals being made along ethnic lines to join up which are reportedly successful.⁴⁵ Groups recruiting children benefit from the militarization of society and the acceptance of violence as normal as well as cultural values and perceptions.

III. Child-Soldiers In Conflict: Snapshots

III.A. Burma

Burma acceded to the Convention on the Rights of the Child in 1991 and has signed the Declaration and Plan of Action of the World Summit for Children. Almost *all* Burmese

⁴¹The most common symptoms of PTSD are: sleeplessness, nightmares, anxiety, depression, bedwetting, flashbacks.

⁴² McCallin, "Psychosocial needs of Refugee Children", 3 *International Journal of Refugee Law* No 1, 1991, p 86.

⁴³ See Brassard, MR., Germain, RB., Hart, SN., "Crisis Intervention for Maltreated Children" in *School Psychology Review*, 1985; Brassard, MR., Hart, SN, Hardy, DB, "The Psychological Maltreatment Rating Scales" in *Journal of Child Abuse and Neglect*, 1993. Hart .SN., Brasard, MR, "A Major Threat to Childrens Mental Health: Psychological Maltreatment" in *American Psychologist*, 1987. Knoff, HM (ed.) , *The Assessment of Child and Adolescent Personality*, New York: Guildford Press, 1986.

⁴⁴seen specially in children fighting with guerrilla movements and in specific instances like in the SLORC forces, in Burma. Children with regular armies in theory seem to be protected as some governments have a policy not to send soldiers under 18 to the front-line yet allow them to enlist voluntarily or with parental consent.

⁴⁵ SPLA used emotional appeals like "Let us take our land back from the Nuers". This resulted in 700 volunteer recruits.

groups have child soldiers in their ranks, as does the State Law and Order Restoration Council (SLORC). The treatment, recruitment and conditions of service vary from group to group. Children are killed, forcibly conscripted, unwillingly separated from their parents and families, kidnapped, tortured, forced to kill, torture and rape and they are either underpaid or not paid at all. They suffer drug abuse, ethnic discrimination and sexual exploitation.⁴⁶ A Burmese boy testified, "sometimes I fell asleep when I was on guard duty, I was beaten by my corporal. He beat me like a dog, like I was an animal, not a human being. There were two or three suicides during that time, of boys who had been hospitalised and finally shot themselves". Children in the Burmese conflict are used as *porters* by the SLORC forces, in the daytime they are made to carry guns and ammunition and follow the soldiers and at night time the girls frequently suffer mass rapes.⁴⁷

The phenomenon of child soldiers in Burma can be understood only within the context of militarisation of the society as a whole. Children grow up in an environment where they are fighting for resistance and to be a soldier is to be a hero and on the other hand for many joining the armed forces is the only means of survival.⁴⁸

The official conscription age of the SLORC is 14 years. The recruits are designated "Ye-Nyunt Youth". They are given political training and taught to be loyal to the government and the army. UNICEF has identified one such camp run by SLORC in the Shan State where children of 7 years and above are being indoctrinated. According to an Images Asia report, these children do not have any choice and are forced to fight. The reason is that recruiting forces and armed groups seem to consider that children make the best fighters.⁴⁹ Fear is the major determining factor in their obedience and performance. They have only the options of murder or suicide. It has been noted that when a large scale battle

⁴⁶ It is estimated that 40,000 Burmese children have been sold into sexual slavery in Thailand .

⁴⁷ Burma Issue Report, 1996 also Smith, M., *Ethnic Groups in Burma: Development, Democracy and Human Rights*, Anti-Slavery International: London, 1994.

⁴⁸ Children in Refugee camps on the Thai -Burma Border, are most vulnerable and enlist as it is the manly thing to do or in other cases the only thing to do as education facilities are available only upto high school and they are not allowed to move out of the camps. Personal interviews and talks with a cross-section of the local population on the Mae-Sot Refugee camps, Thailand in 1994-95.

⁴⁹ See Machel Report para - 34.

is impending the recruitment of children goes up. Child soldiers interviewed by the Images Asia Team reported the expression of fear, despair and horror as their feelings when they were constrained to beat, torture and rape or witness such crimes as part of their initiation into the forces. Unfortunately there exists very little understanding of Post-Traumatic Stress Disorder (PTSD), and hence the scars, mental and physical, of these children remain.

III.B. Liberia

Liberia has been torn apart by a civil war since December 1989.⁵⁰ This war has forced an estimated one third of its population to become refugees. The most prominent characteristic of this civil war has been that civilians have suffered the most, being deliberately targeted by all warring factions. In Liberia, the main rebel forces are Charles Taylor's National Patriotic Front of Liberia (NPFL), the United Liberian Movement for Democracy in Liberia (ULIMO). The government forces loyal to the former government of Doe are the Armed Forces of Liberia (AFL). The NPFL and ULIMO have been consistent in their use of children below the age of 15 as soldiers. Children under 15 years of age have been reportedly used by almost all the warring factions. The AFL is not noted for having soldiers below the age of 18 years but abuses against children have been reported. Children in Liberia have been killed, tortured and have witnessed horrendous atrocities. They have participated in committing these same offences of torture, rape and killing.

The total numbers of children used in the civil war in Liberia is difficult to say, but the UN Consolidated Interagency has estimated that 40,000 to 60,000 fighters are involved⁵¹ and of these at least 6 percent are children. Out of this 6 percent most are very young i.e. less than 10 years old and about 20 percent are between the ages of 15 and 17. It is said that children are used as they are more dependable, obedient and efficient. Children have

⁵⁰ for background information see, Human Rights Watch publications: *Liberia: Human Rights Abuses by the Liberian Peace Council and the Need for International Oversight*, May 1994; *Liberia: Waging War to Keep the Peace: The ECOMOG Intervention and Human Rights*, June 1993; *Liberia: A Human Rights Disaster*, October 1990; *Liberia: Flight from Terror. Testimony of Abuses in Nimba Country*, May 1990.

⁵¹ UN Consolidated Interagency Appeal of November 1993.

been forcibly conscripted into the fighting forces of various factions, the “volunteers” have joined for reasons of revenge, for food, some because they had no other option. During the Octopus Operation in 1992, the NPFL used children as cannon fodder. The child soldiers were the human shield behind which the older troops went into attack formation.⁵²

III.C. Angola

The conflict between the armed forces of Movimento Popular de Libertacao de Angola (MPLA), the governing powers, and the rebel Uniao Nacional Para a Independencia Total de Angola (UNITA) has run for almost three decades. Both government and rebel forces have used children in war. UNITA is reported to have *kidnapped and abducted* children as young as 8 years. The Forcas Armadas Angolanas (FFA) the newly formed military force of the government in September 1992, also had in its ranks children as young as 8 years. Angola ratified the Convention on the Rights of the Child in 1990 but has yet to submit its reports to the Committee on the Rights of the Child.⁵³ However, the issue of child soldiers remains a prickly topic that both government and UNITA refuse to discuss. Neither admits to the existence of child soldiers in their ranks. The official figures stated are 1,500 individuals under the age of 18 each in both the forces, yet UN officials upon surveying four of the fifteen demobilisation centres in March 1996, found that out of 17,000 demobilised soldiers there were more than 1,500 individuals under the age of 18.⁵⁴ Children interviewed in these camps have given testimonies of the atrocities they have undergone and also inflicted upon others. One of the most tragic consequences of this experience is that now on demobilisation, they find themselves with no skills and ability to cope with a normal life. The only education and security they have experienced has been guerrilla warfare and the use of violence.

⁵² Human Rights Watch, *Easy Prey: Child Soldiers in Liberia*, September 1994, p 24. Operation Octopus took place in October 1992 between Taylors forces the NPFL in a major offensive against Monrovia.

⁵³ due 03/01/93 and 03/01/98.

⁵⁴ Personnaz, D., reporting from Luanda on 14 June 1996 for the Gemini News Service.

III.D. Mozambique

In Mozambique, the post independence period was a time of struggle between the ruling Mozambique Liberation Front (Frelimo) and the insurgent Mozambique National Resistance (Renamo). While both sides abused human rights law, Renamo it is alleged, was engaged in recruiting a higher percentage of children. Renamo recruited children in all areas; they used children younger than 8 years of age to work for them and to fight and kill. Investigations confirm that Renamo's child combatants had been put through much psychological trauma and deprivation; they had been tortured until all individualism had broken down. They were then trained to kill and rewarded for it. In comparison to other studies conducted on child-soldiers they appeared to be more prone to narcotic abuse.⁵⁵

III.E. El Salvador

In the eighties, children were reportedly picked up from the streets and were recruited into the military⁵⁶ and police.⁵⁷ There have been reports of children who want to continue to stay with them as they are offered food and money by the forces. The government is putting these children at a double risk as these children are viewed as *collaborators* or *informers* by armed opposition groups like the Farabundo Marti National Liberation Front (FMNL). The FMNL is guilty, too, of recruiting children and using them as messenger and errand boys. Some of the reasons offered by the FMNL are that they are looking after these orphans or that children have chosen to be involved or are accompanying adults involved in the fighting. Another was that they are used to these *adult tasks* early in life! Both the government and the opposition use children as spies. Children are also used as executioners and as guards. Which seems to indicate that once captured by the rival side, the children are in danger of either persecution or death.

⁵⁵ Human Rights Watch/Africa Watch, *Conspicuous Destruction: War, Famine and the Reform Process in Mozambique*, New York, 1992, p 55.

⁵⁶ Evidence collected by the Human Rights Watch Team, findings published in Americas Watch, *The Civilian Toll 1986-1987: Ninth Supplement to the Report on Human Rights in El Salvador*, New York: Human Rights Watch, 1987, p 111.

⁵⁷ Treasury Police formed part of the special counter-insurgency battalion and were combatants in the conflict. reported in Human Rights Watch Children's Rights Project, *Children in Combat*, New York: Human Rights Watch, January 1996, Vol. 8 No. 1(G) p 6.

III.F. Ethiopia⁵⁸

Human Rights Watch has reported that in the nineties, it became a regular occurrence for the Ethiopian government to *forcibly recruit* children below the age of 18, the legal recruitment age into their forces. The intensity of the abuses suffered by these new recruits during conscription have been reported to be on the increase.⁵⁹ Children separated from their families continue to be at risk of detention and forced conscription. An eleven-year old boy testified that he was visiting his grandmother in a neighbouring village, and was detained for not having a travel permit and then forced to enlist in the Ethiopian Army. Pressganging known as *afesa*, is very common in Ethiopia. Young boys remain at risk, even if they are playing football in the neighbourhood park! Recruitment centres used height to certify age, all over 150 centimetres height are considered to be over 15 and hence *allowed* to enlist. A popular method of forced conscription was detaining prospective conscripts on false charges and then giving them the option of enlisting or being imprisoned.⁶⁰ It has been suggested that boys are forcibly conscripted to make up the regional conscription quota in situations where adults are not available.⁶¹ The government response to criticism of this practice has been that these children are not used for combat but serve as messengers and aides.⁶²

III.G. Sudan

In southern Sudan, the Sudan People's Liberation Movement/Army (SPLM/A) and the Southern Sudan Independence Movement/Army (SSIM/A) encouraged young boys to join them by promising them *education* in Ethiopian refugee camps.⁶³ The boys were then given military training and forced to fight in southern Sudan and Ethiopia. According to

⁵⁸ Africa Watch, *Ethiopia: Conscription, A Human Rights Watch Short Report*, Human Rights Watch: New York, vol. 2, no 22, June 1990. [hereinafter Africa Watch, *Ethiopia : Conscription*, 1990]

⁵⁹ Africa Watch, "Ethiopia: Human Rights Crisis as Central Power Crumbles. Killings, Detentions, Forcible Conscription's and Obstructions of Relief," *A Human Rights Watch Short Report*, vol. 3, no 6, 30 April 1991.

⁶⁰ Africa Watch, *Ethiopia: Conscription* , 1990, p 10.

⁶¹ *ibid.*, p 8.

⁶² *ibid.*

⁶³ See Human Rights Watch/Africa and Children's Rights Project, *Sudan: The Lost Boys-Child Soldiers and Unaccompanied Boys in Southern Sudan*, vol. 6, No: 10, November 1994. [hereinafter HRW /Africa Watch, *Sudan the Lost Boys*]

the Human Rights Watch Report, there were more than 10, 000 unaccompanied boys at Kakuma in 1992, their numbers decreasing to 7, 524 in March 1995; yet it has been alleged that the SPLA has continued to recruit boys in 1995-97.⁶⁴ The government of Sudan in 1995 has itself conscripted boys below the legal age into its forces.⁶⁵ Boys as young as 12 were picked up from stadiums, markets, and streets and from residential facilities and shelters for street children. Others were attracted by the promise of jobs in oil fields near El Muglad. On arrival at El Muglad, the only option available to these boys was to enlist and fight for the forces. Children who refused were beaten into submission.⁶⁶ Both the SPLA and SSIA are reportedly practising *warehousing* of children for use as future soldiers. Children serve as servants, messenger boys and cannon fodder at the front-line.

IV. Contemporary Law, Does It Protect Children ?

War in ancient ages was fought by what we refer to commonly as “the law of the jungle”. Wright⁶⁷ states that the war practices of primitive people underline the fact that various rules of war existed. i.e. distinguishing between enemy and non-enemy; rules formalising the beginning and end of war, limitations of places, times and methods of conduct. For example, war among the Sumerians had an organised structure, war had to be formally declared and messengers had immunity. Wars or conflicts were characterised by the possibility of arbitration and peace treaties. The Code of Hammurabi stands testimony to the restraints on war.⁶⁸ The Egyptian culture is also characterised by consideration for fellow beings. The Hittites had a code of conduct for wars, in fact a notable characteristic is that when enemy cities were taken over, inhabitants were not harmed. According to

⁶⁴ Information from conversation with UNICEF staff-member running the Operation Lifeline Sudan. August 1997, Gulu, Uganda. Also see Goodwin-Gill, G., and Cohn, I., *Child Soldiers: The Role of Children in Armed Conflicts*, A Study for the Henry Dunant Institute, Geneva, Clarendon Press: Oxford, 1994, p 32. [hereinafter Goodwin-Gill and Cohn, I., *Child Soldiers*, 1994]

⁶⁵ See Radda Barnen, *Children of War*, No 4/97, December 1997, p 3, report from Interpress Service, 23 October 1997.

⁶⁶ Human Rights Watch/Africa, *Children in Sudan*, pp 60-61.

⁶⁷ Wright, Q., *A Study of War*, 1942: with a commentary on war since 1942 2nd ed. London : University of Chicago Press, 1965.

⁶⁸ The code begins with the words “I establish these laws to prevent the strong from oppressing the weak...”

Homer, the ancient Greeks had limitations on the means and methods of warfare.⁶⁹ *The Code of Manu*⁷⁰ (Manava-Dharama-Sastra) developed in India between 200 BC and 200 AD formed the basis of laws, customs and morals for people. In its chapter seven it details out the code of conduct on the battlefield and reads in part “a soldier must not attack an enemy who is not ready for combat, is wounded or has surrendered.” The Mahabharata from India prohibits the killing of women, children and non-combatants.⁷¹ In India, warriors were forbidden to kill the wounded, disabled or surrendering enemies indicating that means and methods of warfare were limited.⁷² *The Art of War*,⁷³ the Chinese classic on military strategy, written around 500 BC expresses the necessity and requirements of humanity during combat. It stresses that prisoners must be respected, civilians should not be harmed and a commander must not seek the total annihilation of an enemy. The *Bushido Code*⁷⁴ in Japan from the 12th century onwards has seven essential doctrines. The third stresses that in battle, human conduct towards the weak and defeated is the correct moral path. It also emphasises that total annihilation of the enemy is not the object of combat. The *Viqayet*,⁷⁵ written around 1280, forbids the killing of women, children and old people, the sick, and truce-bearers; it forbade the use of poisoned arrows, the poisoning of water and the mutilation of the vanquished.⁷⁶ In Africa,

⁶⁹ Lattimore, R., (ed.), Homer, *The Odyssey*, Book 1, lines 260-3, New York : Harper & Row, 1965, p 34. See also, Philipson, C., *The International Law and Custom of Ancient Greece and Rome*, Macmillan: London, 1911, vol II, pp 166-384.

⁷⁰ Doniger, W., (trans) *The Laws of Manu*, Penguin Classics, 1992.

⁷¹ “he is no son of the Vrishni race who slayeth a women, a boy or an old man”. The Mahabharata was written sometime between 200 BC and 200 AD. It is an issue of historical importance and cultural relevance. Although extremely interesting, it will not be discussed in detail here, partly for lack of space and direct relevance to this particular thesis. In addition, it has been quoted along with other examples, relating to the protection available to civilians, non-combatants, and the concept of childhood being inviolable. See Armour, “Customs of Warfare in Ancient India” 8 *Transactions of the Grotius Society*, 1922 . Pictet, J., *Development and Principles of International Humanitarian Law*, Martinus Nijhoff and Henry Dunant Institute: Dordrecht and Geneva, 1985, pp 5-18.

⁷² Viswanatha, SV., *International Law in Ancient India*, Longmans Green: Bombay, 1925.

⁷³ Sun Tzu, *The Art of War*, 6th Century BC. Ames, RT (Trans) *The Art of Warfare; First English Translation incorporating the recently discovered Yin -c'ueh -shan texts*, New York: Ballantine Books, 1993.

⁷⁴ Pictet, *Development and Principles of International Humanitarian Law*, 1985.

⁷⁵ *ibid*, p 16. Also Khadduri, M., *War and Peace in the Law of Islam*, John Hopkins Press: Baltimore, 1955, pp 83-137.

⁷⁶ *ibid*, p 16.

the ethical code of conduct was that women, children and old people were ensured protection and respect.⁷⁷

All ancient civilisations exerted influence on each other and contributed to the development of these principles and codes of conduct. The middle ages were characterised by the principle of the “just war”. It provided a justification for war as a compromise between morals and political necessity. The underlying theory being that the natural order was a reflection of divine order and a legitimate sovereign has the right to establish this order. The end justified the means and hence the acts of war were exempt from sin. It was a just war!⁷⁸ However the influence of Vitoria, Suarez and Grotius has had a strong impact on the conduct of warfare. These scholars all argued in favour of restraint in warfare. Grotius argued for moderation in the conduct of war and relief for *non-combatants* and claimed that moderation in war was possible. The idea of restraint in war flows through out the laws of war. i.e. “Nothing is allowed which is unnecessary”. Respect for women⁷⁹ and the *helpless* can be traced from the Christian just war doctrine of, “respect for the innocent.” A common accusation over the ages has been that armies when moving through captured or hostile areas, indulge in rape and looting. But an effort to halt these practices can be found in all cultures⁸⁰ for example, in the sixteenth century an ordinance was published by Coligny that made violence against women a capital offence.⁸¹

The dawning of the modern age, meant newer forms of technology and changing social orders and it is *then* that chivalry seems to have fled the battlefields. Warfare in Europe was costly in terms of life, sieges were the norm. As the sack of Malines in 1568 proves, violence permeated churches and convents which were in theory sacrosanct. Although

⁷⁷Diallo, Y., *African Traditions and Humanitarian Law*, Geneva, ICRC, 1978. pp 5-7. Bello, E., *African Customary Humanitarian Law*, Oyez: London, 1980, pp 1-62.

⁷⁸ Melzer, Y., *Concepts of Just War*, A W Sijthoff: Leyden, 1975.

⁷⁹ Gentili “to violate the honour of a woman will always be held to be unjust” in *De Jure Belli*, lib. II, cap xxi, Carnegie 1933 p 257.

⁸⁰ Keen. M., *The Laws of War in the Late Middle Ages*, Routledge and Kegan Paul: London, 1965.

⁸¹ Gardot, “Le Droit de la Guerre dans l’Oeuvre des Capitaines Francais du XVIe Siecle” 72 *Hague Recueil* 1948 citing Forquereux, *La Discipline Militaire* (1592), p 469.

war has been depicted as one wherein these were shared convictions and conventions, populations did suffer. The town of Breda in 1590, was transformed into the “Bastion of Flanders”, 34 years later the Spaniards laid siege to it, in less than a year the bastion capitulated. However, chivalry ruled and the victorious side offered the losers “honourable” terms of surrender. This has been an accepted practice through the ages that children, women and non-combatants were not to be harmed.⁸² Vattel too was of the opinion that restraint in war was necessary: “Whatever is done in excess of measures ... must be condemned as evil”.⁸³ Today mention of war brings up a very different picture; Whereas breaches of norm were the exception now *the nature of warfare has changed from that of a regular, restrained war to an “absolute” all out war*. Military necessity seems to be vanishing as total annihilation seems to replace it. Wars earlier were the imposition of the victor’s will over the loser, appropriation of goods, slaves and land and annihilation of the adversaries. According to Clausewitz, this was only a temporary phase in the ever changing conception of war. Much of the transformation of the conception and nature of warfare can be traced to the French Revolution and the concept of *Levee en Masse*. Napoleon began what is now termed as “absolute war”, gradually armies became national armies. Compulsory military service, advances in technology and the two World Wars have accentuated this “absolute” nature of the warfare. The Spanish Civil War showed that change was definitely underway, as civilians were targeted; W.W.II established that the change was complete by the examples of Coventry, Dresden, Tokyo, Hiroshima and Nagasaki.

Today wars are mostly non-international in character and referred to as internal or civil wars. These civil wars have been described as “wars without quarter”: they are characterised by cruelty, irrationality and in term of costs, usually exceeding the value of what is being fought over. It is therefore necessary for International Law to regulate these wars and insist that human rights are the inherent rights of people even during armed

⁸² Gentili, *De Jure Belli*, Lib. II Cap. XXI (Garnegie 251, 257) 1933. also see Grotius, *De Jure Belli ac Pacis*, Lib III, Cap. IV, s.xviii, ix, x, xv, xvi, vii, ixx Cap. XI ss. I; ix, xi-xv (1625)

⁸³ Vattel, *Le Droit de Gens*, Vol II. Liv., III ch. VIII ss 138, 137. (1758) Carnegie :1961.

conflict. According to Sun Zi “[t]he art of war is of vital importance to the State. It is a matter of life and death; a road either to safety or to ruin”.

During war there are no constant conditions it is true, yet the laws of war are based on one unwavering principle: that is, the right of the non-combatants to have protection. “Laws of war are founded on the principle that military operations should be limited to armed forces and that the civilian population is entitled to general immunity”.⁸⁴ Humane treatment includes respect for life and physical and moral integrity. Henry Meyrowitz writing on the foundations of humanitarian law⁸⁵ states “le droit de la guerre ...” meaning that the laws of war may therefore be seen as a strategy for the survival of *humanity*, (*menschkeit*) by recourse to *humanity* (*menschlichkeit*), as a strategy against dehumanisation, against regression towards a society, a civilisation and a world of barbarism. The end of the Second World War showed that all this had changed. *The protection of the non-combatant or civilian is the dilemma of the modern age.* International Humanitarian Law is just not the law mitigating violence in conflict, it is the only means available to mankind to restrain brutality, even “when the violence is at its worst”.⁸⁶ War as we can see from Chechnya, Kosovo, Sierra Leone etc. is a cruel reality of today’s world. It causes an unlimited amount of loss, pain, anguish and suffering,⁸⁷ yet, it continues to be a live reality in one form or the other in some region of the world. War has been outlawed, yet, the reality of armed conflict remains. Law, it is true, has followed events after they have occurred instead of preceding them, yet the basic concepts of international humanitarian law should never be forgotten: Its sole object is “to regulate

⁸⁴ Singer, “The Protection of Children During Armed Conflict Situations”, 252, *IRRC*, 1987, p 139.

⁸⁵ Meyrowitz, “Reflexions sur le fondement du droit de la Guerre” in Swinarski (ed.) *Etudies et Essais sur le Droit International Humanitaire et sur les Principes de la Croix-Rouge: en l'Honneur le Jean Pictet . Studies and Essays on International Humanitarian law and Red Cross Principles in Honour of Jean Pictet*, 1984, Geneva: ICRC , pp 428-430.

⁸⁶ Meurant quoted by Quentin-Baxter, “Human Rights and Humanitarian Law - Confluence or Conflict?” in *Australian Yearbook of International Law*, vol. 9, 1985, p 96.

⁸⁷ von Grimmeslshausen, HJC., *Der abenteuerlichen Simplicus Simplicissimum*, Bk 1, ch 16, Monpelgarten : Fillion , 1669. summed up the effect of the 30 years war (1618-48) on the German soldier in this couplet

“Hunger und Durstallezeit”

“Hunger and thirst, Cold and heat

Work and want as is meet

Injustice and violent crime

We soldiers commit all the time”

hostilities in order to attenuate their hardships". It represents the transposition of morals and hence humanitarian concerns into legal instruments.⁸⁸

Contemporary conflicts are taking place not between states but within them. Since wars or conflicts are taking place around cities, suburbs and villages, people living there are the first casualties and *guerrilla warfare* has meant that the distinction between combatant and non-combatant is not only blurred but rather invisible. The change in the way a war is fought has meant that the civilians are more prone to abuse. Ethnic violence is a dominant characteristic in these conflicts. A fatalistic logic seems to prevail, in Rwanda for example: it was established that killing adults was not enough, children must also be eliminated - as one political broadcast on the national radio in Rwanda put it "[t]o kill the big rats, you have to kill the little rats".⁸⁹ Rwanda is indeed a tragic example, children for the first instance have been imprisoned and are being tried for genocide.⁹⁰ Also Rwanda, Bosnia and Kosovo testify to the fact that rape is being used more and more as a weapon of terror, intimidation and ethnic cleansing, girls as young as 12⁹¹ being raped.⁹²

The regulation of internal armed conflict is not as well developed as that of international conflict, though the protection of people in internal armed conflict did arise as early as 1758.⁹³ The concept that the general public or civilians should be kept safe from the effects of war made its appearance in the 16th century and took a firm hold in the 18th century. It is, however in the twentieth century that States decided to use legal instruments to regulate non-international conflicts. The reluctance of governments to

⁸⁸ Pictet, J., *Development and Principles of Humanitarian Law: Course given in July 1982 at the University of Strasbourg as part of the courses organised by the International Institute of Human Rights*, Nijhoff; Dordrecht, 1985. p1.

⁸⁹ Radio Mille Collines, Rwanda, 1994, quoted by Francoise J Hampson in "Legal Protection afforded to Children Under International Humanitarian Law - Report for the Study on the Impact of Armed Conflict on Children", May 1996, University of Essex, UK.

⁹⁰ "Children in War", 12 *Peace Matters*, Winter 1995-96, p 9.

⁹¹ report by Stephen Brussels in *The Independent* of 21st March 2000 on p 14.

⁹² Civil wars are said to engender more suffering, as they allow the expression of more brutality and cruelty. Sexual violence is being used more as a weapon of war, as the recent conflicts prove.

⁹³ De Vattel, *Le Droit des Gens ou Principes du Droit Naturel*, 1785, Carnegie: 1916.

regulate internal conflict is clear, it is usual for internal conflicts to be between a “legal” government and an opposing group. States fear that the opposing group might either attain a legal status or similar recognition which would strengthen the group but might weaken their position.⁹⁴ They prefer to use national legislation and try opposition groups in their domestic criminal courts instead of using international norms, which would be applicable once the state accepted this regulation of the civil war. The Zairean response to the protocols is an accurate presentation of the fears of most nations. “Only a sovereign State can claim to have international legal personality and, as such, it enjoys all the prerogatives of sovereignty, including that of entering into international agreements and conventions, that is to say, of becoming a party to them. Accordingly, dissident armed forces are primarily a group of rebels with no international legal personality. Their only legal status is that granted them under the domestic laws of their national State. To claim otherwise is to place a sovereign State on the same footing as a rebel movement, and that would imply *defacto* recognition of the movement”.⁹⁵

The branch of international law dealing with *children in armed conflict* is Human Rights Law and Humanitarian Law. Human Rights Law⁹⁶ reached a new turn in its life after the Second World War. The atrocities committed in the Second World War established the fact that childhood was no longer a protection against violent abuse. The fact that children’s rights are now reflected in binding international legislation implies that the treatment of children by governments is no longer a matter of exclusively domestic concern.⁹⁷ Also it should be never forgotten that *Human Rights is not an idea of minimum standards but “the idea that there are certain rights respect for which is required by a universal minimum moral standard”*.⁹⁸ The legal structure that arose from

⁹⁴ Chadwick, E. *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict*, Nijhoff: The Hague, 1996.

⁹⁵ CDDH/SR.50 Annex, p 104.

⁹⁶ The emergence of codified human rights law can be traced from the signing of the Magna Charta in 1215, followed by the treaty of Westphalia in 1648 to the League of Nations Covenant in 1919. For more details see Cassese, A., *Human Rights in a Changing World*, Polity Press, Oxford, 1990, pp 11- 67.

⁹⁷ Bayefsky, AF., “Introduction” in Bayefsky, AF., (ed.) *The UN Human Rights Treaty System in the 21st Century*, Kluwer: The Hague, 2000, p xviii.

⁹⁸ Milne, AJM., *Human Rights and Human Diversity: An Essay in the Philosophy of Human Rights*, Albany: State University of New York Press, 1986, p 6.

the ashes of the League of Nations aims to protect the altars of human liberty, a structure that expresses mans faith in his worthiness and capacity to be free.

The one convergence point among the many plans to obtain world peace is that they advocate the “curtailment of national sovereignty and propose extensive and vigorous supranational organisation”. The world needs a closer-knit political and economic structure.⁹⁹ It has been commonly held that municipal and international law are different and unconnected things. True, that they may be different but the aim of all law is to govern the conduct of human beings.

International Humanitarian Law came into existence in 1864 and Human Rights Law in 1948. The origin of both arose from the *need to protect the human person*; the two have since developed in parallel and are an effort to limit the evils of war and to defend mankind against arbitrary treatment. The two are close yet distinct in their application.

Between 1945 and 1992, there have been 149 major wars, the toll of these wars or conflicts totals 23 million people dead. War and political upheaval have torn apart entire countries, and *this vortex of violence has pulled in children, a number that grows larger*. Children are clearly the future of a family or a group, and the most effective form of terrorism is to destroy something of the highest value. Today’s wars only emphasis this reality.

IV.A. Guarantee’s Provided By Human Rights Law: A Preview

Throughout the present century, there have been many attempts to strengthen the legal protection of the child.¹⁰⁰ The Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) all state that children are

⁹⁹ Corbett, “World Order - An agenda for Lawyers”, 37 *AJIL* 1943, p 207.

¹⁰⁰ the international legal protection extended to children is discussed in detail in chapter three.

entitled to *special* care and protection.¹⁰¹ The UDHR does not refer specifically to children but encompasses them inadvertently. The forced exploitation of children in armed conflicts in various roles can be said to fall under contemporary forms of slavery.¹⁰² This is a violation of Article 4 of the UDHR, which in the given context happens to be the “corner stone of all human rights”.¹⁰³ Additionally the prohibition of slavery and servitude is now a principle of *jus cogens*. Additionally the UDHR emphasises by virtue of Article 3 the right to life which is absolute even in times of armed conflict, further in Article 5 it clearly states that torture and cruel inhuman treatment are prohibited.

The ICCPR in Article 6(1) like the UDHR stresses on the right to life as an absolute right and in Article 7 the prohibition of torture and inhuman, degrading treatment. Additionally the 1924 and the 1959 Declarations on the Rights of the Child give similar protection, they emphasis the special status of children and their right to *special care and protection*.

The 1974 UN GA Declaration on the protection of Women and Children in Emergencies and Armed Conflict prohibits persecution, imprisonment, torture and all forms of degrading violence against women and children. This declaration urges states to “spare women and children from the ravages of war.” It makes clear that “all forms of repression and cruel, inhuman and degrading treatment of women and childrenin the course of military activities shall be considered criminal”.¹⁰⁴ But the fact is that this declaration is a non-binding instrument.¹⁰⁵

The Convention on the Rights of the Child (CRC) is the most significant form of legal protection existing today. It covers the civil, political and socio-economic rights of

¹⁰¹ UDHR, Art 25(2); ICESCR Art 10(3); ICCPR Art 24(1).

¹⁰² Sudanese experience in general. See Anti-Slavery International reports, UNICEF Reports and AI reports.

¹⁰³ Lillich, “Civil Rights”, in Meron (ed.), *Human Rights In International Law*, Oxford: Clarendon, 1988, p 124.

¹⁰⁴ GA Res. 3318 (XXIX) of 14 December 1974. para 5.

¹⁰⁵ Askin, KD., *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, Martinus Nijhoff: The Hague, 1997, p 250.

children. The rapidity with which the CRC¹⁰⁶ has come into force does bring up the query if it has now attained the status of Customary International Law,¹⁰⁷ and if any of its rules have attained the distinction of being principles of *jus cogens*. The statute of the ICJ asserts that in order to become *Customary International Law* a general practice is accepted as law.¹⁰⁸ Custom arises when “states acquire the habit of adopting, with respect to a given situation and whenever that situation recurs a given attitude to which legal significance is attributed”.¹⁰⁹

International Human Rights Law in general and in the form of the CRC particularly does address the special needs of children. The Convention on the Rights of the Child is the most complete statement of children’s rights ever made and is the first to give these rights the force of international law. It establishes that children need special care and protection and that they should never be treated in an inhuman or arbitrary fashion. The convention represents a commitment to the future, and is far sighted because it recognises that the children of today will have to carry on into the future the work of creating a just and humane social order. The Convention on the Rights of the Child goes further than the Declaration on the Rights of the Child by making states legally accountable for their actions and inaction’s towards their children. In Articles 19 and 35 the CRC makes it the duty of

¹⁰⁶ As of January 2001, 191 states are party to the Convention on the Rights of the Child.

¹⁰⁷ for an analysis of the nature of custom see *The Lotus Case*, France vs. Turkey, PCIJ Reports, Series A, No 10, 1927. *The Anglo-Norwegian Fisheries Case*, UK vs. Norway, ICJ Reports 1951. *The Asylum Case*, Columbia vs. Peru, ICJ Reports 1950. *The North Sea Continental Shelf Cases*, Federal republic of Germany vs. Denmark; Federal Republic of Germany vs. The Netherlands, ICJ Reports 1969. For views of scholars see, Akehurst, M., “Custom as a Source of International Law” 47 *BYIL* 1, 1974-75; Corbett, PE., “The Consent of States and The Sources of the Law of Nations” 6 *BYIL*, 1925; D’Amato, *The Concept of Custom in International Law*, 1971; De Visscher pp 144-163; Jenks, *The Prospects of International Adjudication*, 1964 see chap 5; Kopelmanas, L., “Custom as a Means of the Creation of International Law”, 18 *BYIL* 1937, Kunz, JL., “General International Law and the Law of International Organisations”, 47 *AJIL* 1953; Lauterpacht, *Development* pp 368-393; Lowe, 9 *Rev. Int. Studies* 1983; Thirlway, *International Customary Law and Codification*, 1972; Wolske, *Custom in Present International Law*, 1964. Harris, DJ., *Cases and Materials on International law*, 5th ed. Sweet and Maxwell: London , 1998. Byers. M., *Custom, Power and the Power of Rules: International Relations and Customary International Law*, Cambridge: 1999 .

¹⁰⁸ Article 38(1)(b) of the ICJ Statute

¹⁰⁹ D’Amato, AA., *The Concept of Custom in International Law*, Ithaca: Cornell University Press, 1971.

the state to take measures to protect the child from all forms of abuse . By virtue of Article 38 armed conflict is clearly included :

1. State Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to children.
2. State parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take part in hostilities.
3. State 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, State 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 effected by an armed conflict.

The words, *undertake to respect and to ensure respect* for rules of international humanitarian law applicable to them in armed conflicts which are relevant to children is important. Further, in para (2) 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. It further states an obligation on the part of state parties to refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In the case of individuals who have attained the age of fifteen years but who have yet not attained the age of eighteen years, state parties shall endeavour to give priority to those who are oldest. Besides Article 38, the debates about the age of majority leading to the definition of child in Article 1 of the CRC needs to be looked at from a cross-cultural and universal perspective. This age

limit decides who the convention is applicable to, and Article 1 by accepting that the age of majority could be different under different legal systems tends to weaken the CRC. However, the main problem in extending protection to children remains as to what extent are these standards observed and implemented in reality? And how can we ensure that these standards become reality?

This convention may generally contribute to the further development of customary international law¹¹⁰ as it seems “a new morality for children has materialised in the convention”.¹¹¹ In the form of the CRC the International Community has shown its belief in the need for special protection to children. It has subsequently been adopted with a broad consensus on what rights are due to children and the obligations on its part towards the realisation of those rights for children.¹¹² However, one of the main questions for this thesis is whether Article 38 of the CRC is wide enough to relate and cover modern-day warfare? and does the entire convention apply during armed conflict or is derogation possible?

IV.B. Guarantee's Provided By Humanitarian Law: A Preview

International humanitarian law has extended protection to children firstly as civilians and non-combatants and secondly as a particularly vulnerable group.¹¹³ Children must be protected as they represent “humanity's future”. The Fourth Geneva Convention of 1949 (GC IV)¹¹⁴ sets out the rights and treatment due in international armed conflict to all

¹¹⁰ McGoldrick, D., “The United Nations Convention on the Rights of the Child”, *International Journal of Law And The Family*, Vol. 5, 1991, p 158.

¹¹¹ UNICEF, *Facts and Figures*, 1990.

¹¹² UN Doc E/CN.4/1989/SR.54 ; UN Doc E/CN.4/1989/SR.55.

¹¹³ See Rosenblad, *International Humanitarian Law of Armed Conflict*, 1979; Pictet, *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, 1958; Obradovic, “La Protection de la population civile dans les conflits armes internationaux”, in Cassesse, *The New Humanitarian Law of Armed Conflict*, 1979; Khushalini, Y., *Dignity and Honour of Women as Basic and Fundamental Human Rights*, 1982; Kalshoven, “Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977; Part II”, 9 *Netherlands YBIL* 1978.

¹¹⁴ Convention relating to the Protection of Civilian Persons in Time of War, August 12, 1949, [hereinfter GC IV].

civilians.¹¹⁵ The main thrust of the protection of the GCIV can be found in Part III Section 1, which deal with the protection of civilians and hence encompasses children.¹¹⁶ Child civilians are given special protection in Articles 24, 27, 50 but in comparison to the Additional Protocols (APs) of 1977¹¹⁷ the GCs of 1949 though recognising children as a vulnerable category and requiring extra care are not as clear as the APs. The principle of special protection of children is very clearly stated in Article 77 of API.¹¹⁸ Protocol II makes similar provisions and thus emphasises that the principle of special protection of children in armed conflict is firmly established. Altogether however, special protection extended to children is enshrined in no less than 25 articles of the 1949 GCs and the APs of 1977. The APs regulate the participation of children in armed conflict. The problem however, is in the fact that firstly the two APs are applicable to different types of conflicts. API applies to international armed conflicts and AP II to non-international armed conflicts, and though the GCs have the status of customary international law, the APs do not. 162 States are party to API and 138 to APII. API in Article 77 refers only to direct participation; hence indirect participation is allowed. Governments use this loophole to justify the use of children.¹¹⁹ Further, APII in Article 4 does not allow children below 15 to take a direct or indirect role, but it does not protect children between the ages of 15-18. Further, today's armed conflict are internal in character and APII is often unratified by the state in question. In the instance that it is applicable, and since it applies to all the "parties to the conflict" there remains the problem of regulating the actions of an armed opposition group which does not accept these rules, enforcement of these provisions for various reasons then become impossible.

¹¹⁵ Article 3 in the case of non-international conflict and 13 of GC IV define civilians.

¹¹⁶ See Articles 27, 31 and 32.

¹¹⁷ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of victims of International Armed Conflicts, 12 December 1977 [hereinafter API] and Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non- International Armed Conflicts, 12 December 1977 [hereinafter AP II] .

¹¹⁸ Plattner, D., "Protection of Children in International Humanitarian Law", IRRC, vol. 240 , 1 May 1984, p 142.

¹¹⁹ e.g. Ethiopia , see snapshots section above.

Additionally, there might be another challenge to implementation when organised forces follow the policy of non-recruitment of children but younger members of a local population themselves try to participate actively in the conflict. How will international law regulate these aberrations and seek and provide alternatives to enlistment, participation and clarify implications for these participants.

There are 20 states in which children between the ages of 10 and 18 are being trained in military schools and at least another 25 that allow children to fight in war before they allow them to vote!¹²⁰ It does seem that States are giving children's lives a lower priority when compared to military feasibility!

The suggestion must therefore be that an absence of condemnation at national and international levels has encouraged the practice of child-recruitment by allowing the spread of this practice.¹²¹ However, the current state of affairs should not be taken as evidence that the norm [against child soldiers] has been undermined. The fact that children are fighting does not indicate that a new rule or norm allowing children to fight is emerging, because for "such a general right to come into existence would involve a fundamental modification of the customary law",¹²² and "for a new customary rule to be formed, not only must the acts concerned "amount to settled practice, but they must be accompanied by the *opinio juris sive necessitatis*".¹²³ In this case the absence of *opinio juris* in support of the practice indicates that such practice is a breach of the existing norm.

To reiterate, recruitment is the "defining" moment. If they were not recruited, child-soldiers would not exist. It has been stated that recruitment is a "problem of political

¹²⁰See generally Coalition to Stop the Use of Child Soldiers, *The Use of Children as Soldiers in Africa: A Country Analysis of Child Recruitment and Participation in Armed Conflict*, March 1999. And Goodwin-Gill and Cohn, I., *Child Soldiers*, 1994, Table in Annexe 1, pp 187-208.

¹²¹ Brett, McCallin, O'Shea, *The Invisible Soldiers*, 1996, p. 8.

¹²² *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (Nicaragua vs. United States) in *ICJ Reports*, 1986, para 206.

¹²³ *ibid*, para 207.

ethics, the recruitment laws themselves establish the age but if states themselves allow the armed forces not to respect the laws we shall never get anywhere”.¹²⁴

It seems that there exists a need for children and their families and communities to be better informed about their rights and the process of enforcement. Additionally, the monitoring of recruitment practices such that, they are in conformity with international law obligations; that the best interest's of the child remain a priority, is a must.

V. Conclusions:

The main thrust of Humanitarian Law in extending protection to children is twofold, firstly as civilians and non-combatants they should be protected from abuse of any kind and secondly as children they have a special status. It is because of this special status that they *should not be* recruited or forced to fight or be abused. This protection extends to post-war or a similar situation that even if they have fought and committed crimes they will not be given the death penalty, and a lenient view be taken in view of their mental and emotional immaturity.

The reality, however, is quite different. Most of these basic rights have not been implemented. As statistics tell us, the major victims of today's wars are children and civilians. Children are not only victims as non-combatants alone but victims also as active participants today. Some as young as 6 years are fighting and killing people. They are used as decoys, as spies and mine detectors! Children in this century have fought and are fighting not only civil wars but also international wars. In Iran, after receiving religious training in martyrdom, thousands of 10-11 year olds went onto the front line armed with guns and a “key” around their necks that would give them entry into “jannat” i.e. paradise.

¹²⁴ Dr Ramon Custodio, President of the Committee for the Defence of Human Rights in Honduras, quoted in the case study for Honduras by Brett, McCallin, O'Shea, *The Invisible Soldiers*, 1996, p 18.

Many children are supposed to have volunteered to have joined the various forces they are fighting with, out of their own free will. This is an over simplification of the problem.¹²⁵ They may have walked up to enlist but the question is what were the options that these children had to choose from? The options available to them is what the international community must consider if it wants to halt the use of child soldiers. The Cambodian experience proved that most volunteers felt prey to enlistment as they were *unaccompanied children* without the familiar security of a parent or family. They had no food, or the familiar stability of a home or caring adults so they turned to the adults who promised them this security. A nine-year-old soldier in Uganda said "I have a gun, food and a place to sleep. That's more than I had in my village. If I stayed there I'd probably be dead by now".¹²⁶ In Honduras, an American Green Beret was caught training 13 year old boys for combat. The official response to this was that it was sometimes the only chance the youngsters had for a job, paycheque and a *square meal*.¹²⁷

Many children join the military to escape poverty.¹²⁸ Children are the saddest victims of any conflict, they miss out on family life, on childhood, they experience violence that leaves them physically and psychologically scarred. In their inability to cope with their fears and frustrations they turn to drugs and violence, and hence continue finding it hard to socialise and regain their self worth. In Rwanda an estimated 114,000 children were separated from their families by the end of 1994. By June 1996, some 1,741 children were in detention facing rape, killing and genocide charges, approximately 550 of them were under 15.¹²⁹ In Angola a survey conducted in 1995, showed that 66 percent of the children had seen people murdered, another 67 percent had seen their families and friends beaten or tortured. Children, particularly girls and women have suffered organised rape in Bosnia, Herzegovina and Croatia. A child in Mostar, Bosnia, has been quoted as saying that his 'generation was the destroyed generation' as their lives could never be normal

¹²⁵ Hammerburg, T., "What Can Non-Governmental Organisation's Do to Stop the Recruitment of Child Soldiers?", in *Child Soldiers*, 1994, Radda Barnen: Swedish Red Cross, p 31.

¹²⁶ Quoted by Boothby after a personal interview with a relief worker in New York, 16 April 1986.

¹²⁷ M Ruiz, "The Pint -Size Paratroopers", *Newsweek*, 5 April 1982.

¹²⁸ Jean Paul (15): "I joined the army to get food for my mother , my brothers and sisters." Quoted in Graham, V., "Rwanda's Former Child Soldiers Find Help" in *Children First*, Issue 31, April 1996, p15.

¹²⁹ Machel Report - para 250.

again. A little girl from Honduras testified that "At the age of 13, I joined the student movement. I had a dream to contribute to make things change, so that children would not be hungry....Later I joined the armed struggle. I had all the inexperience and fears of a little girl. ...girls were obliged to have sexual relations with combatants..... There is a great pain in my being when I recall all these things....In spite of my commitment they abused me, they trampled my human dignity. Above all they did not understand that I was a child and that I had rights".¹³⁰

A Khmer Rouge leader has been quoted as saying that though it does take some time, it is the younger ones that become the *most efficient* soldiers.¹³¹ It has also been claimed that children are used as soldiers as they are easier to manipulate and control.¹³² But the truth is that children are reluctant participants, and gradually under the influence of drugs and adults these feelings of fear and guilt are transformed "into a kind of rage that obliterates moral sensibility".¹³³ But on putting down arms and gradually entering the real world there is no longer a buffer between the guilt of the fact that they have committed crimes and their consciences. Psychologists have stated that the psychological disturbance suffered by children who have perpetuated violence is greater than among those who were victims of it.¹³⁴ It remains unclear whether children in the long run have the maturity to handle the stress created by war and its experiences.

It has been pointed out that the impact of war leaves a significant impact, a long-term psychological problem for a significant number of adult combatants and this could only be *magnified* in the case of children.¹³⁵ The WHO reported in February 1994 that 61 percent of students in Monrovia, Liberia had seen someone killed, tortured or raped, six

¹³⁰ Brett, Mccallin, O'Shea, *The Invisible Soldiers*, 1996, p 84.

¹³¹ Thailand-Kampuchea border, 12 November 1981, in interview with N Boothby.

¹³² Human Rights Watch, *Easy Prey: Child Soldiers in Liberia*, September 1994, p 23.

¹³³ Boothby, "Children and War", *Cultural Survival Quarterly* vol. 10, No 4, 1986. p 29.

¹³⁴ Pynoos, RB., Spencer, ETH., "Witness to Violence: The Child Interview" 25 *Journal of The American Academy of Child Psychiatry* 1986.

¹³⁵ See http://www.gulflink.osd.mil/medical/gwillness_defining.html, for Gulf War illness-related medical Research and Publications. Also http://gulflink.osd.mil/medical/canadian_study.html for Health Study of Canadian Forces Personnel involved in the 1991 conflict in the Persian Gulf. See also Hartley-Brewer, J., "Veterans sue MOD for war trauma" in *The Guardian*, 22 April 2000, on p 2.

percent had played an active role as perpetrators and 77 percent had lost a close friend or relative in the war. They all showed serious psychological damage.¹³⁶ Further the Gulbenkian Foundation convened a commission on children and violence, the key finding of this mission was “research evidence highlights negative, violent and humiliating forms of discipline as significant in the development of violent attitudes and actions from an early age” i.e. children subjected to violence are likely to be violent themselves.¹³⁷

In Palestine, South Africa and Ireland, children have shown how this violent environment not only adds to human suffering but is the seed for further conflict. The continuous and increasing exposure to violence and brutality, desensitises the children to suffering. Such children are more and more prone to committing violent and brutal inhuman acts. Most wars and situations of tension have their roots in long-running social, political or and economic crisis, it is time for the international community to take effective measures to solve these tensions.

The existing law on the rights of the child is not an exclusive concept¹³⁸ to any one culture. In fact children have always been considered special and in need of special care and attention. According to Article 1(3) of the African Charter on the Rights of The Child, there is a clear duty placed on the states to discourage traditional and cultural practices inconsistent with the Charter. It clearly sends a strong message to the states that cultural traditions will not be accepted when and if used to impede the internationally accepted norms on the Rights of the Child. It has been considered immoral and an outright wrong through the ages to make children suffer. The principle of *humaneness* has often been the reason that children have been extended protection and care even by enemy forces. Many cultures view children in their innocence as the closest form to God.¹³⁹ However, debates over the ages have proved that the concept of children’s rights

¹³⁶ Reuters Information Services, Feb. 2, 1994.

¹³⁷ Gulbenkian Foundation, *Children and Violence*, London, 1996.

¹³⁸ Van Beuren, *International Law on the Rights of the Child*, 1995. For a global perspective see *Columbia Human Rights Law Review*, vol. 13, no 1, 1981; Sahar, *Childhood in the Middle Ages*.

¹³⁹ This is an Indian belief and is widely accepted in Asia and Africa. A wide acceptance of this exists in the Islamic world as well, for example in Iran, a saying exists that children who die go straight to heaven as they are innocent and are closest to god.

is a universal concept.¹⁴⁰ Rights are necessary to support the principle of equal respect, for a claim to be accepted as a right it must be supported by the principle of “equal respect”.¹⁴¹

It has been claimed that the reason that children’s rights are violated is because the children are unable to make themselves heard, their vulnerability combined with their invisibility leads to this abuse. The invisibility of children and child soldiers is highlighted by the constant absence of even a mention in any peace treaty negotiated to date.¹⁴² The truth is that children are entirely in the power of adults, it is this majority i.e. adults that decides what rights are due to individuals and it seems that for this very reason the rights of children get overlooked. However it has been submitted that the international community should continue to respect the current autonomy of children.¹⁴³ Children have been legally recognised as holders of specific rights and because of their “physical and mental immaturity” in need of special safeguards and care.¹⁴⁴ And if our laws and safeguards are proving to be inadequate then we should look ahead and close the gaps that exist in law. The main reason for children requiring special care is that children represent the future of this world. And as Mahatma Gandhi said, “if we are to make real peace in this world, we shall have to begin with children”.

This thesis is based on the assumption that ‘child’ means every individual below the age of 18 and will address the protection of children who are child-soldiers. It focuses on children who are participants in armed conflict and not as civilians. The CRC is the core document for legal protection in this thesis. It is divided into 9 chapters. This thesis has three main structural divisions beginning with the fundamental and theoretical issues plus

¹⁴⁰ Veerman, *The Rights of the Child and the Changing Image of Childhood*, Nijhoff : Dordrecht, 1992.[hereinafter Veerman, *Changing Image*,1992] The strongest argument in favour of the universality of childrens rights is the rapidity with which the CRC was adopted.

¹⁴¹ Dworkin,R., *Taking Rights Seriously*, 1971 and *Taking Rights Seriously - New Impression with a reply to Critics*, London: Duckworth, 1978.

¹⁴² Cohn, I., “The Protection of Children in Peacemaking and Peacekeeping Processes”, 12 *Harvard Human Rights Journal*, 1999, pp 129-195.

¹⁴³ Lowy, “Autonomy and The Appropriate Projects of Children” in Alston, Parker and Seymour (eds.), *Children, Rights and The Law*, Clarendon Press: Oxford, 1992.

¹⁴⁴ Geneva Declaration on the Rights of the Child, 1924.

an analysis of the existing legal mechanisms available to date. The second part is a comprehensive practical study on the basis of the preceding analysis while the final part argues for solutions. Chapter One is this introductory chapter which addresses the fundamental issues such as the special status of children as a vulnerable group; the use of children in armed conflict; age of majority, legal rights and recruitment; means and methods used to transform children into child soldiers; the experiences of child soldiers; and the effect it has on their lives etc. Chapter two addresses different theories on the rights of the child; it delves into issues of morality and law and establishes the moral basis for extending special protection to children. It submits liberal paternalism as the most appropriate theory instead of paternalism, liberalism or others, to rely on for children generally and specifically for children at risk as child soldiers. Chapter Three establishes the basis of extending protection to child-soldiers under legal norms. It presents the legal rights of children. Encompassing the law of international human rights and humanitarian law, it looks at specific provisions of the law, examines and analyses the existing protection extended. Though it covers both international and non-international conflicts, the emphasis remains on non-international conflicts; internal disturbances and emergency situations are touched upon briefly. On the basis of the problem confronting child-soldiering; the legal and moral rights due to a child; it is Chapter Four that analyses the role of government and non-governmental forces in the practice of recruitment and subsequent participation. Compulsory, forced, voluntary and induced recruitment is analysed with emphasis on the recruitment practices of non-governmental forces. This is followed by Chapter Five on the examination of treatment and due process followed in the case of captured child combatants. From this theoretical and practical analysis of the problem of child-soldiering and its consequences in detail, a case study of Uganda is presented in Chapter Six. This draws on all the preceding chapters to present a clearer understanding of the issue of child soldiers, the reality of their lives against the rhetoric and reality of international protection available to the children of the world. The aim of this case study is to elaborate on the role of children in armed conflict, to identify the legal and cultural gaps in the substance of law, identification of social, political and cultural reasons for the existence of child soldiers.

The treatment of child soldiers within groups, attitudes of the militia, the local population and governmental authorities towards them. An attempt is made to identify local and regional programs acting on behalf of the child soldiers to assist them in rehabilitation, reintegration and eradicating this practice. Following this is Chapter Seven which draws heavily on the case study and deals exclusively with Rehabilitation; a relatively recent right according to some. This evaluates an urgent need of children in all situations of conflict. Chapter Eight, based on the presentation, analysis and evaluation of all aspects presented, examines the response and role of both governmental, non-governmental organisations and bodies, that is the international response to the problem and possible interventions. It looks briefly at the influence of the arms trade. The US and France today are among the biggest suppliers of arms. However, very little is known about international trade in small arms, which operates through the informal sector. The possibility of curbing it with respect to children is attempted. This thesis ends with Chapter Nine containing the concluding remarks and an analysis of existing legal norms. Arguments are made for new norms and better implementation policies.

Chapter Two

A CHILD'S RIGHT TO PROTECTION VS. A CHILD'S RIGHT TO AUTONOMY : IS IT POSSIBLE TO FIND A BALANCE BETWEEN THEM ?

I. Introduction:

The word “child” normally indicates a young human being who has not attained puberty or the age of majority and / or is the offspring of an adult. Childhood is defined as the state of being a child. In a broad definition one can say that it is a period of time that lasts from birth until adulthood. The nature of childhood is that it is a state of vulnerability, dependency, innocence, of playing, crying, and of growing. It is a transitional phase, sometimes viewed by adults only in terms of the “absence of adulthood,” which in contrast is viewed as the culmination of the goal of development. At a minimum childhood is understood in terms of age, and of a growing power to reason, understand and implement. It has been accepted that childhood is to be valued in itself. Scholars like Friedrich Froebel, Arnold Gesell, Johann Pestalozzi, Maria Montessori, Jean Piaget, AS Neill all have indicated in their works that the psychology of childhood is fundamentally different from that of adults and is to be valued for itself. In the case of children they are both helpless and vulnerable and are still developing. Since they are still developing they are potential full personalities.¹⁴⁵ Locke was of the opinion in his book *Some Thoughts Concerning Education*, that the child was a *tabula rasa*, and it was upto the adults to write on this blank paper to give it a form, thus effectively subjugating the child to an identity that was forged by an adult. Locke it is understood, viewed the child as a potential citizen or adult. Rousseau on the other hand recognised correctly that childhood is important in itself and not merely a means to an end. Also he stressed that a child's intellectual and emotional life is important because it is a unique stage in one's life.¹⁴⁶

¹⁴⁵ Wolfson, SA, “Children's Rights : The Theoretical Underpinning of the Best Interests of the Child.” in Freeman, M., and Veerman, P., (eds.) *The Ideologies of Children's Rights*, Martinus Nijhoff, Dordrecht, 1992, p 24.

¹⁴⁶ Rousseau, J J ., *Emile*, Boom , A., (Introduction, Notes and Trans) New York: Basic Books, 1979, and Rousseau, *Emile*, Foxley , B ., (trans) London: JM Dent, 1992.

Why this debate and discussion over children and their special needs and status? In a simple argument, the reason we protect children is because childhood has a special place in all our lives. Children are particularly helpless and vulnerable and rely on the others with competing interests, for protection and care. They are also developing and potential personalities. Each of these factors is indicative of the moral imperative in protecting children. Children are “today”¹⁴⁷; childhood is a time of innocence when they are protected from adult forms of behaviour as we find it morally unacceptable to expose them to it. Children are the adults of tomorrow¹⁴⁸ and if we are to safeguard tomorrow the struggle has to begin today by protecting the children from violence, as the many examples around us have established that violent children turn into violent adults. Factors such as these lead to the determination of the way that children are to be treated and what their best interests are.

Today children are specific right holders, the case that they have rights has been won. However, as submitted in chapter one, children are being forced to fight and kill. The reason why children are being used on the front-line today is because they are easily available, are an expendable commodity and are easy to manipulate and intimidate. This vulnerability makes them prone to this form of violent and inhuman abuse. This chapter looks at children's rights and child - soldiers. It argues that children should not be allowed to participate as combatants in armed conflict of any kind. It is a basic assumption of this thesis as submitted earlier that child means an individual below eighteen. It therefore also addresses the question whether childhood is a manufactured phenomenon, a social construct and is age a relevant point of distinction? It looks at some

¹⁴⁷ Gabriela Mistral of Chile “We are guilty of many errors and many faults but our worst crime is abandoning children, neglecting the fountain of life. Many of the things we need can wait. The child cannot. Right now is the time his bones are being formed, his blood is being made and his senses are being developed. To him we cannot answer “tomorrow”. His name is “today”.

¹⁴⁸ In the words of Abraham Lincoln: “A child is a person who is going to carry on what you have started. He is going to sit where you are sitting, and when you are gone, attend to these things which you think are important. You may adopt all the policies you please; but how they are carried out depends on him. He will assume control of your cities, states and nations. He is going to move in and take over your churches, schools, universities and corporations. All your books are going to be judged, praised or condemned by him. The fate of humanity is in his hands.” quoted in UNICEF, Information Bulletin no 13, 1976, p 6.

contemporary theories and debates on offering protection to children or giving them autonomy. It concludes by analysing whether it has to be one or the other; if a middle ground or a compromise between the two i.e. protection and autonomy rights is possible. Further is this conclusion practical, feasible and most of all is it in the best interests of the child ?

II. 18 years - more or less ?

How does childhood differ from adulthood ? Childhood is recognised as a distinct stage in one's life. The nature of childhood differs from that of adulthood in a distinct manner. Their world is different from that of adults. They do not participate in adult forms of behaviour e.g. children are asexual and non-participants in decision making i.e. law and politics. Looking at childhood from the perspective of developmental study - it is related to age and is linked to cognitive competence, awareness, rationality, ability to sustain oneself independently and to being responsible for one's actions by virtue of age and experience. For children these qualities develop with the passage of time. Children are still learning about themselves and the world around them. Formal education provides them with this knowledge at a distance from the adult world. Children are smaller, frailer and have a dependency of different levels at different stages of their lives until they reach adulthood themselves. It has been submitted by some scholars notably Aries that childhood did not exist in earlier times. It is Archard's submission that childhood did exist, it is merely the conception of childhood that has differed in different eras. Childhood is therefore a manufactured or constructed phenomenon, as nature does not stipulate one specific age as the end of childhood. It is a continuous process and varies from individual to individual eventually leading to mature adulthood. For e.g. there may be a child of 14 with the emotional maturity of a 20 year old, but physically a 14 year old, or in another instance an eighteen year old may not be as aware and mature as other contemporaries but may be younger in his emotional capabilities and after a few years may be on par with the rest of his contemporaries. Is age a relevant point of distinction?

It is true that the extent of childhood is not the same in different cultures. In some a child is viewed as an adult at the age of 12, in another at the time of the first hunt or kill made. In most states today eighteen is the agreed legal age of majority. Childhood therefore is to a large extent linked to “age”. However since a universal “cut-off” does not exist, and it is a matter of national choice, many cultures insist that their the age of majority is different in their cultures. In this case should possibly a teenager who is considered an adult, or the head of a family be allowed to fight? Is it acceptable for him / her to fight and should the state be allow to differ in this respect? Where does international law stand on these issues with respect to child soldiers?

Firstly, what we refer to today as human rights are what was once termed as natural rights.¹⁴⁹ Many views exist as to the origin of the concept that man had certain rights by the mere fact that he /she was human. In the words of Jose Diokno, “Human Rights are more than legal concepts; they are the essence of man. They are what make human. That is why they are called human rights; deny them and you deny man’s humanity.”¹⁵⁰ Mainly the two world wars and other conflicts around the world served to increase an already heightened interest in this concept of “human rights”. World War II played a major role in the history of rights and its culmination in the Universal Declaration of Human Rights (UDHR)¹⁵¹ and the United Nations (UN) changed the concept from natural to human rights. “Rights are no longer derived from the operations of natural reason, but rather from an idea of what it is to be human. We think that a person who is malnourished, tortured, wrongly imprisoned, illiterate and perhaps lacking in regular and paid holidays is not living in a manner appropriate to a human being.”¹⁵² It has been said that “Human

¹⁴⁹ Carnation, M., “What are Human Rights”, in Liquor, W., Rubbing. B., (eds.) *The Human Rights Reader*, 1978, p 17.

¹⁵⁰ Lecture at a conference on Human Rights, Simian University, 31st August 1981. quoted by Data’ Pram Kumaraswamy in “ The Universal Declaration of Human Rights - Is it Universal ?” in *The Review of the International Commission of Jurists*, ICJ: Geneva no 58-59 December 1997, p 123. [hereinafter *The Review*].

¹⁵¹ It should be noted that the UDHR is legally unenforceable, yet many of the rights proclaimed are a part of the positive law of all most all nations. Though it can be argued that the UDHR did not become a part of positive international law until the two covenants went into force. Both the covenants i.e. the International Covenant on Economic, Social and Cultural Rights went into force on 3 January 1976 and the International Covenant on Civil and Political Rights went into force on 23 March 1976.

¹⁵²*Supra* fn 5 , p 18.

Rights are grounded on what are taken to be universal structures of society or on the requirements of common good.”¹⁵³ Higgins states that “people everywhere want the same essential things: to have sufficient food and shelter, to be able to speak freely, to practise their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured or detained without out charge and that, if charged they will have a fair trial”.¹⁵⁴ Also, it is true that we can find legitimate criteria in the historical experiences of real people struggling to overcome domination. Values like, truth, human dignity, freedom, equality, justice, solidarity exist without doubt and they all constitute a specific heritage of mankind.¹⁵⁵ There also exist common afflictions like war, hunger, poverty and disease that are common to all. It is these needs, interests, values and dangers that the ‘universal nature’ of human rights are based on, the difference being that in certain cultures and societies specific rights and freedoms receive more importance than others.¹⁵⁶ Yet, it is also to be noted that given a democratic choice between the right to live or to be killed, to be tortured, enslaved or to live freely, to have a say in the kind of government one would like to live under, to have our dignity and essence of humanity preserved; the answer to this test provides us with one of the strongest affirmations of the universality of human rights.¹⁵⁷ It is true that “universality means respect for differences, for pluralism and for cultural identities, based on respect for fundamental rights of every human person. Then there is also universality of content, a substantive universality in which the concepts of freedom, equality and solidarity are combined”.¹⁵⁸ “Human Rights, in short, must proceed from the basis of

¹⁵³ Gould, CG., *Rethinking Democracy: Freedom and Social Competition in Politics, Economy and Society*, Cambridge: Cambridge University Press, 1988, p 208.

¹⁵⁴ Higgins, R., *Problems and Process: International Law and How we Use it*, Clarendon Press: Oxford, 1994, p 96.

¹⁵⁵ Lopatka, A., “The Rights of the Child are Universal: The Perspective of the UN Convention on the Rights of the Child” in Freeman, M., and Veerman, P., (eds.) *The Ideologies of Childrens Rights*, Martinus NijHoff, Dordrecht, 1992, p 47.

¹⁵⁶ see Leuprecht, P and Imbert PH quoted by Adam Lopatka in “The Rights of the Child are Universal: The Perspective of the UN Convention on the Rights of the Child” in Freeman, M., and Veerman, P., (eds.) *The Ideologies of Childrens Rights*, Martinus Nijhoff, Dordrecht, 1992, p 47. footnoted on p 52. n.1-3.

¹⁵⁷ Ramcharan, BG, “The Universality of Human Rights”, in *The Review*, no 58-59, December 1997, ICJ: Geneva, p 105-106.

¹⁵⁸ Cortes Ruiz- Gimenez, J., quoted on p 91 in *Universality of Human Rights in a Pluralistic World: Proceedings of a Colloquy organised by the Council of Europe in Co-operation with the International Institute of Human Rights*, Strasbourg, 17-19 April 1989. NP Engel : Strasbourg.

ideological pluralism”¹⁵⁹ yet accepting at the same time that the basic values of human kind are the same. Henkin rejects the claims of “cultural relativism” or a multicultural approach to the construction of human rights because he feels that this would allow societies to interpret the content of human rights texts according to their convenience.¹⁶⁰ However, it is submitted “[a] law among nations acceptable to all its members suggests the existence of some common ground and not merely the outward thrust of domestic preoccupation’s. This common ground has an autonomous existence”.¹⁶¹ Because “[a]s the world changes so will human rights develop, and as human rights develop so will the world change”.¹⁶² Morality which is a major factor in the acceptance or rejection of rights has been suggested is a “distinct and relatively autonomous area of beliefs, attitudes, and rule-following activity, ordered in accordance with a scheme of rigid compartmentalisation of life”.¹⁶³ According to Prof. Makau wa Matua - Alston, Steiner and Franck though not in agreement completely on the content or normative importance of different human rights they are generally agreeable in their vision of the political society intended by human rights.¹⁶⁴

The debate about what the term “Human Rights” comprises, or the rights to which human beings are entitled, continues. But the “idea of human rights is used to affirm that all individuals, solely by the virtue of being human, have moral rights which no society or state should deny”.¹⁶⁵ As submitted earlier a true democratic choice test does establish that there is a minimum catalogue of fundamental human rights that seems to be acceptable to all.¹⁶⁶ The universality of human rights is accepted by us or at least implies

¹⁵⁹ Pathak, RS., “Introductory Report” in *Universality of Human Rights in a Pluralistic World*, Council of Europe: NP Engel: Strasbourg, 1990, p 10.

¹⁶⁰ Henkin, L., *The Age of Rights*, New York : Colombia University Press , 1990, p ix-x.

¹⁶¹ Pathak. RS., “Introductory Report” in *Universality of Human Rights in a Pluralistic World*, Council of Europe: Strasbourg, 1990, p 12

¹⁶² *ibid*, p 17.

¹⁶³ MacIntyre. A., *Three Rival Versions of Moral Enquiry*, Duckworth: London, 1990, p 26.

¹⁶⁴ Makua wa Matua, “The Ideology of Human Rights”, in *Virginia Journal of International Law*, vol. 36, No: 3, Spring 1996, p 627.

¹⁶⁵ Sidorsky, D., “Contemporary Reinterpretations of the Concept of Human Rights” in Sidorsky (ed.), *Essays On Human Rights*, 1979, p 89.

¹⁶⁶ Van Boven, T., “Distinguishing Criteria of Human Rights” in Vasak , K., and Alston , P., (ed.) *The International Dimensions of Human Rights*, Vol. 1, 1982, p 43.

that the crucial normative issue finally has been determined:¹⁶⁷ - "the last half of the 20th century may fairly be said to mark the birth of the international as well as the universal recognition of human rights".¹⁶⁸ The problem however is that reality and rhetoric remain very far apart. "the belief that rights are universal, and are not relative, to particular social or historical culture has become, if anything, even more important in their use as international norms".¹⁶⁹ When one refers to cultural relativity, the arguments mostly centre around, religion, morality and sexuality. To look at these three examples one should study the arguments surrounding for example: circumcision, age of consent for heterosexual and homosexual sex, the age to marry and the age to vote. Male circumcision is regarded as an acceptable religious practice in many cultures.¹⁷⁰ Female circumcision¹⁷¹ is considered an acceptable practice too, but the consequences and the impact it has on the individual, make it unacceptable in many other cultures and is therefore regarded as a form of torture in a majority of cultures. But when both these differing cultures or societies view the right not to be tortured they are in agreement. The age of heterosexual consent and that of homosexual consent have been an issue of debate for some time in the UK. Why are we making an issue of sexuality? The reason it is an issue is that such behaviour i.e. being sexually active is considered an adult form of behaviour and we try to protect children from exploitation. Where the chances of abuse or exploitation by adults is possible the age of consent becomes important. The age of consent is therefore a way to ensure that children have protection, against this adult form of behaviour and from possible exploitation by adults. Another interesting coming of age issue deals with the right to vote. Eighteen seems to be the universally acceptable age for the right to influence a political decision, so why is it then that the international community finds it so hard to find a common argument for the age of recruitment and fighting?

¹⁶⁷ Fields and Narr, "Human Rights as a Holistic Approach", *HRQ*, vol. 14, 1992, p 1-20.

¹⁶⁸ Weston, BH., "Human Rights" in vol. 6, *HRQ*, 1984 p 262.

¹⁶⁹ Sidorsky, D., "Contemporary Reinterpretations of the Concept of Human Rights" in Sidorsky (ed.), *Essays On Human Rights*, 1979, p 89.

¹⁷⁰ Ennew, J., "Shame and Physical Pain : Cultural Relativity, Children, Torture and Punishment" in Van Beuren, G., (ed) *Childhood Abused: Protecting Children against Torture, Cruel, Inhuman and Degrading Treatment and Punishment*, Dartmouth : Aldershot, 1998, p 37.

For a number of reasons, deciding when childhood ends is controversial, and therefore it is hard to decide when it ends or should end. Harris¹⁷² and Franklin¹⁷³ in fact though less radical when compared to earlier liberationists promote the central premise that even rather young children are capable of competent thought and of making informed choices; and that adults like children are capable of making mistakes. It is also becoming clearer that there is an emerging global culture, which stands firm on the position that the treatment of citizens by a government is no longer a matter of exclusive domestic concern. It is a legitimate concern of others and they can express this concern.¹⁷⁴ Further, irrespective of the fact that it is a state or a non-state agency violating the rights of these children legal intervention is justified when it is the collective moral judgement of a society regarding a practice, that without any doubt is intolerable.¹⁷⁵ Law it has been said is “nothing but a rational regulation for the good of the community, made by persons having powers of government and promulgation”.¹⁷⁶ Law is a degree of permanence and a minimum standard of morality. The core of law must have an affinity with the basic aim and nature of mankind. Rules are not synonymous with positive law because routine law differs between divergent groups. This can be explained by the fact that morality itself may be a subjective value in different circumstances, though in all due respect, the core value remains constant. “‘Concepts’, by their nature, may owe their endurance to the relativism of their definition by differing individuals rather than to their core meaning”.¹⁷⁷

¹⁷¹ See Dorkenoo, E., and Elworthy, S., *Female Genital Mutilation: Proposals for Change*, MRG: London, March 1992.

¹⁷² Harris, J., “The Political Status of Children” in Graham, K (ed.) *Contemporary Political Philosophy*, Cambridge University Press: Cambridge, 1982.

¹⁷³ Franklin, B., (ed.) *The Rights of Children*, 1986 Blackwells and Franklin, B., (ed.) *The Handbook of Childrens Rights : Comparative Policy and Practice*, Routledge :London, 1995.

¹⁷⁴ Kausikan, B., “Asia’s Different Standard” in 92 *Foreign Policy*, No 24, 1993. See also Lillich and Hannum, *International Human Rights: Problems of Law, Policy and Practice*, Publisher Little, Brown and Company: New York , 1995, p 139.

¹⁷⁵ Lord Devlin in *The Enforcement of Morals*, Published for the British Academy by Oxford University Press: London, 1959.

¹⁷⁶ definition by Tomas Aquinas, *Summa Theologica*, 1a2ae 90.4 quoted in White and McCoubrey , *Textbook on Jurisprudence*, Blackstone Press, 1993, p 68.

¹⁷⁷ Wood, M., “Rule, Rules and Law”, Leith. P., and Ingram, P., (eds.) *The Jurisprudence of Orthodoxy: Queens University Essays on HLA Hart*, Routledge: London, 1988, p 28.

Laws are supposed to provide a basic system of forbearance and compromise which will allow a society to function and provides sanctions as a means of enforcement.

The passing of laws is only a beginning, it is a signal that must be taken up by all of society's institutions. It can be summarised that the suffering undergone by children is similar in almost every instance of participation in armed conflict wherever it may be taking place, therefore the protection extended to children should be applicable to all children universally. Cultural differences or practices are an unacceptable excuse. This abuse of children has been rightly criticised. It has been said that this particular treatment of children should "invoke moral outrage" of the highest kind.¹⁷⁸ The entire spectrum of children rights theories are based on this moral basis that it is wrong for children to suffer even in extremely vicarious situation of warfare and other disasters. Children are given first priority in any situation because it is a fact that we all accept that childhood is a special time of our lives and it deserves protection. Age is a relevant point of distinction, even if one accepts that the drawing of the line at eighteen is arbitrary, research indicates that by the time a child reaches eighteen her development is more or less complete.¹⁷⁹ International law rightly should try to include the highest number of children it can offer protection to. And as the legislation of a vast majority of States show, the age of majority is eighteen and this is the least the international community should settle for.

III. Evolution of Children's Rights - A Summary :

Children's rights have been debated over for many years now. Different views and perspectives exist. The view that children *do not need* specific rights as they are protected

¹⁷⁸ Graca Machel, Special Rapporteur and Carol Bellamy of UNICEF in separate interviews, quoted in chapter 1 and 4 of this thesis.

¹⁷⁹ Sandoz, Swinaraski and Zimmermanned, *Commentary on the Protocols of 5 June 1977 to the Geneva Conventions of 12 August 1949*, p 899. See also Gross, R., *Psychology: The Science of Mind and Behaviour*, Hodder & Stoughton: London, 1987, 11th Impression, 1991. see also "Optional Protocol to the Convention on the Rights of the Child Concerning Involvement of Children in Armed Conflict", 322 *IRRC*. 1 March 1998, pp 107-125. and Document of 8 December 1997 on the same topic regarding the Position of the International Committee of the Red Cross both can be found on website - <http://www.icrc.org/icrceng.nsf/>

by adults also exists. It emphasises among other things that adults have the best interests of the child at heart. This view that children are cared for and hence do not therefore need specific rights does still exist and can be found in the writings of Goldstein, Freud and Solnit.¹⁸⁰ Another view falling in more or less the same point of view is that childhood is viewed as a special age, an age of innocence. Since children are kept free of the stress and worries of an adult life, there is no need to think in terms of “children’s rights”. However, this is an over- exaggeration of the situation. A look at an annual report of any year of the *State of the Worlds Children*, puts this theory to rest. The truth is that Children *do need* specific rights and are in fact the holders of specific rights. In fact many were / are of the view that the child did have a separate identity. According to Tomas Aquinas the child is an individual human being, separate from the family.¹⁸¹ Jean Bodin was one of the first to consider that children might need protection from their families itself in specific instances.¹⁸² This image of the adult as a caring, responsible individual and always having the best interests of the child at heart has proven many times to be a fallacy. It is true that in most cases adults do live up to this responsibility but the number of cases of abuse and exploitation are too many to disregard.

Historically speaking the children’s right movement has been in existence in some form or the other for centuries now. In June 1852 , an article with the title “The Rights of Children” was published.¹⁸³ Further the same time period saw a growing movement with the aim of “child-saving”. The idea was to save individual children rather than extending legal protection to children generally and give them specific rights. Most writings indicate that children were not viewed as individuals. It has been suggested that this intervention in safeguarding children’s rights lay in the view in terms of “usefulness to society” and that children were viewed as “objects of intervention rather than legal subjects”.¹⁸⁴ The mid-19th century found the “child-savers” rescuing children from abusive parents and

¹⁸⁰ see Goldstein, J., Freud, A., Solnit, AJ, *Before the Best Interests of the Child*, Free Press: New York, 1979. also London: Burnett Books, 1980.

¹⁸¹ Aquinas, T., *Summa Theologiae*, vol. 37 (trans. T Gilby, 1975) question 57 article 4.

¹⁸² Bodin, J., *Six Books of the Commonwealth*, (Trans. MJ Tooley, 1955) Book 1 at p 6.

¹⁸³ Slogvolk, in *Knickerbocker*, no 36, 1852, p 489. quoted by M Freeman, in Freeman , MDA and Veerman, P., (eds) *The Ideologies of Childrens Rights* , Dordrecht : Martinus Nijhoff , 1992.

¹⁸⁴ Freeman, MDA “ The limits of Childrens Rights” in Freeman and Veerman, (eds.) *ibid.* p 30.

employers and providing food and shelter to orphans. Some claim that the lives of children can be summed up as at the worst they were chattels and at the best inferior beings given protection by parents and other adults.¹⁸⁵ Though historically we see that Aristotle saw the child as an extension of the family, and in his view parents would not harm their children ever.¹⁸⁶ According to Hobbes,¹⁸⁷ children were in the power of their parents. It was in the hands of the parents to preserve or destroy their children. Hobbes was also of the opinion that children tacitly obeyed the commands of their parents because they knew instinctively that they were dependent on the will of the parents when it came to a choice between life or death. The concept of “nurturing” rather than accepting children in their own right was predominant at this time. However, the child saving movement of the nineteenth century or early twentieth century did not focus on children “as individuals.” It is only in the latter half of the twentieth century that a serious consideration was given to this concept.

In 1896, Frances S Hallows wrote that “children’s rights are ... to be born into the world in a healthy condition...the wrongs of a child begin before birth”.¹⁸⁸ Ellen Kay in 1900 published her book entitled *Century of the Child*, where she stated that it was the right of the child to choose its own parents, what she meant was that two individuals before having a child should consider the outcome of their union, whether the child would be healthy both physically and spiritually. After Kay came Eglantyne Jebb. Jebb, advocated that the child was never the enemy in any situation i.e. thus placing them above the political divide and started special funds and committees to reach children in war. Henry Goldszmit¹⁸⁹ published the *Right of the Child to Respect* in 1929. He argued for a higher

¹⁸⁵ Aries, P. *Enfant et la vie familiale sous l'Ancien Regime*, Baldwick, R (trans) *Centuries of Childhood: A Social History of Family Life*, New York : Knopf and London : Jonathan Cape, 1962; also with new introduction by A Phillips, London : Pimlico, 1996. deMause, L., (ed.) *The History of Childhood*, New York : Psychohistory Press, 1974; Zelizer, *Pricing the Priceless Child*, Princeton University Press, 1985.

¹⁸⁶ Aristotle, *Nicomachen Ethics*, 1138 Book 6. Peters FH (trans) 3rd ed. 1886; also Thomson, JAK (trans.) *The Ethics of Aristotle: The Nicomachean Ethics*, Revised ed. London : Penguin, 1976.

¹⁸⁷ Hobbes, T., *Leviathan*, MacPherson, CB., (ed.) 1968. Hobbes discussion on child-parent relationship can be found in the section “Covenants of the Vanquished and the Victor or the Child to the Parent.”

¹⁸⁸ Halowes, FS., *The Rights of Children in Spirit, Mind and Body; Thoughts for Parents*, SW Partridge and Co: London, 1896, pp 7-8.

¹⁸⁹ lived from 1878 - 1942, known by his pen-name of Janusz Korczak. He was a polish paediatrician.

status for children in society than was given to them. He also argued that adults should respect children as they are and accept that the children had a right to respect, to cry and to laugh, children were in his view a complete people. Campbell too has urged that children have a right to be children and not adults or mini-adults.¹⁹⁰ According to Laurence Houlgate¹⁹¹ there are two groups of child rights advocates. The first is based on what he termed 'the theological principle of beneficence'. He explained this as a duty to promote the good of others "and since children are classed too weak and limited in their emotional and cognitive capacities to be able to protect themselves we have an urgent duty to create special positive and negative claim rights for them".¹⁹² He continues to describe the second group as consisting of those who give first priority to the 'deontological principle of justice' which can be summed up as children should be treated as equals to adults. i.e. equality of treatment.

In contemporary times¹⁹³ "child-liberators" have come to replace the "child-savers" of earlier times. For example Martin Hoyles¹⁹⁴ talks of the "suffering" of modern children in the form of a crucial separation from work as law and society prohibits children from being employed until reaching a certain acceptable age. John Holt¹⁹⁵ and Richard Farson¹⁹⁶ are two other proponents of child liberation. Some of the rights put forward by them for example the right of the child to be free from physical punishment have gained a kind of universal acceptance, others remain controversial. In Farson's view the right to work is a part of the "right to economic power" for the child. But both Holt and Farson seem to have a rather extreme view. Among the more controversial rights advocated by them for children are the right to work, right to vote and the right to sexual freedom. In fact Holt supported the right of the child to use drugs! The extremism of their views

¹⁹⁰ Campbell. T., "The Rights of a Minor" in Alston, Parker and Seymour (eds.) *Childrens Rights and the Law*, 1992. Clarendon Press: Oxford , p 20.

¹⁹¹ Houlgate, L., *The Child and The State*, 1980.

¹⁹² *ibid*, p 15.

¹⁹³ for an idea of views in the 1970's on liberation for children see, Adams, P., Berg. L., Niel, AS., Ollendorff, *Childrens Rights*, 1971; for a differing view in the same time-period, see Foster, jr. HH., *A Bill of Rights For Children*, 1974.

¹⁹⁴ Hoyles, M., *Changing Childhood*, Writers and Readers Publishing Co-operative, London 1979.

¹⁹⁵ Holt, J., *Escape From Childhood*, Penguin : Harmondsworth , 1974.

¹⁹⁶ Farson, R., *Birthrights*, Penguin: Harmondsworth, 1978.

ensured that this version of the liberation theory has had only a modest impact on public policy even after 20 years; though it did heighten public sensitivity to children rights. Holt submits that “in important matters, nobody can know better than the child himself”.¹⁹⁷ Farson has a similar argument. He strongly submits that the most overriding of all birthrights is the ‘right to self-determination.’ Children should have the right to “decide the matters which affect them most directly”.¹⁹⁸

Freeman¹⁹⁹ advocates, it is submitted, a more suitable theory, which he terms ‘liberal paternalism’. This theory aims at maximising the independence and autonomy of the child,²⁰⁰ yet justifying under special circumstances parental intervention in the best interests of the child. Freeman puts forward the perspective that in order to do so a basis on the premise of the need to respect “individual autonomy and to treat persons as equals” is required. He turns to Rawls *Theory of Justice*, to support this argument. Referring to the Rawlsian concept of social contract, and in particular the argument that the principles of justice that one should have to choose from are equal liberty and opportunity i.e. and an “arrangement of social and economic inequalities so that they are both to the greatest benefit of the least disadvantaged”. Coming to the principles of paternalism he states, “[p]arties to a hypothetical social contract would know that some human beings are less capable than others; they would know of the variations in intelligence and strength, and they would know of the very limited capacities of small children and the rather fuller, if incomplete, capacities of adolescents. They would take into account of the insights from cognitive psychology which suggests that children even as young as 12 are as capable of making decisions about their lives as adults are for them”.²⁰¹ He also submits that “this version is not paternalism in its classical sense for within those parameters there would be little room for children’s rights at all. ... since the goal is rational independence, those

¹⁹⁷ *supra* fn 195, pp 175-176.

¹⁹⁸ Farson, R., *supra* fn 196, p 154.

¹⁹⁹ Freeman, M., *The Rights and Wrongs of Children*, Francis Pinter: London, 1983.

²⁰⁰ see also Minow, M. “Rights for the Next Generation: A Feminist Approach to Children’s Rights” in 9 *Harvard Womens Law Journal* 1, 1986, specially p 14.

²⁰¹ see Damon, W., *The Social World of the Child*, San Francisco: Josey Bass, 1977 and Conger JJ., *Adolescence and Youth: Psychological Development in a Changing World*, New York: Harper and Row, 1973.

who exercise constraints must do so in such a way as to enable the child to develop their capacities... All paternalistic restrictions require moral justification.”.

In looking after the “best interests of the child” one must recognise both the limits of protection and the dangers of the liberation theory. To extend the “Best” to the child one must it is submitted render both protection as well as recognise their autonomy. Liberal Paternalism as indicated by Freeman seems to accept that children need to be in a position to take decisions, or at least have their views taken into account to prepare them for their roles as responsible adults. Children should be brought up in a manner in which they learn to value and respect both others and themselves. Additionally, if a child has reached the age of majority without having had any role to play in the decision-making process regarding his or her lives, it is absurd to believe that on reaching this magic age she or he would automatically be in a position to take sensible, mature decisions which would be advantageous in the long run. Children need to have some sort of participatory role to play, to be able to reach this stage. Freeman²⁰² too has suggested that while special treatment of children can be justified on the basis of immaturity or developing capability or incapability it now is time that there should be a change and children should be brought “to a capacity where they are able to take full responsibility as free, rational agents for their system of ends.” This re-assessment of the role of law in the treatment it renders to children remains critical. There has been some change in its attitude though for example of the practice of excluding children from activities on the basis of their age, when they are capable. In the UK landmark case of *Gillick v West Norfolk and Wisbech Area Authority*²⁰³ the House of Lords indicated that a more intelligent approach to assessing children’s legal competence should be adopted: “If the law should impose on the process of ‘growing up’ fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change.” However, in the case of *Re W*²⁰⁴ the

²⁰² Freeman, MDA., *The Rights and Wrongs of Children*, Frances Pinter : London, 1983, p 57.

²⁰³ 1986, AC 112. The case dealt with the ability of teenagers to take responsibility for the important decision regarding health and contraception in opposition to the views of parents and society.

²⁰⁴ [1992] 4 All ER 627.

court ruled that if the child or adolescent was taking a decision which was harmful to the best interests of the child, a parent or appropriate carer could over rule that decision.²⁰⁵

Autonomy for children has been stressed upon by Article 12 of the CRC:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

and the Committee on the Rights of the Child by their focus on decision making process's in schools and local communities as an issue of capacity. But this means that every child's maturity, his or her ability to understand and cope with the situation would need to be assessed. To assess maturity there is the need to allow expression. This ability to express themselves is an "essential part of determining where the child's interest lay"²⁰⁶ while the "child's right to express views and have them taken into account is one of the basic principles of the convention ; it is not to be set aside because of either government reluctance or parental concern."²⁰⁷ Whilst the concern may be real and justified in the context of procedures inimical to participation by children, the correct response is to change the system and the procedures to accommodate children. This is a challenge

²⁰⁵ see Lowe . N., Juss, S., "Medical Treatment - Pragmatism and the Search for Principle" in 56 *MLR* 1993, pp 865 - 872.

²⁰⁶ Marshall, K., *Children's Rights in the Balance The Participation - Protection Debate*, Edinburgh : Stationary Office, 1997, p 101.

²⁰⁷ Some countries have legislated the child's right to be heard, but there are also age limits. for e.g. In Norway once a child reaches the age of 12 the legal obligation to hear the child comes into force. If a child over 12 is not given an opportunity to voice his or her opinion then this is reason enough to pronounce a mistrial. In Sweden, the law states that " ..in step with the child's advancing age and development, the custodian shall make an increasing allowance for the child's views and wishes." In many other countries this principle is often seen as a threat to the rights and authority of the parents.

which must be taken up by governments”.²⁰⁸ However, issues like this may be very sound in terms of many issues relevant to children but what about in the instance of a difficult, uncontrollable child who may for example leave home, and be in a dangerous situation that could have long term negative consequences. In such a case, common sense and appropriate parental guidance would have to prevail. For example imagine a child of 15 years who has left home, is addicted to drugs, and lives in a dangerous environment where rape, death or even murder is a strong possibility. The parents would be justified in trying to help this child by overruling the child’s decision to live in this manner and therefore enable the child to overcome this situation and lead a better life. But often it is not as simple and straight forward as that. Coming specifically to the issue of child-soldiers which is the subject of this thesis, international law prohibits under 15 years olds from fighting, yet they are to be found on the front-lines. This is a clear violation of law²⁰⁹ and their rights. Then comes the issue of 15-18 year olds who as has been submitted gain no benefit what so ever from fighting as soldiers, but in fact suffer immense harm from this exposure to violence, what happens when they *volunteer* to fight or wish to fight, do we let them? It is submitted that this is a classic case for intervention keeping their best interests in mind.

IV. Conclusions:

Children have repeatedly been declared privileged wards of humanity. The fact that children have rights, is well established. The burden now moving from passing laws to monitoring to what extent governments honour their national laws and fulfil international obligations. The emphasis, has we can see moved from “protection to autonomy, from nurturance to self-determination, from welfare to justice”.²¹⁰ Today the debate over children’s rights has moved from that of an individual child to that of institutional

²⁰⁸ Marshall, K., *Children’s Rights in the Balance The Participation - Protection Debate*, Edinburgh: Stationary Office, p 101, 1997. p 30.

²⁰⁹ see chapter 3 in this thesis.

²¹⁰ Freeman, MDA., “Introduction: Rights, Ideology and Children” in Freeman, M., and Veerman, P., (eds.) *The Ideologies of Childrens Rights*, Martinus Nijhoff, Dordrecht, 1992, p 1.

discrimination. However good or moral the world may be, the fact is, as submitted earlier that children need to have their rights spelt out, to avoid a conflict of interests. It has been established that children require both protection and autonomy.

A crucial issue to the rights of children is that childhood differs from adulthood and hence is the beneficiary of protection from what we consider adult forms of behaviour such as submitted examples of sexuality and political rights. Universal standards regarding children are possible, and in the many different philosophies it is to be noted that notions of children's rights have a common ground. And if these philosophies are at variance it may be that they are at odds with an individualistic philosophy such as that of Farson or Holt with reference to the use of drugs or the right to sexual freedom, but there are many areas in which the common ground is quite clear. When it comes to child soldiers specifically, it is submitted it seems that political differences between cultures may exist but not moral and philosophical difference regarding the abuse of children on the front-line. The issues discussed also bring up the question of whether one can be under a moral obligation to respect the rights of children if they are not under a legal obligation to do so? The answer it is submitted from the arguments stated above is that given that we have accepted children and childhood as unique and a special status in our lives which is entitled to special care and protection, and that they are above political ideologies, it is therefore the moral responsibility of all adults to ensure that children do not suffer abuse of any kind.²¹¹

That autonomy is a good thing is accepted. But it has been established²¹² that soldiering is not of any benefit whatsoever and the urgency to protect children from the effect is imperative. Freeman does advocate intervention in the case it is necessary and in the case of child soldiers it is submitted it is necessary to intervene, and not allow individual under eighteen to participate in any form of armed conflict. The fact *is* that children's lives are ruled by the actions of others, as they are among the most powerless and vulnerable

²¹¹ Lord Devlin supported the view that legal intervention is justified where in the collective moral judgement of a society a practise is intolerable. See Devlin, P., *The Enforcement of Morals*. London : Oxford University Press, 1965.

²¹² see chapters 4 and 6 specifically.

members of our society. This increases the obligatory responsibility of adults towards children. Interestingly we do recognise today that participation is a fundamental right of children. A child's ability to make an appropriate or the best choice depends on maturity, experience and access to information.²¹³ This is "therefore a powerful assertion of children's rights to be actors in their own lives and not merely passive recipients of adults decision-making."²¹⁴ However the right to participate is to be realised such that the consequences will "improve the emotional and psychological health of children, enhance the quality of decisions and create a more democratic and participative society".²¹⁵ In the case of fighting as child soldiers, very few children have the information to make such an informed decision. If they do have information as to the possible effects of fighting and are still keen to fight for reasons of revenge or poverty, it is the moral and obligatory responsibility of adults to ensure that they are not exposed to this violation. As the recognition of fundamental respect for children as unique individuals in their own right's and not just as the "property of an adult who has responsibility for them means that it is important to test each intervention to restrict those choices by the child, against a serious assessment of whether the exercise of the choice would seriously harm the child".²¹⁶ Children on the front-line, as has been submitted in Chapter One, suffer significantly; and if we have to stop this abuse of children, this thesis submits that it is without any doubt the moral duty and responsibility of all adults to ensure that children do not fight in any armed conflict.

²¹³ Flekkoy, MG and Kaufman, NH , *The Participation Rights of the Child: Rights and Responsibilities in Family and Society*, Jessica Kingsley Publishers: London, 1997, p 88.

²¹⁴ Lansdown, G., *Taking Part - Children's Participation in Decision Making*, IPPR: London, 1995 , p 2.

²¹⁵ *ibid*, p 4.

²¹⁶ *ibid*, p 25.

Chapter Three

THE LEGAL BASIS FOR THE PROTECTION OF CHILDREN IN TIMES OF ARMED CONFLICT

1. Introduction: The Evolution Of Law To Protect Children

The concept of childhood has been constantly evolving through the years. International law is an area where one can trace this slow evolution. Law first had to deal with the problem of recognising the child as a separate legal person. Jurisprudentially it is a harsh reality that children were viewed as chattel, property of predominantly the father.²¹⁷ From the Roman doctrine of *patria potestas*²¹⁸ until the first half of the 19th century,²¹⁹ the right of the parent to kill or harm a child was not recognised in principle, yet children suffered abuse at the hands of adults including in the form of parental authority.²²⁰ The *puissance paternelle* of the French Civil Code gave the father unchecked authority over the child until the age of 21. It is also reflected in The *German Code* of 1896.

It is only in the last half of this century that children have been declared as “persons under the law”.²²¹ It has been said that the very first instruments focusing on protection provided only “piecemeal protection from specific forms of economic and sexual exploitation”.²²² A major reason for the promulgation of laws extending protection to

²¹⁷ Stoljar, S.J., *Children, Parents and Guardians*, International Encyclopaedia of Comparative Law, Vol. 4, chapter 7, p 3-39; Weisberg, D.K., “The Concept of the Rights of the Child”, *The Review*, ICJ: Geneva, vol. 21, 1978, pp 43-45.

²¹⁸ under this doctrine, the child was viewed as *paternal property*. In Roman legal history one finds that from the time of the Twelve Tables to post-classical times the father had unlimited rights over his child. This right included the authority to abandon, sell or kill the child.

²¹⁹ See generally, De Mause, L., “The Evolution of Childhood” in DeMause (ed.) *The History of Childhood*, New York : Psychohistory Press, 1974.

²²⁰ Weisburg gives example of harsh legislation in colonial Massachusetts and in France.

²²¹ *Tinker v Des Moines Ind. Sch. Dist*, 383 US 503, 1969.

²²² Van Bueren, G., “The Historical Framework of the International Documents on Children” in Van Beuren (ed.) *International Documents on Children*, 1993, Martinus Nijhoff : Dordrecht. p xv.

children was the industrial revolution and the exploitation suffered by children as a result.²²³ Most nineteenth century reforms were in the field of juvenile justice and child abuse. This century also witnessed protection from parents and parental cruelty. Legislation has been improving ever since.²²⁴ In fact, in modern European family legislation, parental criminal liability and deprivation of parental rights are well established.²²⁵ Interestingly, the deprivation or termination of parental rights in the interests of a child has become a universally recognised principle.²²⁶ It exists in some form or the other globally.²²⁷ In the nineteenth century, legislative reforms resulted in establishing the principle that society could prevent abuse by interfering with parental rights.²²⁸ In the words of Lord Fraser, "parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable a parent to perform his duties towards the child and towards other children in the family".²²⁹

In 1919, the International Labour Conference adopted the Minimum Age (Industry) Convention. This was soon followed in 1921 by the League of Nations International Convention for the Suppression of Traffic in Women and Children. It was only in 1924

²²³ another factor is probably the fact that as the status of women strengthened the doctrine of paternal authority weakened, thus weakening the concept of paternal property.

²²⁴ Weisburg, DK., "Evolution of the Concept of the Rights of the Child in the Western World", in *The Review*; ICJ: Geneva, No 21, December 1978. pp 43-48.

²²⁵ For example, Parental criminal liability is found in Germany - Criminal Code s223b ; France by the offence of *abandon de famille*, PC art 357; England under the Children and Young Persons act of 1969. Deprivation of parental rights under German Law - CC s1666, par 1; Italian Law CC art 33, French law of 4 June 1970 CC art 378 .

²²⁶ Weisberg, K, "Evolution of the Concepts of the Rights of the Child in the Western World." *The Review*, ICJ: Geneva, no 21, Dec 1978 p 48.

²²⁷ Under the Civil Code of Islamic Republic of Iran, see chapter 2 and 3, specifically articles 1175, 1179, 1180, though articles 1177 does state that "A child must obey its parents and must respect them whatever its age." Article 1180 states that "a minor child is under the guardianship of its father or paternal grandfather", it is specifically article 1175 that states as a negative right that a "child cannot be taken from its parents or the father or the mother who is in charge of its custody except in cases where justification exists for doing so."

Under the African Charter it does put some duties but at the same time protects children by saying "cultural practices" are an unacceptable excuse to cause any harm whatsoever to children. In recent years. some girl - children have received asylum in countries away from their home and relatives to avoid FGM.

²²⁸ English Law - section 37 of the Poor Relief Act, 1868. The Mary Ellen case in 1874 in New York, America. Another well know act is the Prevention of Cruelty to, and Protection of Children Act, 1889 in the UK.

²²⁹ *Gillick vs. West Norflok and Wisbech Health Authority*, 1 AC 112, 170, 1986.

that the Geneva Declaration was adopted. Its origins lie in the suffering undergone by children in the war and is principally concerned with the economic, social and psychological needs of the child, yet it is the basis on which all modern day i.e. twentieth century protection mechanisms for children stand on. Natural law principles were incorporated into this declaration and were accepted by positivist international law. The Declaration of Geneva was re-affirmed in 1934 by the League and heads of states pledged to incorporate it in their domestic laws. This was followed by the 1943 inter-allied conference of Educational Fellowship representing nineteen states which adopted the "Children's Charter for the Post-War World" followed by the Pan-American Child Congress which adopted in its turn the "Declaration of Opportunity for Children". These instruments were followed by national instruments like the American Charter for the Welfare of the Child in Times of War. Then came the Universal Declaration of Human Rights (UDHR), the International Covenants of 1966, followed later, in 1989, by the Convention on the Rights of the Child. Now law is faced with the task of improvement of safeguards for the rights of the child as the family is taken as the nucleus of society and the child as the core of the society hence the concept of the *best interests of the child* plays such a prominent role today.

This chapter will look at the present day legal provisions extending protection to children in times of armed conflict after a brief look at the major international and regional provisions in the field of child rights. It summarises the legal protection available to children both in human rights and humanitarian law and then looks at the strength and weakness of this protection with specific reference to child - soldiers.

II. Protection Extended To Children Under Human Rights Law

II.A. The Declaration On The Rights Of The Child, 1924

The Declaration on the Rights of the Child was adopted in 1924 in the Fifth Assembly of the League of Nations. This is the first instrument, i.e. a human rights declaration adopted some twenty four years before the Universal Declaration of Human Rights (UDHR), by

an inter-governmental organisation. The Declaration sums the entire aims, goals and *duty* of mankind to children, the most vulnerable members of any society in its phrase “*mankind owes to the child the best it has to give.*” This declaration known as the Declaration of Geneva, has a simple text and reads:

By the present Declaration of the Rights of the Child commonly known as the “Declaration of Geneva”, men and women of all nations, recognising that mankind owes to the child the best it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed.

1. The child must be given the means requisite for its normal development both materially and spiritually.
2. The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured.
3. The child must be the first to receive relief in times of distress.
4. The child must be put in a position to earn a livelihood, and must be protected against any form of exploitation.
5. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

An interesting feature of this declaration is that in its preamble it does not refer to the obligations of states, but places this duty directly on the “*men and women of all nations.*” This is both a strength and weakness, as in its text it clearly states that this was not a binding instrument on states: “The assembly endorses that declaration of the rights of the child commonly known as the Declaration of Geneva and invites the States Members of the League to be guided by its principles in the work of child welfare”. This can be traced back to the assumption that adults, regardless of race, nationality and creed would ensure protection to children, as children were viewed as recipients rather than right holders. The Declaration has no enforcement mechanisms, yet retains its importance in the history of

child rights as it is the first to establish internationally the concept of the rights of the child, thus laying the foundations for international standard setting. This Declaration covers a range of rights highlighting the economic and social rights of the child. But it does seem that the language of this declaration is more “welfare” oriented. Further children are regarded as recipients rather than holders of specific rights. Though the declarations seems to take the form, to some extent, of child-salvation, it does remain important for making, as stated earlier “international” the concept of child rights, and secondly for laying the basis for future standard setting in the field of child-rights. It also lays to rest the fallacy that the concept of children’s rights is recent.

The Declaration is as relevant now to children in armed conflict as it was when drafted. Children suffer in all kinds of ways, their spiritual and mental health are just as important as their physical well-being. For example, two percent of the children who died in Uganda’s civil war died as a direct result of violence but 20 percent died due to deaths caused by disease and another 78 percent by hunger. A survey²³⁰ conducted in 1995, in Angola showed that 66 percent of children had seen people being murdered, 67 percent had been witnesses to torture and beatings, and 91 percent had seen dead bodies. In all, two-thirds of the children had been in events that were simply death defying. In Afghanistan, UNICEF²³¹ revealed that some 72 percent of the children had experienced the death of a relative between 1992-96. Almost all the children had witnessed acts of violence. Two thirds of them had seen dead bodies or body parts and nearly half had seen people killed during rocket and artillery attacks. A disturbing 90 percent believed they would die during the conflict. Disease and hunger are the inevitable side products of any war²³² along with violence and traumatised individuals. In war violence becomes the norm and the victims in turn often continue to perpetuate it, for peace in tomorrow’s world it is the children of today that have to grow in peace .

²³⁰ United Nations Childrens Fund, “Angola Alliance for Life” Document prepared for *The State of the World’s Children 1996*, Luanda, July 1995, p 4.

²³¹ AI report, ASA 11/13/99 November 1999, *Children Devastated by War: Afghanistan’s Lost Generations*. Website: <http://www.amnesty.org/ailib/aipub/1999/ASA/31101399.htm>.

²³² Green, RH., “The Course of the Four Horsemen: The Costs of War and its aftermath in sub-Saharan Africa: An Overview”, in Macrae, J., and Zwi, A., (eds.) *War and Hunger*, UK: Zed Books, 1994, p 34.

II.B. Universal /Global Protection

II. B. i. The Charter Of The United Nations

The United Nations Charter is the constitutional document which established the United Nations and came into force in 1945. It sets out the aims, principles and rules of the structure of the UN. The UN Charter has elevated human rights to international law status and created an obligation on the part of member states to “promote universal respect for and observance of, human rights and fundamental freedoms for all”. Although it contains some provisions relevant to international human rights law, it does not contain any express reference to children. However, Article 55 (c) reads,

“universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

Article 56 reads,

“All members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.”

By virtue of Articles 55 and 56, it can be established that member states do pledge themselves to take action in achieving human rights standards and freedoms for *all*, and thus includes children. However since the Charter makes no specific reference to children it overlooks forms of discrimination which might be specific for children i.e. basis of birth, social origin or ‘any other status’ which might include age or age of minority.

This Charter importantly provides for the establishment of specialised agencies to help States achieve the goals set out in Articles 55 and 56. They include the United Nations

Children's Fund (UNICEF)²³³ and the United Nations Educational, Scientific and Cultural Organisation (UNESCO). UNICEF was specifically created as a temporary body in 1946 for "the benefit of children and adolescents of countries which were the victims of aggression".²³⁴ The role of these organisations remains crucial to the well being of the world's children.²³⁵

II.B.ii The Universal Declaration Of Human Rights 1948

The UDHR catalogues human rights which apply to *all* and therefore to children. In Article 16(3) it refers to the family as "the natural and fundamental unit of society" and suggests that it is the duty of the society and state to protect it. The UDHR however contains only two articles which contain specific reference to children i.e. Articles 25 and 26. Article 25 (2) reads:

"2. Motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock, shall enjoy the same social protection."

The UDHR thus emphasises that children are entitled to *special care and assistance*, it provides through the protection of motherhood protection to the rights of the child, hence proclaiming both directly and indirectly the rights of the child as of utmost importance. An interesting factor seems to be that it enjoins the rights of mother and child but does not do the same for the role of the father!

Article 26 reads:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.

²³³ United Nations International Children's Emergency Fund, now a permanent body. It had retained its acronym but the title has been amended to United Nations Children's Fund.

²³⁴ UN Chronicle, Vol. XXI, No 2, 1984.

²³⁵ See Chapter 8 for the role of international organisations.

Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

It therefore seems that the UDHR apparently accepts the importance of inculcating in children the spirit of tolerance and friendship thus giving due importance to the status of childhood and the importance of children as the policy makers of tomorrow in the maintenance of the ideals of the UN. Though the strict interpretation of this would be that it speaks of the right to education, in terms of access and aims.

Though the preamble of the UDHR clearly states its universality by stating that it is a “common standard of achievement for all peoples and all nations”, its legal status however, is not too strong, as it is a GA resolution, hence it is not a binding instrument. This ambiguity has important consequences for the rights of children under international law. In the International Court of Justice in the *North Sea Continental Shelf* cases it was stated that “general or customary law rules and obligations by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion and will by any one of them in their favour”.²³⁶ If a specific provision has the status of customary international law, it would be binding on a state irrespective of its being a party to a specific treaty provision.

²³⁶ ICJ Reports 1969, p 38-9.

The differing views regarding the precise status of the UDHR are the minimalist approach, i.e. the UDHR is a non-binding resolution and that it represents an authoritative interpretation of the human rights provision on the charter by the GA. Thirdly it has been suggested that this declaration has since its adoption become customary international law. The last it is submitted has been supported by state practice that it is indeed now *customary international law*. The position that the UDHR now has the characteristic of *jus cogens* too has found support in state practice. The UDHR is now very much a part of almost all constitutions²³⁷ of the world, hence seems that it is incorporated into domestic legislation. Since it seems to have the status of customary international law, and its principles are found in other international instruments like the International Covenants of 1966, it is feasible to state that enforcement of its principles are very much the same as the UN principles. Articles 28-30 of the UDHR and the Tehran Declaration seem to only underscore the fact.

II .B.iii The Declaration Of The Rights Of The Child 1959

With the dissolution of the League of Nations, it fell to the Temporary Social Commission of the Economic and Social Council of the United Nations to discuss a second declaration of the rights of the child that would “be as binding on the peoples of the world as they were in 1924”.²³⁸ The Social Commission had three options which they studied: 1. They could re-affirm the original Declaration of Geneva with a few minor alterations 2. They could retain the original with only simple amendments / additions that would transform it into a UN Charter on the rights of the child or 3. they could draft a new document.

The proposal for a new Declaration attracted tremendous state interest. 21 governments in March 1949 sent their comments to the Secretary-General. The declaration thus had from the very beginning an initiative with diverse culture and economic standards. The voting

²³⁷ see the French declaration and also constitutions of countries after 1948 and specially South Africa and former Soviet states.

²³⁸ UN Doc A/41/85.13

within the social commission was in favour of the second option i.e. of amending the original thus transforming it into a “United Nations Charter of the Rights of the Child; embodying the main features of the newer conception of child welfare”.²³⁹

The necessity and desirability of a second declaration was discussed in great detail. It was agreed that the *special needs of the child* justified a separate declaration. However, it took 13 years before the draft declaration was on the floor of the General Assembly (GA). This draft was put before the Human Rights Commission which after discussion revised this draft. The revised text was placed before the Social Commission in 1959. On 19 October 1959, the Third Committee adopted the Declaration by 70:0:2. On 20 November 1959 the GA adopted the Declaration on the Rights of the Child.

This declaration consists of a preamble and ten principles. The principles described in the preamble can be described as rights and freedoms that governments should incorporate into their domestic legislation. The preamble of this declaration basically reiterates the pledge that “mankind owesthe best it can give”. It also places a specific duty upon voluntary organisations to ensure the observance of these rights. It enshrines the principle that children are entitled to *special protection*. This protection is to be in conjunction with the concept of *best interests of the child*. It contains a broad non-discrimination clause. It takes what is in the opinion of some scholars a more realistic approach than the 1924 declaration in specifying that children should be ‘*among the first* to receive relief’ instead of ‘*the first* to receive relief’. It also is a reflection of the fact that children have special needs in times of peace and in times of war. It goes further than the 1924 Declaration in stating that children have the right to special care before as well as after birth. It includes new concepts as the right to name and nationality, right to leisure and recreation. Principle 6 specifies that a child has a right to “full and harmonious development of ...personality, needs and understanding”. The 1959 Declaration aims at protecting the child’s right to a happy childhood. A big step forward seems to be the language used in the text of this declaration. In comparison the 1924 Declaration seems more suited to that

²³⁹ ECOSOC, 3rd year, 7th session, Supplement no. 7, 31.

of child - welfare. It views the child as a recipient of protection and care, whereas the 1959 declaration goes further, albeit not too much as the same is found in many principles of the text of the 1959 Declaration but it does further the cause of children as subjects and their rights as a “legal” right.

An interesting fact is that though governments were happy to support a Declaration, there were some that stated that they would have preferred to adopt a Convention on the Rights of the Child. But this was opposed by some others on the basis that the time was not yet ripe for this.²⁴⁰ This declaration is a non-binding resolution of the UN GA, but the fact that it was adopted unanimously accords it greater weight than other resolutions of the GA. It has a strong moral force because of the mere fact that it has the approval of all member states of the UN, but whether it has the status of Customary International law is ambiguous. The Declaration while going over new ground regarding the rights of the child does run into the problem of enforcement and implementation. It mentions the problem and calls upon all adults, organisations and authorities to ensure these rights by legislative and other measures. The role of voluntary organisations has been highlighted. And the role played by voluntary organisations today in terms of persuading governments of the need of international legal protection and impartial expertise leading to improvements in the status of children is as relevant today as in 1959.

II. B. iv The International Covenant On Economic, Social And Cultural Rights 1966²⁴¹

The International Covenant on Economic, Social and Cultural rights (ICESCR) applies to all men and women. The preamble recognises the indivisibility of human rights, acknowledges that all human rights are inter-linked and of equal importance. It does not

²⁴⁰ Poland was strongly in favour of the convention, so was Mexico, but Netherlands opposed it on the ground that the differing economic, social, cultural differences along with divergent views on morality and religion would give rise to innumerable problems. See UN Doc E/CN.4/780

²⁴¹ For further information see, Alston, P., “The International Covenant on Economic, Social and Cultural rights”, in UN, *Manual on Human Rights Reporting*, New York: UN, 1991. pp 39-77. Craven, M., *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Clarendon : Oxford , 1995.

carry a child-centred approach proclaiming rights necessary to ensure the basic dignity of children but refers specifically to children in Articles 10 and 12. Article 10 reads :

“ The States Parties to the present Covenant recognise that:

1.The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which paid employment of child labour should be prohibited and punishable by law.”

By virtue of Article 10 the family is the fundamental unit of society and the child's vulnerability is recognised and extended special protection. Article 10(3) “employment in harmful to normal development” could be used with reference to children in armed conflict. Article 12 recognises the right to “the highest attainable standard of physical and mental health.” Article 13 speaks of the right to education.²⁴²

²⁴² The Right to Education becomes extremely important when it is noted that a number of children enlist to fight when education is promised to them, and it has been submitted that unaccompanied children and

The CESCR has in the last few years focused on poverty, malnutrition, discrimination, lack of housing, forced evictions, which have tended to address children as well. Coming specifically to children, the CESCR has looked at issues of child labour,²⁴³ forced evictions and involuntary resettlements, the right to education, the right to adequate housing .

A State that is party to this convention is under the obligation to utilise its resources and implement the provisions of this convention. States that are party to this convention have the duty to submit a report on measures taken and progress achieved in implementation to the Economic and Social Council. The Economic and Social Council on its part may make arrangements with other specialised agencies for further information. They may also by virtue of Article 19 transmit relevant information to the Commission on Human Rights. They may also present to the GA their reports on the member states. Under Articles 22, 23, 24, the Council can offer technical assistance and other measures to assist a member state in fulfilling its obligations under the covenant. The covenant it is true, makes no provision for the establishment of any specialist supervisory body ²⁴⁴ but in 1986 the committee was established by the council after many debates, to make a reality of the rights outlined in the covenant. It held its first session in 1987.

The Committee has succeeded in evolving procedures that go further than those in use by other treaty bodies under the UN umbrella. Though the reporting procedures and additional problems²⁴⁵ have meant that the Committee was not quite in a position to achieve its goals in a fashion akin to the human rights committee then. Since one of the main ways of evaluating a states performance seems to be a study of reports submitted

refugee children are more prone to enlist /volunteer when no education and vocational facilities are provided to them.

²⁴³ see Concluding Observations on the following reports, Paraguay E/C.12/1/Add.1 (1996) Para 15; El Salvador E/C.12/1/Add.4 (1996) para 12; Zimbabwe E/C.12/1/Add.12 (1997) Para 12; Peru E/C.12/1/Add.14 (1997) Para 25.

²⁴⁴ Alston, *The Committee on Economic, Social and Cultural Rights*, p 3.

²⁴⁵ for example, this committee being alone among the treaty bodies in not providing its members with an honorarium. Human resources made available have been insufficient.

and the fact is that most reports do not provide all the relevant information, the committee has devised and developed techniques²⁴⁶ like the “general discussion” and “general comments”. The concept of general discussion was developed in response to the lack of time to synthesise the information put before it. A day was therefore set aside to facilitate the exchange of experience and develop a better understanding of the relevant issues. It has become a practice for the committee to use this day to discuss generally one specific issue or right to further understanding. In these discussions the Committee has drawn widely on available expertise from various sectors both governmental and non-governmental.²⁴⁷

The Committee from its third session onwards began to prepare its general comments. The aim of these general comments was to assist the State parties to “fulfil reporting obligations”.²⁴⁸ The Committee has developed it further and clarified the aim of general comments: “make the experience gained so far through the examination of these reports available for the benefit of all States parties in order: to assist and promote their further implementation of the Covenant; to draw the attention to the States parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedures and to stimulate the activities of State parties, the international organisations and the specialised agencies concerned in achieving progressively and effectively the full realisation of the rights recognised in the covenant”.²⁴⁹ The use of general comments is an important mechanism that has allowed the further development of the jurisprudence of the Committee.²⁵⁰ This has meant that besides a rapid development of jurisprudence, it has also become a means by which an agreement may be reached on the interpretation of a specific provision without addressing individual states.²⁵¹ The comments have all contributed to a greater clarity and understanding of the role and

²⁴⁶ Craven, M., *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Clarendon Press: Oxford, 1998, p 27.

²⁴⁷ *ibid*, pp 92-94.

²⁴⁸ Report of the Committee’s Second Session, UN Doc E/1988/14 on p 63, para 367.

²⁴⁹ Report of the Committee’s Seventh Session, UN Doc E/1993/22 p 19, para 49.

²⁵⁰ Craven, M., *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Clarendon Press: Oxford, 1998, p90. See also Article 38 (I)(d) of the ICJ Statute.

²⁵¹ *ibid*.

approach of the committee and the norms within the covenant. The very descriptive nature of the comments, the development of common understanding of the norms indicate an interpretative function *in abstracto*.²⁵² It is however to be noted that, though these are not strictly binding per se, they carry considerable legal weight.²⁵³ Additionally, endorsement by ECOSOC and the GA of the CESCR annual reports adds further weight to the general comments mechanism.²⁵⁴

In General Comment No 5,²⁵⁵ entitled “Persons with Disabilities”, the CESCR has laid the obligation on the State parties to protect “vulnerable members”.²⁵⁶ Further, in paragraph 32, it specifies that children with disabilities are entitled to special protection. In its General Comment No 7, it has addressed the issue of adequate housing as a right specially pertinent to children, women and another vulnerable groups as they tend to suffer “disproportionately from the practice of forced evictions”.²⁵⁷

In 1988 the Committee on Economic, Social and Cultural Rights (CESCR) broke the mould by allowing the formal submission of written reports by NGOs having consultative status with the UN. It went on to adopt the practice of permitting NGO representatives to participate as experts in general discussions. It has explicitly set the stage for states to respond to specific information supplied by NGOs. Further, it has taken many steps to lay the groundwork for a more “effective dialogue”. It has been able so far to develop a procedure whereby an individual state is given the principle responsibility of evaluating a dialogue with a given state. In general comment one they identified seven different objectives which the reporting procedure should promote. This served to emphasise that reporting was of vital importance and much more than just a diplomatic gesture. In the third general comment, the committee made an explicit statement on “the nature of the States Parties Obligations” therefore providing the “intellectual and legal framework” to

²⁵² *ibid*, p 91.

²⁵³ see Meron, T., *Human Rights Law Making in the United Nations*, 1986, p 10.

²⁵⁴ see Tomuschat, C., “National Implementation of International Standards on Human Rights”, in *Canadian Human Rights Yearbook* 1984/5 vol 31, at 36.

²⁵⁵ UN Doc E/C.12/1994//13

²⁵⁶ para 12.

²⁵⁷ UN Doc E/C.12/1997/4

the committee for interpreting the normative implications of specific rights laid out in the covenant. After the initial report, parties are expected to submit a report every five years. However, like the Human Rights Committee, the CESCR can only publish names or criticise defaulting states.²⁵⁸

II. B. v. The International Covenant On Civil And Political Rights 1966²⁵⁹

The International Covenant on Civil and Political Rights (ICCPR) complements the ICESCR . In Article 2(1) “Each state partyundertakes to respect and ensure.....” it recognises that all member states have to ensure irrespective of any distinction or discrimination on any basis for *all* individuals, all the rights enshrined in the covenant. This therefore places all state parties under an obligation to ensure that rights under the ICCPR are safeguarded for all including children.

As in the ICESCR, the ICCPR in Article 23 emphasises the family as the natural and fundamental unit of society and as such entitled to state protection. In addition to general protection the ICCPR safeguards specific rights of children by virtue of Article 24 which reads:

- “1. Every child shall have, without any discrimination as to race, colour, sex, language, religion or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.”

In addition to the measures that a state is under an obligation to undertake to ensure that all individuals enjoy all rights as proclaimed in the Covenant, a child is entitled to special

²⁵⁸ Harris, DJ, *Cases and Materials on International Law*, 5th Ed. London : Sweet and Maxwell, 1998, p 697.

²⁵⁹ For further information see, Henkin, L., (ed.) *The International Bill of Rights: The Covenant on Civil and Political Rights*, New York, 1981.

measures of protection. These two articles together give strong protection to children as their legal right.

It has been the opinion of the Human Rights Committee which is the implementing body of this covenant that states “often seem to underestimate this obligation .. in which children are afforded enjoyment of their right to a special protection”.²⁶⁰ In addition, children are made the beneficiaries of specific provisions under the ICCPR which are safeguards for administration of justice. The relevant sections of Article 14 read:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charges against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

The ICCPR prohibits the death penalty for any crime committed by an individual under the age of 18 at the time of commissioning of the crime.²⁶¹ Also a Sri Lankan proposal

²⁶⁰ McGoldrick, D., *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Clarendon Press: Oxford, 1994.

²⁶¹ UN Doc. A/C.3/SR/1 650.

during the drafting exercise has lead the ICCPR to state that juveniles should be kept separate from accused adults and that the adjudication of juvenile cases should be as quick as possible in the interest's of the child. It also stresses the need for segregation of young offenders from convicted adults and to ensure treatment in accordance with "their age and legal status". The ICCPR thus ensures strong protection to children, i.e. all individuals under the age of 18. It emphasises importantly the need for rehabilitation and of keeping such individuals away from the influence of adult and perhaps habitual offenders. The HRC too has like the CESCR has developed the mechanism of general comment. The HRC has stated the purpose of their general comments is to make their cumulative experience available to all States with an aim to promote the further implementation of the ICCPR, to improve the reporting mechanism and promote and protect human rights.²⁶² The general comments drafted by the HRC too have served the purpose of developing the jurisprudence of the HRC under the ICCPR. Academics, commentators and international organisations too have been referring to them.²⁶³ In its General Comment No 13/21, it has suggested that extra safeguards and procedures may be necessary for States to fulfil their obligations under Article 14 of the ICCPR. Article 7 of the ICCPR, places an obligation on states to ensure "no one shall be subjected to torture or to cruel, inhuman treatment". In the HRC's General Comment No 20, they emphasis the protection of children in particular.

Articles 28 to 53 deal with the implementation and enforcement mechanisms of the ICCPR. Article 40 of the ICCPR imposes an obligation on the part of the member states to report on the measures they have undertaken to ensure the enjoyment of rights enshrined in the ICCPR within one year of the entry into force of the covenant and there after whenever the committee requests. By virtue of Article 41, a member state can complain about another member state that is not fulfilling its obligations under the ICCPR. The matter has to be settled to the satisfaction of both the states involved. The

²⁶² Un Doc A/36/40, p 107.

²⁶³ GC 8/16, Doc A/37/40, pp95-6.

Committee can appoint an ad-hoc commission which can offer its good offices to ensure an amicable solution. The Commission submits its report to the State parties.

II.B. vi. Declaration On The Protection Of Women And Children In Emergency And Armed Conflict, 1974.

This declaration is an expression of the deep concern felt by the GA over the suffering of women and children as civilians, in emergencies and periods of armed conflicts. It calls upon all member states to strictly observe the 6 principles specified in its text, namely that all attacks on women and children are prohibited; All forms of torture and punitive punishment including acts like evictions would be considered criminal.²⁶⁴

In Article 6, it states that “Women and Children belonging to the civilian population and finding themselves in circumstances of emergency and armed conflict in the struggle for peace, self-determination, national liberation and independence, or who live in occupied territories, shall not be deprived of shelter, food, medical aid or other inalienable rights, in accordance with the provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration of the Rights of the Child or other instruments of international law.” By virtue of Articles 1, 2, 3, it emphasises specifically that all states should abide by their obligations under the Geneva Conventions and Additional Protocols and other instruments of international law. In Article 4 it reiterates that women and children be “spared from the ravages of war”. It reads “all necessary steps be undertaken to ensure” which seems, it is not a mere directive but a strongly worded obligation. This document seems to be representative of strong protection but, the fact remains, that this is a declaration, and a GA resolution though it carries moral and political force it is, essentially non-binding in character as it is by nature “soft law” or evolving law.

²⁶⁴ art 5.

II.B. vii. The Convention On The Rights Of The Child 1989

Children are covered by existing international human rights norms it is true, but as reports from all over the world prove, children need special protection and rights because of their vulnerability. In fact children have been suffering so badly that they require special protection.²⁶⁵ This is a recent treaty, which creates new rights for children under international law along with imposing new obligations on States in relation to protection and provisions for children. The UN Convention on the Rights of the Child (CRC) is without any doubt a major landmark in the history of children's rights.

The CRC has an interesting history, the proposal for the adoption on a convention on the rights of the child was put forward by Poland, in early 1978. The timing was aimed at having the convention adopted in 1979 thus paying a tribute to the International Year of the Child. There is no doubt that the CRC is based on the 1959 Declaration and hence its principles are already established among the international community. It was hoped that approval and subsequent adoption would be ensured with very little debate however the response was lukewarm. While few were able to actually or officially *express* their doubts about the *need* for a legal document on the fundamental rights of children, *concerns* were still raised.

In 1978 some of the *concerns* expressed were that, "the language of the draft was inappropriate", the Danish Government stating that it "lacks the preciseness and clarity which is required in the formulation of legally binding texts." Another was that the text did not concern itself with a whole range of rights and that it was silent on the question of implementation. According to Attenborough,²⁶⁶ the Convention on the Rights of the Child (CRC) 1989, is important because it gives legal weight to the acknowledgement that children have specific human rights, by the mere fact of childhood. It sets standards which all countries are expected to either attain or surpass. Yet one of the main criticisms

²⁶⁵ Hammerburg, T., "The UN Convention on the Rights of the Child and how to Make it Work", 12 *Human Rights Quarterly*, 1990, p 99.

²⁶⁶ In Vittachi, A., *Stolen Childhood: in Search of the Rights of the Child*, Polity Press : Cambridge, 1989, p ix.

levelled against it is that it undermines the fundamental and universal nature of human rights. Another is that all aspects of children's rights are not covered. A third is that language is sometimes vague and unclear, some articles being difficult to interpret.²⁶⁷

Nevertheless, it was finally adopted in 1989, unanimously and today is a well supported document.²⁶⁸ This seems to indicate the legitimising of the concept of child rights as well as the fact that they are holders of specific human rights. It marks a shift in political consciousness. This means that we do not have to spend time convincing governments that children rights are necessary and a good idea but may now focus attention on monitoring and honouring the promise made by them when becoming parties to the Convention on the Rights of the Child.

The Convention of 1989 or the CRC goes further than the 1959 Declaration as it shows a marked slant towards the economic, social and cultural rights of children. It includes the right to preserve his or her identity and the rights of indigenous children to their own culture. It further enshrines rights which had so far been acknowledged only in case law or under regional treaty's i.e. to have their views taken into account. A very strong improvement is in the fact that this is a binding force in areas which until the entry into force of the convention were non-binding.

The CRC has been described as both "consolidator and innovator"²⁶⁹ as it brings together the rights of child expressed directly or indirectly in 80 different texts. It brings together economic, social, cultural, civil and political rights, thereby demonstrating that different categories of human rights can be contained in one instrument. Its "innovative" nature can be abstracted from the fact that it goes beyond existing standards and practices in regard to a child's right to life and development, to protection from all forms of exploitation

²⁶⁷ Cantwell, N., "The Origins, Development and Significance of the United Nations Convention on the Rights of the Child" in Detrick, S., (comp. and ed.) *The United Nations Convention on the Rights of the Child : A Guide to the "Travaux Pre'paratoires"*, Martinus Nijhoff : Dordrecht , 1992.

²⁶⁸ 191 States are party to the CRC as of 29 March 2000.

²⁶⁹ Mower, jr. AG. *The Convention on the Rights of the Child. International Law Support for Children*, Greenwood Press : London, 1997, p 6.

etc.²⁷⁰ For many state parties under their national constitutions, the contents of international conventions and treaties become part of their national laws and hence are enforceable under their domestic procedures.²⁷¹

The practical impact of this convention can be felt when one analyses the impact it has on present and future economic and social health of the world.²⁷² It has immense significance in contribution towards making a practical impact on national legislations. In Article 4, it places a direct obligation on states to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.” The wording in the latter part of this article, it is submitted, seems to contain a direction to the effect that children and their well - being are not merely a matter of exclusive national interest and where justified international assistance or intervention may be viewed as acceptable.

In Article 3(1) the CRC reads “In all social actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” This concern for the best interests of the child to prevail as a primary consideration is important, as it indicates that decisions taken on behalf of the child should have long term benefits for the child.

²⁷⁰ United Nations Department of Public Information, *Convention on the Rights of the Child*, New York: UN, 1991, p 3.

²⁷¹ Jupp, M., “The UN Convention on the Rights of the Child,” *HRQ*, Vol. 12 No. 1, February 1990, p 135.

²⁷² Karl-Eric Knutsson “Protecting the health and education of todays children is the most basic and wisest of all investments” in Hammerburg, “A Decade of Campaigning for childrens rights” in *Making Reality of Children’s Rights* (Final Report of The International Conference on the Rights of the Child) Stockholm: Save the Children, 1989, p 58. The World Bank also reiterated this “[t]he educated child would make a greater contribution to the world economy, increasing economic production to the benefit of all.” Also the World bank has estimated that “an increase of one year in the average years of education may lead to a 3% increase in GDP” cited in Rith Legar Sivard, *World Military and Social Expenditures 1991*, 14th edition, Washington DC: World Priorities, 1991, p 12.

“The Convention was meant to reflect the minimum present-day standards of what things children have rights to; nevertheless, one cannot say that there is a universal approval for the provisions therein. A whole series of articles will violate some of the countries national laws”.²⁷³ The convention thus is a prime example of “negotiated consensus”, yet it *promotes child welfare as an issue of justice* and not of charity. “The Convention provides an opportunity and impetus to define and harmonise human rights standards for children, to fill in the many gaps identified in the current provisions, and to set the results of this in-depth reassessment within the context of a single, binding international instrument. It codifies under one title those provisions of international law pertaining to children. It is therefore an important and easily understood advocacy tool - promoting the welfare of the worlds children as an issue of *justice* rather than one of *charity*. It provides a framework for UNICEF and other United Nations agencies and NGOs to define and promote more effectively existing and future programme priorities and will create the impetus for an alliance of action for the world’s children”.²⁷⁴ Veerman continues to describe it as an “innovative” convention as he says it makes the states and their agencies responsible for the physical, psychological and social re-integration of the child whose rights are violated. States are being asked to look beyond their traditional concepts of childhood and are told explicitly that children have a right to have a say regarding conditions that effect their lives. The CRC is the first international convention that formulates explicitly the “right to identity” it is also the first to state that “traditional practices” harmful to the well-being of a child are unacceptable.

The CRC is divided into three main sections; the preamble which lays out the main principles, Part I (Articles 1- 41) sets out the obligations for State Parties, Part II (42 - 45) deals with the implementation and monitoring of the obligations set out in Part I. Articles 46-54 comprise Part III of the Convention and is concerned with procedural matters.

²⁷³ Cantwell, N., “ ‘The International Consensus’ on the Rights of the Child” in *Action for Children - unfinished business*, Report of a Symposium in Amsterdam on 2 June 1986 at the Free University. Stichting Educatief Centrum Kind en Derde Wereld: The Hague, 1987. p 47.

²⁷⁴ Veerman, PE., *The Rights of the Child and the Changing Image of Childhood*, Martinus Nijhoff: Dordrecht, 1992, p 184.

It includes 35 articles covering civil, political, economic, cultural and social rights based on three principles namely that children need special safeguards beyond those provided for adults. The best environment for a child's survival and development is the family and that governments and adults should act in the best interests of the child.

The guiding spirit of this document is the *best interests of the child*. This basic principle underlying the document marks an important step forward in terms of approaches taken to children as a group and as individuals. Its basic aim can be said to be setting standards for the defence of children against neglect and abuse. This abuse can be at various levels in different countries, and hence allows for different cultural, political and material realities. It places a strong emphasis on the family and caring that should be extended to the child. It stresses the need for additional protection in a legal form before and after birth and highlights the vital role of international co-operation in realising the rights of the child. Article 8 denotes a new obligation upon states, the right to preserve identity, Article 24 is another landmark of progress as it forbids harmful cultural practices for the health and physical well-being of children. In Article 33 is emphasised the explicit need to protect children from drug abuse. The convention speaks of protection from capital punishment and torture in Article 37; Article 39 along with Article 40 is one of the most essential forms of protection extended to children today, it speaks of their physical, psychological recovery, social re-integration and the juvenile justice process.

Geraldine Van Beuren sums up the CRC in a very simple and accurate way. She states that it is concerned with the four P's: "the participation of children in decisions affecting their own destiny; the protection of children against discrimination and all forms of neglect and exploitation; the prevention of harm to children; and the provision of assistance for their basic needs".²⁷⁵ The significance of the CRC lies in the fact that this is the first global instrument that recognises that "children possess rights". The CRC thus

²⁷⁵ van Beuren, G., *The International law on the Rights of the Child*, Martinus Nijhoff & Save the Children Fund : Dordrecht, 1995. p 15.

recognises and re-iterates that children are a vulnerable category and deserve special protection.²⁷⁶ A point to be noted is that children are offered special protection because of the very fact of their childhood and not because of their being members of any social group i.e. these rights are held by children independent of any adults they may be related to.²⁷⁷ The CRC does not merely stop at identifying the child as the “possessor” of rights but also makes it possible for these rights to be asserted in national judicial or administrative proceedings, as Article 12 seems to indicate.

It has been suggested that one of the most significant contributions of the CRC is that it transforms the child from a passive object of the law to an active subject of the law.²⁷⁸ By becoming a party to the Convention States accept the responsibility by virtue of Article 3(2), that rights outlined in the CRC become reality for children within their jurisdiction. It therefore constitutes a major step in ensuring that national forums ensure these rights by bringing to bear the weight of the international community on behalf of children, thus improving the quality of life of children all over the world.

Does the CRC have a self-executing character? If a treaty has a self-executing character, it implies that it creates certain rights and obligations, which private individuals can invoke directly in a court of national jurisdiction. It often is the case that States take on international obligations but do not take the necessary measure to implement them. In such conditions a private person can invoke the treaty provision in a domestic court. Hence this nature, i.e. self-executing, is a form of protection available to the individual and has therefore a tremendous practical effect. The self-executing nature of the Convention will be carried out in the first place in courts, in different areas of law such as youth protection, criminal law, family law etc. on which the Convention has a bearing. Many provisions will require action by national authorities, who will define what an

²⁷⁶ The preamble states “in all countries of the world there are children living in exceptionally difficult conditions andneed special consideration.”

²⁷⁷ Mower, AG., *The Convention on the Rights of the Child: International Law Support for Children*, Greenwood: London, 1997, p4.

²⁷⁸ O'Donnell, D., “The Convention on the Rights of the child: A Challenge for UNICEF”, *Bulletin of Human Rights* vol. 91 no 2 1992 p 32.

appropriate action is. For e.g. Article 38(3) clearly in the first sentence, involves direct action in court i.e. ban on recruitment of individuals under 15 into army, but the second sentence of the same does not seem clear, because of the use of the phrase “endeavour to”.

The CRC does not, it seems give more importance to any one right over another, and hence cannot be said to create a hierarchy of or between rights. It is submitted that it covers a broad range of rights which try as far as possible to extend to different requirements and situations that a child may have to face. And importantly it allows no derogation and is applicable fully even in times of war.²⁷⁹

The monitoring mechanism of the CRC is found in Articles 42 - 45. The monitoring system based on the concept of “positive atmosphere” lies on the idea of mutual help, support and co-operation. Therefore a complaints procedure was not developed in the CRC. An argument that no UN body has an overall view and expertise on the Rights of the Child had a decisive influence on the parameters set for the Committee on the Rights of the Child.²⁸⁰ The monitoring mechanism is similar to other international human rights conventions. It is a reporting obligation and an obligation to inform on the part of states to the Committee; in the form of periodic reports within two years of the entry into force of the convention for the State party and then every five years, concerning national policies to the monitoring committee, which comprises of 10 experts serving in their private capacity.²⁸¹

²⁷⁹ The CRC contains no derogation clauses and see *Nuclear Weapons Advisory Opinion*, 1996 available on http://www.dfat.gov.au/intorgs/icj_nuc/unan5a_a.html. see para's 30, 24, 25, 26-34, 50, 58-63, 78 and 79. See also Van Beuren, G., “Special Features of the Assistance and Protection of Children” in Karshoven, F., (ed.) *Assisting the Victims of Armed Conflict and Other Disasters*, 1989; Akande, D., “Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court” in *BYIL*, 1997, p 181.

²⁸⁰ Detrick, S., (ed.) *The United Nations Convention on the Rights of the Child. A Guide to the “Travaux Préparatoires”*, Martinus Nijhoff, 1992, p 539.

²⁸¹ Article 45(2)

The Committee comprises of 10 members “experts of high moral standing and recognised competence in the field covered by the convention”. Article 44 puts an obligation upon the experts to request further relevant information from the state parties. States are required to make their reports widely known to the public in their own countries. Interestingly, this committee is the smallest of all UN Treaty based organs. “The Committee Members are solely accountable to the children of the world”,²⁸² if not a political it is without any doubt a strong moral obligation.

The Committee are nominated by State Parties to the Convention, if elected they retain post for the period of four years. The Committee reports once every two years to the GA via the ECOSOC. The main issues that they are concerned with are the primacy of the best interests of the child, right to life, right to name, registration, nationality and to know and be cared for by their parents, illegal separation from parents, right to have their views taken into account, freedom of religion and conscience, association, access to information, privacy, healthcare, standard of living, education, protection from abuse, drugs, rights of children with disabilities, freedom from economic exploitation and last but not the least the actual implementation and publicising of these rights. The Committee has the authority to request the General Assembly to request the Secretary - General to undertake studies on specific issues concerning children.²⁸³ The Committee may make suggestions and recommendations to the State concerned. Article 45(d) implies that that these suggestions and recommendations can be based on the further information collected by the committee in addition to the state report. Further the Committee has the authority to establish its own rules of procedures.²⁸⁴

One weakness of this reporting system seems that the report has to be made for the first time after ratification within two years and then every five years. The CRC does not give a clear definition of what is to be included in these reports. Article 44 does not force the states to take measures to assess the degree of the effect of new measures and to check

²⁸² CRC/C/10, para 33.

²⁸³ Article 45(c).

²⁸⁴ Article 43(8).

whether the state is taking the appropriate measures to realise the rights of the child. It seems to be satisfied if the measures taken are listed. States are "encouraged" to provide relevant data, statistical and other indicators. States until recently though they had been provided with guidelines²⁸⁵ seemed to have complete authority in deciding what is relevant.²⁸⁶ This flexibility has resulted in diversity in terms of quality of the first reports submitted to the committee.²⁸⁷ Though most reports did meet the standards some country reports did not contain pertinent information.²⁸⁸ Obligations and rights set out in the convention are subject to certain qualifications.²⁸⁹ There has since been noted a deficiency in the guidelines for reporting as, UN documents suggest that there are shortcomings in reports as the Committee did not ask the right questions for e.g. failure to ask states for information concerning spending, even the most elementary questions about the percentage of the National budget allocated for children's health and education were not asked."²⁹⁰ When it is a fact that "politicians are duty-bound to care for children as a class - yet over the past ten years, the public budget share for education, juvenile justice, public health, social welfare and other services for children has decreased in almost every country in the world".²⁹¹ Further, there has been a failure on the part of the Committee to ask for economic information required to evaluate a party's implementation of the CRC on the basis of its available resources.²⁹² A third alleged guideline deficiency is that the link between the need for structural adjustments in a State and the well-being of its children was ignored. This could have led to some study of national social structures. And

²⁸⁵ CRC/C/5

²⁸⁶ Abramson, B., "First State reports: Sunny andcloudy", *International Childrens Rights Monitor*, 1993, vol. 10, nos 1-2, p 23; Goodman, D., "Analysis of the first session of the Committee of the rights of the Child", *NQHR* vol. 1, 1992, p 51; Theytaz-Bergman, "Adjustments urgently needed. Fourth Session of the Committee on the Rights of the Child", *International Childrens Rights Monitor*, 1993, vol. 10 no 4, p 22; Smith, J., "The Committee on the Rights of the Child", *NQHR* 1994 vol. 3, p 322; Himes, JR., "Reflecting on Indicators concerning the Rights of the Child - The development and Human rights communities should get their acts together", in *Innocenti essays No 5, The United nations Convention on the Rights of the Child; Three Essays on the Challenge of Implementation*, UNICEF, Florence, 1993, p 20.

²⁸⁷ Abramson, B., *ibid*, p 22-37.

²⁸⁸ for observations on report , see CRC/C/20 para 139 for Rwanda, CRC/C/16, para 111 for Sudan, CRC/C/20, para 56 for Peru, CRC/C/20 para 37 for Indonesia.

²⁸⁹ Mower, Jr., GA., *The Convention on the Rights of the Child: International Law Support for Children*, 1997, Greenwood Press, London, p 25.

²⁹⁰ Abramson, B., "First State Reports", *Monitor* Vol. 10 no 1-2, 1993, p 23.

²⁹¹ Castelle, K., *In the Child's Best Interest*, 3rd Ed. Philadelphia, Pa: Defence for Children International, USA, 1990 p 10.

the failure to ask parties to provide information on what steps were being taken to discharge their responsibilities under the CRC in terms of international co-operation.

In October 1994, the Committee prepared an overview of the reporting procedures.²⁹³ This has structured and defined the reporting procedure. State reports include section (h) which looks at children in situations of emergency and deals with obligations under Articles 22, 38 and 39 of the CRC. Section (h)(ii) is to report on children in conflict with the law, i.e. Articles 40, 37 and 39.

The effectiveness of the CRC reporting system depends on the will of the states. This may be interpreted as 1. the promptness and time limits adhered to when submitting the report . 2. the amount of relevant information contained in the report. Since there are no specific guidelines, the first reports showed mixed results. For example as of March 1995 only 42 percent i.e. 56 out of 132 states had submitted reports and then "there were wide disparities between reports submitted by different countries."²⁹⁴ Some members stated that some of the reports contained all the information needed by the committee to evaluate the reporting States performance yet, there were those that did not contain sufficient information to evaluate its performance.²⁹⁵ Currently one can see improvement in the quality of reports being submitted. As of 29 March 2000, 175 reports have been submitted to the Committee, 154 are overdue, and 61 are due in the coming months.²⁹⁶

According to Article 43 of the CRC the Committee²⁹⁷ has been established to "examine the progress made by state parties in achieving the realisation of the obligations

²⁹² Abramson, B., "First State Reports", *Monitor* Vol. 10 no 1-2, 1993, p 24.

²⁹³ CRC/C/33, of 24 October 1994.

²⁹⁴ Committee on the Rights of the Child, Convention on the Rights of the Child, *Official Records*, "Summary Record of the 108th Meeting" CRC/C/SR.108, 6 March 1995, p4.

²⁹⁵ Mower Jr. AG., *The Convention on the Rights of the Child: International law Support for Children*, Greenwood Press:Westport, CT, 1997, p 108-115.

²⁹⁶ The United Nations High Commission for Human Rights - Treaty Bodies Database found at <http://www.unhchr.ch/tbs/doc.nsf>

²⁹⁷ For evaluation of the committee See Bennett Jr., WH., "A critique of the Emerging Convention on the Rights of the Child", *Cornell International Law Journal* vol. 20 No 1 Winter 1987. Cohen, CP., Hart, SN., and Kosloske, SM., "The UN Convention on the Rights of the Child: Developing an Information Model to Computerise the Monitoring of Treaty Compliance" *HRQ.*, vol. 14(2) May 1992.

undertaken in the present convention.” The Committee is expected to monitor the performance of 191 states which are party to this Convention, a Convention that covers a wider variety of rights than any other treaty under the UN framework.²⁹⁸ Article 45 (b) makes it mandatory for the committee to transmit to any of the UN specialised organs and other competent bodies “any reports from the States Parties which contain a request, or indicate a need for technical advice or assistance along with the Committee’s observation and suggestions, if any.” The Committee thus has the responsibility of not only monitoring performance but also of ensuring implementation by providing technical assistance to overcome obstacles in implementation. So there is this practical limitation in terms of the sheer volume of work that needs to be done for the CRC - the substantive part of the convention contains 40 articles, all but 9 of them are multi-sectional. These articles cover a wide range of rights and freedoms - civil, political, economic, social and cultural rights and corresponding conditions within states, information on domestic legislation, laws, regulations and relevant practices are all required to be covered! It should also be kept in mind that most states are party to other human rights conventions as well as the CRC and have to submit reports regarding them to the UN. For example, Mower uses the following example to support this “of one group of 44 parties to the Convention on the Rights of the Child, 13 are parties to all six treaties, 12 are parties to five other treaties, 6 are party to four of the others treaties, 5 are party to three other treaties, 4 are party to two of the other treaties, 3 are party to one other treaty and 1 is party to no other treaty”.²⁹⁹ He also suggests that it would be quite realistic to comprehend that all the states who have ratified these human rights treaties have not done so for obvious reasons and are not ready to commit and invest time, energy and human resources to produce reports! Another issue would be that if a report reveals that there is no law prohibiting hazardous employment or voluntary enlistment of children into armed

²⁹⁸ O'Donnell, D., “Two Steps Forward.....One Step Backward?” *Monitor* Vol. 8 1991, p 4.

²⁹⁹ Centre for Human Rights, *United Nations Action in the Field of Human Rights*, ST/HR/2/Rev.4, Geneva, United Nations, 1994. *passim*; Committee on the Rights of the Child, Convention on the Rights of the Child, *Official Records*, “States parties to the Convention on the Rights of the Child”, *passim*. The International Covenant on Civil and Political Rights; The International Covenant on Economic, Social and Cultural rights; The International Convention on the Elimination of All Forms of Racial Discrimination; The International Convention on the Suppression and Punishment of Apartheid; The Convention on The

forces, should the committee recommend the adoption of such laws? should it insist? can it insist? It is submitted as seen from above, since the Committee has the authority to make its own rules of procedure;³⁰⁰ has been established to examine the progress made by State parties;³⁰¹ States have placed themselves under a legal obligation to take all appropriate legislative and administrative measures to ensure protection to children by virtue of Article 3(2) of the CRC; By virtue of Article 45 the Parties to the CRC have given the committee the authority to make suggestions and recommendations as they deem appropriate. Though the Committee can be openly critical of a State party, it is not deemed adversarial. Further, in their overview of reporting procedures, the Committee have stressed that delegations be headed “by someone with governmental responsibility” so that discussions with the Committee could be more fruitful.^{302, 303} During the discussions the delegations are expected to respond to the both general and specific questions³⁰⁴ and further information requested by the Committee.³⁰⁵ These recommendations often take the form of an evaluation of the extent to which the party actually meets its international obligations. They also may include measures considered necessary by the Committee for the State to enact at the national level to comply with international obligations.³⁰⁶ The value of these recommendations may be interpreted strictly as “moral” but state practice seems to indicate that States do take these recommendations into account³⁰⁷ and act accordingly. There also exist procedures for follow-up action.³⁰⁸ This combined with the

elimination of all forms of Discrimination against Women; The Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment are the six treaties referred to in the example.

³⁰⁰ Article 43(8) of the CRC.

³⁰¹ Article 43 of the CRC.

³⁰² CRC/C/33 of 24 October 1994, para 15.

³⁰³ Clapham, A., “UN Human Rights Reporting Procedures: AN NGO Perspective”, in Alston, P and Crawford, J., (eds.) *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press: 2000, pp 175-176. Clapham states that often officials are unable to answer the questions, but are very adept at talking around the subject.

³⁰⁴ CRC/C/33 of 24 October 1994, para 16-18.

³⁰⁵ *ibid*, para 18-20.

³⁰⁶ Connors, J., “An Analysis and Evaluation of the System of State Reporting” in Bayefsky, A., (ed.) *The UN Human Rights System in the 21st Century*, Kluwer: The Hague, 2000, p 6.

³⁰⁷ see page 63 and fn 243 of this thesis.

³⁰⁸ CRC/C/33 of 24 October 1994, paras 23-32. The Secretariat of the Committee on the Rights of the Child provides documentation which tracks the implementation of measures recommended by the Committee in its concluding comments.

acceptance that it is no longer a matter of exclusive domestic jurisdiction,³⁰⁹ the Committee as the moral spokespersons for children of the world may be in a position to develop its role further³¹⁰ and therefore may be in a position to insist. But will it succeed?³¹¹ and what effect will failure or success have on its performance?^{312, 313}

Hammerburg has said that “there is no practical possibility for the Committee to monitor in detail the implementation of the Convention in each country”.³¹⁴ It seems the very scope of its responsibilities undermines the expectations as a treaty monitoring body. Practical limitations like time frames and personnel involved hence become crucial.

The CRC is to date the most important and all encompassing document relating to protection of the rights of the child . The power and strength of this document depend on the support it receives from people all over the world.³¹⁵ As a response to the suffering that children undergo in various forms of abuse and exploitation and in the hope of avoiding repetition, articles were included into the CRC which deal with specific areas of

³⁰⁹ see pages 20 and 112 of this thesis.

³¹⁰ Philip Alston, the independent expert (appointed by the Secretary-General pursuant to GA. Res. 47/111, 16 December 1992) in his report entitled *Final Report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System*, Un Doc E/CN.4/1997/74 of 27 March 1997, para 9, states: “in improving the quality and effectiveness of monitoring and in reforming the procedures and institutions, is inevitably a gradual process and there are no “miracle cures” to be found.”

³¹¹ Byrnes, A., “Uses and Abuses of the Treaty Reporting Procedure: Hong Kong Between two Systems” in Alston, P and Crawford, J., (eds.) *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press: 2000. Clapham, A., “Defining the Role of Non-Governmental Organisations with Regard to the UN Human Rights Treaty Bodies” in Bayefsky, A., (ed.) *The UN Human Rights System in the 21st Century*, Kluwer: The Hague, 2000, pp 183-194. Kilkelly, U., “The United Nations Committee on the Rights of the Child - An Evaluation in the Light of the Recent UK Experience”, *Child and Family Law Quarterly*, Vol. 8, 1996.

³¹² CRC, *Overview of the Reporting Procedures*, CRC/C/33, of 24 October 1994, para 32. The Committee indicated that in the absence of persistent non-reporting, it would nevertheless examine the record of the State party on the basis of available material.

³¹³ *Report of the Committee on the Elimination of Racial Discrimination*, A/51/18, 1996 paras 20, 609-613. In 1993, CERD initiated “early warning” and “urgent procedures” whereby it examined situations of particular concern because of actual and potential circumstances. By the end of 1999, situations in 17 State parties have been under consideration in public or private session. This has resulted in formal decisions, exceptional reports etc. This impact has led to it being considered by the Economic, Social and Cultural Rights Committee, the Human Rights Committee and CEDAW. The Committee on the Rights of the Child has not yet developed a similar practise but has indicated it might do so in the future.

³¹⁴ “Report on Other Meetings and Activities”, in *General Assembly Official Records*, World Conference on Human Rights, A/CONV.157/PC/42/Add.2, April 20 1993. p 5.

³¹⁵ Jupp, M., “The UN Convention on the Rights of the Child: An Opportunity for Advocates”, vol. 12 *HRQ*, 1990.p 130.

a child's life, where under threat. Together these articles constitute "an assertion and definition of the child's right to protection". Article 19 is the most inclusive of this right.

According to the Vienna Convention on the Law of Treaties (1969), Article 2 para 1(d) defines a reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to the State." The CRC has many unilateral statements submitted. Those of a very general nature have been made by a number of Islamic countries.³¹⁶ The more specific reservations submitted concern Article 1 which refers to the qualifying age of a child, Article 21 dealing with adoption procedures and Article 38 referring to children participating in armed conflict. For example, Botswana confirmed that, "[t]he Government of the Republic of Botswana enters a reservation with regard to the provisions of article 1 of the Convention and does not consider itself bound by the same insofar as such may conflict with the Laws and Statutes of Botswana." Colombia upon ratification, stated: "[t]he Government of Colombia, pursuant to article 2, paragraph 1(d), of the Vienna Convention on the Law of Treaties of 23 May 1969, declares that for the purposes of article 38, paragraphs 2 and 3, of the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, the age referred to in the said paragraphs shall be understood to be 18 years, given the fact that, under Colombian law, the minimum age for recruitment into the armed forces of personnel called for military service is 18 years".³¹⁷

Article 1 reads :

"For the purposes of this convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier."

³¹⁶ Pakistan, "Provisions of the Convention shall be interpreted in the light of the Islamic laws and values." similarly worded statements were submitted by Turkey, Indonesia, Afghanistan and Kuwait.

³¹⁷ see "Reservations, Declarations, and Objections relating to the Convention on the Rights of the Child" : 07/12/99. UN Doc . CRC/C2/Rev.8. of 7 December 1999.

The drafting of this article was marked by considerable debate.³¹⁸ The main disagreements seemed to be about the exact point when childhood begins, at conception or birth? In the end, a compromise was reached and the delegates chose to abandon this debate and adopted an article which allowed compatibility with a wide variety of domestic legislation. Article 1 if read along with Article 9 of the preamble, leads to further debate. Yet it is a matter of concern that we cannot agree on the upper age limit for childhood too and hence have weakened the very protection that was being extended to childhood.

Article 38 has the infamous privilege of being the most controversial article of the entire CRC. It reads:

“1.State Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to children.

2. State parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take part in hostilities.

3. State 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, State 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

³¹⁸ See, Detrick (ed.) *The UN Convention on the Rights of the Child: A guide to the Travaux Preparatoires*, Martinus Nijhoff, 1992, pp 635-636.

feasible measures to ensure protection and care of children who are effected by an armed conflict.”

Article 38 forbids that any human being below the age of fifteen shall take a direct part in hostilities of any kind. It is interesting to note that this issue of age again gave occasion to considerable debate. A number of States like Argentina and Ecuador declared their intention to have a higher age limit in their implementation while the United States, United Kingdom and France argued for a lower age limit! With reference to Article 38, Cantwell is of the opinion that “the ‘standard’ adopted easily qualifies as being the most shameful in the entire convention”.³¹⁹ The monitoring mechanism involves an *obligation* on the part of States Party to report to the Committee. This is in the opinion of Veerman³²⁰ a convention that requires implementation in a “positive spirit” with a “strong emphasis on the need for international solidarity, co-operation, dialogue and technical assistance in fostering implementation”. The enforcement ability of the CRC in international law too has been questioned.³²¹ From a legal and normative perspective, the monitoring mechanism of the CRC seems to be very weak.³²² Many articles are a compromise texts. Many articles repeat existing international law from various other documents of a similar nature, yet to children in armed conflict, they seem to offer no greater protection than that which already exists.

To summarise the CRC, it does accomplish 5 major goals³²³: it creates new rights for children under international law, i.e. right to preserve his/her identity, to practice their own culture, it enshrines in an international human rights treaty for the first time to have his/her views to be taken into account. The CRC creates a binding obligation upon states

³¹⁹ Cantwell, N., “The Convention on the Rights of the Child: A Review of the Content”, *SOS TORTURE*, no 21, December 89/January 90, p 26.

³²⁰ Veerman, P., *The Rights of the Child and the Changing Image of Childhood*, Martinus Nijhoff, 1992, pp 208-9.

³²¹ Alen, A., Pas, W., “The UN Convention on the Rights of the Child’s Self-Executing Character”, Verhellen, E., (ed.) *Monitoring Childrens Rights*, Martinus Nijhoff, 1996. p 176.

³²² Verhoeven, J., “La mise en oeuvre de la Convention des Nations Unies sur les droits de l’enfant. Observations en droit des gens.” in Meulders-Klein, MT., *La Convention sur les Droits de L’enfants et la Belgique*, 1992. Story-Scientia, Brussels, pp 69-70.

³²³ Van Bueren, *International Law on the Rights of the Child*, p 16.

in areas which so far were non-binding, i.e. rights of disabled and handicapped children, and safeguards in adoption procedures. It also creates new obligations with reference to protection and provision of children. It also prohibits discrimination against children. But it fails them at a crucial point by virtue of the ambiguity present in Article 1 in failing to clarify when childhood ends and by the compromise achieved in Article 38 and failing to protect children between the ages of 15-18 from participating in war.

II.B. viii. World Declaration On The Survival, Protection And Development Of Children; And Plan Of Action For Implementing The World Declaration On The Survival, Protection And Development Of Children In The 1990's.

In September 1990, the World Summit for Children brought together leaders and heads of state for over 150 countries. The Summit Declaration, consisting of twenty seven goals, promised a new political commitment in achieving its aims. Importantly, the heads of State and leaders also agreed to "make available the resources to meet these commitments". One of the consequences of this summit is that it acts as a catalyst for progressing the aims of the CRC.³²⁴ In order to achieve the goals set out in the summit, countries have had to draw up detailed national programmes. The World Summit for Children has introduced the principle of *first call for children*, this is a "principle that the essential needs of all children should be given high priority in the allocation of resources, in bad times as well as in good times, at national and international levels as well as at family levels".³²⁵ However it omits any serious reference to the child's right to participation. The reasons stated in explanation of this are that participation would result in conflict and governments would have problems accepting it, and hence the implementing role of the UNICEF would be effected.³²⁶ According to van Bueren this unwillingness by organisations like UNICEF and others "to place as high a value on the child's present autonomy has hindered the international protection of the child".³²⁷

³²⁴ Grant, JP., *The State of the Worlds Children 1991*, UNICEF: Oxford University Press, 1990.

³²⁵ United Nations Childrens Fund, "World Declaration on the Survival, Protection and Development of Children" and "Plan of action for implementing the world declaration on the survival, protection and development of children in the 1990's", *The State of the Worlds Children 1991*, UNICEF: New York, 1990.

³²⁶ Van Beuren, quoting a UNICEF staff member in *The International Law on the Rights of the Child*, 1995.

p 15.

³²⁷ *ibid.*

II B . ix. Convention Concerning The Prohibition And Immediate Action For The Elimination Of The Worst Forms Of Child Labour Adopted By The Conference At Its Eighty- Seventh Session, Geneva , 17 June 1999.

The General Conference of the International Labour Organisation at its 87th session adopted the Convention Concerning The Prohibition And Immediate Action For The Elimination Of The Worst Forms Of Child Labour, or Convention 182. This was adopted as a response to the need for a new instrument for the prohibition and elimination of child labour as a main priority at both levels, i.e. national and international. In its preamble it states that this requires “immediate and comprehensive action”. It comprises of the preamble and a text of 16 articles.

Article 1 of the ILO Convention 182 places an obligation on all member states to take immediate and effective measures to secure the prohibition and elimination of the “worst forms of child labour as a matter of urgency”. In Article 2 it specifies that child is every individual below 18 years of age, a big step forward for International law. It reads :

“ For the purposes of this Convention, the term “child” shall apply to all persons under the age of 18”.

This is the first international instrument to do so, clearly with no ambiguity. Article 3 defines forced or compulsory recruitment of children for use in armed conflict as one of the worst forms of labour.

“For the purpose of this Convention, the term, “worst forms of child labour” comprises :

(a) all forms of slavery or practices similar to slavery, such as sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for used in armed conflict.

(d) work which by nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”

and yet these provisions exclude the so called voluntary recruitment of children. It has been established earlier that most volunteers are enlisting not on ideological grounds but because of hunger and related food options, or the fact that they are separated from the family and have no other option. Interestingly, Article 4 states that Article 3(d) will be determined by national laws. Article 7(b) speaks of the right to rehabilitation and reintegration. As of 29 March 2000 was ratified by 11 countries and subsequently came into force in November 2000.

II. B. x. The Draft Optional Protocol To The Convention on the Rights of the Child on Involvement of Children In Armed Conflict :

Ever since the CRC became a reality, there has been much effort put into the adoption of a Draft Optional Protocol (OP) to the CRC, as Article 38 of the CRC has proved to be inadequate. The many current situations around the globe today impress the dire need for raising the age of recruitment. The Committee on the Rights of the Child in the 53rd session of the Commission on Human Rights reiterated that given the aims and impact of the OP to the CRC, “it attached particular importance to the exercise of drafting an Optional Protocol”.³²⁸ In the Inter-sessional open-ended working group on a draft OP,³²⁹ the Quakers in their statement on behalf of the Coalition to Stop the Use of Child Soldiers stated that “the only way to ensure non-participation of children in hostilities is not to recruit them”. Further the statement also drew attention to the fact that the ICRC consultation on “People on War” gave an answer to the question “[a]t what age is a young person mature enough to be a combatant”. The answer: “88 percent had stated 18 years or above and of whom 35 percent stated over 21 years”.

³²⁸ E/CN.4/1997/96 of 13 March 1997. “Report of the Working Group on a draft Optional Protocol on the Rights of the Child on the involvement of children in armed conflicts on its third session.”

³²⁹ Geneva, 6th Session, 10-21 January 2000, UN Doc E/CN.4/2000/WG.113/2 of 17 November 1999.

The purpose of the OP is to establish new standards to protect children from becoming involved in armed conflicts. Its character as an optional protocol clearly establishes that those governments unable or unwilling to meet the standards set are not bound by its provisions nor obliged to become parties to it. As clearly re-stated by the United Nations High Commissioner for Human Rights, Mary Robinson, to the fourth session of the working group³³⁰ “national legislation should not be represented as an obstacle to the elaboration of more advanced international standards”.³³¹ The main opponent to the issue was/is the United States of America (US). In fact, the US submitted a proposal³³² stating that the real problem was the recruitment and use of children by non-State actors. The US proposed an alternate draft.³³³ However, since the US is not in favour of the raising of the age of recruitment to 18, it has been a slow and cumbrous process. The main issues: the actual raising of the age to 18, the issue of volunteers, and the issue of non-State and State entities. There was also debate about keeping the issue of governmental forces and non-governmental forces separate, as well as the different types of recruitment separate. Whereas many preferred a flat all out ban for under 18s, on all kinds of participation, in any conflict, with any kinds of forces.³³⁴ After 6 years of difficult negotiation 21 January 2000 marks the reaching of an agreement on the text by States. It has since been adopted on 27 April 2000³³⁵ with consensus by the Human Rights Commission.³³⁶ Now it awaits after the approval of the Economic and Social Council and the General Assembly, the formal process of ratification.

³³⁰ E/CN.4/1999/NGO/83 of 5 March 1999, para 4.

³³¹ Article 27, of the Vienna Convention on the Law of Treaties. See also Brownlie, I., *Principles of Public International Law*, Clarendon Press: Oxford, 1998, p 34.

³³² see E/CN.4/2000/WG.13/2/Add.1 of 9 December 1999.

³³³ *ibid*, after para 24.

³³⁴ E/CN.4/1997/96 of 13 March 1997. “Report of the Working Group on a draft Optional Protocol on the Rights of the Child on the involvement of children in armed conflicts on its third session.” paras 55-60.

³³⁵ the draft OP was submitted to the Commission on Human Rights at its 56th session (20 March -28th April 2000) for consideration and approval, through the Economic and Social Council, to the General Assembly for final adoption.

³³⁶ see United Nations Press Release, Commission on Human Rights, 26 April 2000. also Remarks of Mary Robinson, United Nations High Commissioner for Human Rights and Secretary General for the World Conference against Racism at the closing of the 56th session of the Commission on Human Rights , 56th session, 28 April 2000, Afternoon.

The much awaited treaty establishing the age of 18 as the minimum age for participation in armed conflict as the OP deals with only one issue that is the raising of the age of recruitment to 18. Does it meet the expectations and more importantly the needs of children in armed conflict ?

The text of the draft OP as agreed upon on 21 January 2000 consists of 18 preambulatory paragraphs (pp) and 13 articles in the main body. It begins by stating that a “widespread commitment” exists to protect and promote the rights of the child, reaffirms that child require special protection and care. It recognises in pps 3 and 4 that that children are being abused as soldiers, and in pp 8 “convinced that an Optional Protocol to the Convention, raising the age of possible recruitment of persons into armed forces and their participation in hostilities, will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children.” In pp 9 it notes that the ICRC has recommended that “parties to conflict take every feasible step to ensure that children under the age of 18 years do not take part in hostilities.”

Article 1 of the draft OP states that

“all state parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities”.

Article 1 places an obligation on states to take measures, “feasible” ones, that members of armed forces under 18 do not take a direct part in hostilities. Firstly, it is clear that this Article allows recruitment of under 18s into the armed forces of a state party. By using the word “direct” the legal loophole provided by “direct and indirect participation” has been used to allow under 18s to be recruited and as experience in the Gulf and Falklands has shown it is not possible to protect under 18s from active combat.

By virtue of Article 2 it places an obligations on State parties to

“ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.”

This article is intended as a safeguard. It asks States recruiting to ensure that there is no element of coercion in the process. This too indicates that voluntary recruitment of under 18's i.e. 16 and above would be allowed. It has already been established by the ICRC, and other humanitarian organisations that it is extremely difficult to establish how “voluntary” the nature of enlistment is.³³⁷

Article 3:

“States Parties shall raise the minimum age in years for the voluntary recruitment of persons into their national armed forces from that set out in Article 38 (3) the Convention on the Rights of the Child, taking into account of the principles contained in that article and recognise that under the Convention persons under 18 are entitled to special protection.

Each State Party shall deposit a binding declaration upon ratification of or accession to this Protocol which sets forth the minimum age at which it will permit voluntary recruitment into its national forces and a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced.

States Parties which permit voluntary recruitment into their national armed forces under the age of 18 shall maintain safeguards to ensure, as a minimum, that :

such recruitment is genuinely voluntary;

such recruitment is done with the informed consent of the persons parents or legal guardians;

such persons are fully informed of the duties involved in such military service.

³³⁷ see ICRC Position Paper, 1 March 1998 in 322 *The Review of the Red Cross*, pp 107-125 and chapters 2 and 4 of this thesis.

Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations who shall inform the States Parties. Such notification shall take effect on the date which it is received by the Secretary - General.

The requirement to raise the age in paragraph 1 does not apply to schools operated by or under the control of armed forces of the States Parties, in keeping with Articles 28 and 29 of the Convention on the Rights of the Child.”

In Article 3, it lays out safeguards for these volunteers by placing the responsibility on States to ensure that the recruitment is “voluntary” in every sense, and that the consent given is “informed”. The issue of informed consent is debatable as the view does exist, that children under 18 do not always have the maturity to comprehend the consequences of this decision.

It is Article 4 that this protocol truly offers the protection to children that they need. It prohibits clearly any kind of participation of under 18s but it applies *only* to armed groups . It reads :

- “1. Armed groups, distinct from the armed forces of a State, should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
2. State Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
3. The application of the present article under this protocol shall not affect the legal status of any party to an armed conflict.”

In paragraph 2 it places a duty on States Parties to prevent recruitment, and to criminalise such practice. This is a big step forward for international law.

Article 6 in paragraph 1 places a positive obligation on parties to “take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of this protocol within its jurisdiction.” This reinforces the protection offered in Article 4(2) above. It has been noted that it is crucial for the protection of rights, for the people to know what rights they actually have. With respect to this Article 6 (2) is appropriate.

“State Parties undertake to make the principles and provisions of the present Protocol widely known and promoted by appropriate means, to adults and children alike.”

Article 6 (3) refers to the possibility of the use of children contrary to the obligations contained in the OP. It states that

“State Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to this Protocol are demobilised or otherwise released from service. State Parties shall, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery, and their social reintegration.”

Article 7 asks States to cooperate on activities of prevention of the recruitment of children, rehabilitation and re-integration. For countries which are devastated by war, this co-operation would be crucial.

“1.State Parties shall cooperate in the implementation of the present protocol, including in the prevention of any activity contrary to the protocol and in the rehabilitation and social reintegration of persons who are victims of acts contrary to this protocol, including through technical co-operation and financial assistance. Such assistance and co-operation will be undertaken in consultation among concerned States Parties and other relevant international organisations.

2. States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral, or other programmes, or inter alia, through a voluntary fund established in accordance with the General Assembly rules.”

Articles 8 - 13 deal with ratification, coming into force, and amendments etc.

The OP to the CRC, is a much awaited, much debated instrument. Its aim as outlined since the time of conception has been to protect children under 18 from participation in armed conflict. The Draft OP is a move forward for international law with reference to Articles 4, 6 and 7. But Articles 1, 2 and 3 represent yet another trade-off in the politics of international law at the expense of children.

II.C. Regional Protection

There exist in addition to the global instruments, regional initiatives for the protection of the rights of the child. The Council of Europe, The Organisation of American States (OAS) and The Organisation of African Unity (OAU) are some regional bodies that have adopted instruments. Unfortunately Asia and the Pacific Region have yet to come up with one.

II C.i. Americas

II.C.i. a. Organisation Of American States

The protection of Human Rights in the Americas known as the inter-American system has two legal sources. The first has evolved directly from the Charter of the Organisation of American States (OAS), and the second was created by the American Convention on Human Rights. The Charter based system applies to all member states of the OAS and the Convention system only to state's that are party to it. According to Burgenthal, both the OAS and the American Convention are applicable and work together to strengthen

institutional pressures that can be exerted on guilty governments.³³⁸ In actual practice the two systems more or less function as one.

II. C. i. b. The OAS Charter

The OAS is a regional inter-governmental organisation which includes among its members most of the sovereign states of America. Established in 1890, it aims for the protection of human rights in an economically, socially and politically diverse land region. The OAS functions with the help of organs like the General Assembly and the Permanent Council.

The OAS charter is a multilateral treaty. It is the constitutional instrument and opened for signature in 1948 and entered into force in 1951. It was amended by the Protocol of Buenos Aires in 1967 and came into force in 1970. A more recent set of amendments are the Protocol of Cartagena de Indias, Columbia, opened for signature in 1985 followed by the Protocol of Washington 1992 and by the Protocol of Managua in 1993. The OAS Charter with its amendments came into force on 29 January 1996.

The 1948 Charter made few references to Human Rights, but emphasised important rights in the then Article 3 (j) “the American States proclaim the fundamental Rights of the individual without distinction as to race, nationality, creed or sex” another was the then Article 13 “each state has the right to develop its cultural, political and economic life freely and naturally”. Further amendments have introduced important changes regarding human rights, such as the Protocol of Buenos Aires establishing the inter-American Commission on Human Rights. This and further amendments have also strengthened significantly the normative character of the American Declaration of the Rights and Duties of Man.

³³⁸ Buergenthal, T., “The Inter-American System for the Protection of Human Rights” in Buergenthal, T., and Shelton, *Protecting Human Rights in the Americas*, 3rd. ed. 1995. also see *International Human Rights in a Nutshell*, 2nd ed. West Publishing Co. , St Paul , Minn, 1995.

II. C. i. c. The American Declaration Of The Rights And Duties Of Man

The OAS adopted the American Declaration of the Rights and Duties of Man on 2 May 1948. It contains “extensive guarantees of both civil and political rights and economic, social and cultural rights”.³³⁹ It also places limits on State sovereignty.³⁴⁰ The Declaration protects rights that are not found in the American Convention.³⁴¹

In its preamble, it reads “All men are born free and equal in dignity and in rights”. The use of “men” here is to encompass all mankind, hence including women and children. It promises rights in its chapter one covering a wide range of rights set out in 27 articles. In Article 27 it sets out the “scope of the rights of man” it reads:

The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and advancement of democracy.

In Articles 6 and 7 it emphasises the importance of the family as a fundamental unit and ensures special protection, care and aid to women and children. By virtue of Article 12 it specifies the right to education.

In chapter two entitled “Duties” it specifies duties to society, to receive instruction, to vote etc. It is in Article 30 that it lays out duties towards children and parents. It reads:

“It is the duty of every person to aid, support and protect his minor children, and is the duty of children to honour their parents always and to aid, support and protect them when they need it.”

Since it is assumed that these rights are for all, they encompass children. However, Article 30 remains the sole child-specific article in this declaration.

³³⁹ Harris, DJ., “Regional Protection of Human Rights : The Inter-American Achievement” in Harris, DJ, Livingstone, S., (eds.) , *The Inter-American System of Human Rights*, Clarendon Press: Oxford, 1998. p 4.

³⁴⁰ *ibid*, p 5.

³⁴¹ *ibid*, p 6.

II. C. i. d. The American Convention On Human Rights: Pact Of San Jose, Costa Rica

The American Convention on Human Rights was adopted on 22 November 1969 by the OAS. It has been in force since 18 July 1978. The Convention specifies that “person” means every human being. Article 17 deals with the rights of the family and Article 19 with the rights of the child. Under Article 17 is emphasised the principle of non-discrimination between children born in and out of wedlock. Article 19 entitled “the rights of the child” reads:

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the state.

This is a rather broad and vague form of protection but it does emphasise that all minors should be protected by the family, society and the state. The obligation is placed in a rather straightforward fashion on the adults surrounding the child. It however does not give a definition of a minor. According to Article 27(2) “no derogation is permitted from certain listed rights”.³⁴² It specifies that Article 19 i.e. the rights of the child has a non-derogable status.

The American Convention like the European Charter prohibits the death penalty for individuals below the age of 18.³⁴³ By virtue of Article 5 and specifically sub-paragraph 5 of the same, it creates a clear and specific duty on states to establish and maintain special tribunals for children undergoing criminal procedures. Interestingly the OAS - court has laid the precedent for compensation to children as a result of suffering caused due to government action.³⁴⁴

³⁴² *ibid*, p 17.

³⁴³ see Article 4 (5).

³⁴⁴ see, I/A Court of H.R., *Velasquez Rodriguez Compensatory Damages* case. Series C No4 (1988), Harris refers to this judgment as the leading case in International human Rights Law on the responsibility of a State in case of disappeared persons. *supra* n 88 p 28.

It establishes two organs towards ensuring implementation: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.³⁴⁵ Each of these consist of seven experts, elected in their individual capacities. The members of the inter-American Commission are elected by the general assembly of the OAS by all member states, irrespective of their being party to the American Convention. The Judges of the Inter-American Court can be nominated and elected only by states party to the American Convention. The judges do not have to be nationals of the nominating state. The only condition is that they should be national's of an OAS member state.

The inter-American Court of Human Rights came into being in 1979.³⁴⁶ The court has both advisory and contentious jurisdiction. In both its roles it has tackled a number of issues. Though child soldiering has never come up before it, children rights have. Article 1 of the Declaration and Article 4 of the Convention, protect the right to life. The positive obligation placed on States Parties have been substantiated by the court in the land mark cases of *Velasques Rodriguez*³⁴⁷ and *Godinez Cruz*.³⁴⁸ The Court has acknowledged in these cases that "the State has a right and a duty to guarantee its national security" but there are limits to this action "regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the state is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action".³⁴⁹

The obligation placed is to protect the right to life of all persons. With reference to children, the Commission on the other hand has had to answer to issues such as if a foetus is a human person³⁵⁰ and the death penalty³⁵¹ applied to children under 18. Regarding the

³⁴⁵ see Gomez, V., in Harris, DJ and Livingstone, S., (eds.), *The Inter-American System of Human Rights*, Clarendon Press: Oxford, 1998, pp173-211 for an analysis of interaction between the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the Permanent Council and the General Assembly of the Organisation of American States and individual member states.

³⁴⁶ Trindade, AAC., "The Operation of the Inter-American Court of Human Rights" in Harris, D and Livingstone, SL (eds.) *The Inter-American System of Human Rights*, Clarendon Press: Oxford, 1998.

³⁴⁷ *Velasquez vs. Honduras*, I/A Court H.R. Series C No 4 (1988)

³⁴⁸ *Godinez Cruz vs. Honduras*, I/A Court H.R. Series C No. 5 (1989).

³⁴⁹ *Velasquez vs. Honduras*, I/A Court H.R. Series C No 4 (1988) para 154

³⁵⁰ *Baby Boy case* Case 2141 (USA) IACHR Annua report 1980 - 1 25.

death penalty its application is clearly limited by Article 4 of the Convention, and it clearly states that the death penalty may not be imposed upon persons under 18 or above 70 at the time of the crime. Interestingly though the Commission has demonstrated an abolitionist attitude, it has been faced with the situation when States like Peru amended its constitution to add terrorism to the list of crimes which can be punished by the death penalty. The commission considered that this was a "manifest violation of Peru's obligations under the Convention".³⁵² The Commission has ruled that "the death penalty is a grievous affront to human dignity and its application constitutes cruel, inhuman and degrading treatment of the individual sentenced to death". Although the Convention does forbid the death penalty for those under 18, the Declaration does not do the same. The USA is not a party to the Convention and hence the case of two 17 year old boys³⁵³ who were awarded the death penalty came up before the Commission. The Commission concluded that "in the member states of the OAS there is a recognised norm of *jus cogens* which prohibits the State execution of children". In the opinion of the Commission this was the case even for the USA. It was then faced by the argument of the USA "that there is no extant rule of customary international law declaring eighteen to be the age of majority for the purposes of determining whether a person should be tried as a juvenile or as an adult". In response, the Commission after studying if the death penalty was awarded on the basis of the crime to under 18's or that it depended upon the sentencing law in the state concerned and finding it to be the latter concluded that "the failure of the US federal government to pre-empt the states as regards this most fundamental right - the right to life - results in a pattern of legislative arbitrariness throughout the United States which results in the arbitrary deprivation of life and inequality before the law, contrary to the Articles 1 and 2 of the American Declaration". The Court too has had occasion to comment upon the issue of the death penalty. Besides this, the Commission has found States in violation of their obligations under Article 19 of the convention in a number of cases: for example,

³⁵¹ Case 9647 (USA)

³⁵² Davdison, S., "The Civil and Political Rights Protected in the Inter-American System" in Harris, D and Livingstone, SL (eds.) *The Inter-American System of Human Rights*, Clarendon Press : Oxford, 1998. pp 222 - 233.

³⁵³ *Roach and Pinkerton* cases. IACHR Annual report 1986 -7 at 170.

Peru³⁵⁴ when it ruled that detention by force of children by the Peruvian Force was a violation of Article 19, the rape of a 6 year old by a soldier in El Salvador,³⁵⁵ in a number of cases regarding the disappeared children in Argentina, the Commission studied and concluded that a number of provisions of both the Convention and the Declaration had been violated. The Commission also noted that none of these provisions and the rights they provided were of a derogable nature. From the summary of limited cases looked at one can assume that the Inter-American System does tend to lean strongly against violations of the rights of children, as it is strongly in favour of special protection and care to children though it has not until recently taken a firm stand on the issue of child soldiers specifically.

II.C .i. e. Additional Protocol To The American Convention On Human Rights In The Area Of Economic, Social And Cultural Rights - "Protocol Of San Salvador"

The OAS has also adopted an additional protocol known as the "Protocol of San Salvador". It is in Article 16 entitled "Rights of the Child" that it lays out general rights it reads:

"Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his Family, Society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially recognised circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, atleast in the elementary phase, and to continue his training at higher levels of the educational system".

Article 16 of this protocol incorporates the principle of non-separation of children from their parents and their right to free and compulsory education at least upto the elementary

³⁵⁴ Case 11.006, IACHR Annual Report 1994, p 71.

³⁵⁵ Case 10.772, IACHR Annual Report 1993.

stage. It further emphasises that for those below the age of 16, education comes first. It also places a duty on states to create a stable and positive environment for children to develop in. The aim being that children would therefore grow in a positive environment absorbing values of 'understanding, solidarity, respect and responsibility'. This protocol emphasises the vulnerability of children and hence the protection required by them, wherein it prohibits by virtue of Article 7(f) night work, and dangerous and unhealthy work for those under 18 years of age.

But none of these instruments provide specific protection to children in armed conflict. Though Article 7, especially in light of the ILO Convention No 182, can be said to be applicable to children participating in armed conflict. The General Assembly has resolved³⁵⁶ to encourage all member states of the OAS to support efforts to end the use of child soldiers i.e. children under the age of 18 years in armed conflict by armed forces or groups. They have also supported the adoption and implementation of national plans to end the recruitment of children under 18. On 7th June 1999 the General Assembly³⁵⁷ in its resolution on the "Inclusion of Childrens Issues on the Hemispheric Agenda" resolved that the sexual exploitation and participation of children in armed conflict be dealt with systematically by the Inter-American Children's Institute "in co-ordination with other organs, agencies, and entities of the United Nations system and other relevant organisations, in such a way as to propose the development of strategies and plans of action aimed at preventing and combating this scourge".

II.C.ii. EUROPE

II.C.ii. a. Council Of Europe

The Council of Europe was established by 10 countries after the Second World War in 1949 in an attempt to unify Europe. Today it comprises of 41 member states. The main organisations that it works with are the European Union (EU) and the Organisation for

³⁵⁶ see Resolution CD/RES.03 (74-R/99) .

³⁵⁷ AG/RES.1667 (XXIX-0/99).

Security and Co-operation in Europe (OSCE). The Council of Europe comprises of a decision making body known as the Committee of Ministers; A deliberative body known as the Parliamentary Assembly and a voice for local democracy: the Congress of Local and Regional Authorities of Europe. The Council of Europe³⁵⁸ is aimed towards the pursuit of peace as stated in the statute of 5 May 1949. It has since established a number of significant instruments and organs to help it achieve these aims.

II. C. ii. b. Convention For The Protection Of Human Rights And Fundamental Freedoms

The European Convention on Human Rights (ECHR) adopted in Rome on 4 November 1950 and entering into force on 3 September 1953, is the first international agreement establishing supervisory and enforcement machinery on human rights.

According to Article 1 an obligation is placed on all member states to “secure to everyone within their jurisdiction” the rights and freedoms set out. It is by virtue of this that it has proved to be of assistance to children. Since the convention adopts the term “everyone” its applications extends to children generally. But a specific reference to the “important needs of childhood is absent”³⁵⁹ since the “Convention lacks even the most basic recognition of the Rights of the Child”.³⁶⁰ However it does make provision for children. In fact Article 5 dealing with liberty and security of the person allows only in a specific case the detention of minors under section (d):

³⁵⁸ a. The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.

b. This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.

c. Participation in the Council of Europe shall not affect the collaboration of its members in the work of the United Nations and of other international organisations or unions to which they are parties.

d. Matters relating to national defence do not fall within the scope of the Council of Europe.

³⁵⁹ Kilkelly, U., *The Child and the European Convention on Human Rights*, Dartmouth : Aldershot, 1999, p 3.

³⁶⁰ *ibid.*

“the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority ;

Likewise, in Article 6, the Convention takes into account minors:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or parts of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Article 14 is a general guarantee of the rights and freedoms set forth in the ECHR. It has given rise to some jurisprudence, particularly together with Article 8. In the *Sutherland Case*³⁶¹ the commission dealt with the age of consent for homosexual activities. The applicant claimed that the difference of the ages of consent for heterosexual and homosexual activity amounted to discrimination. The Commission thought it necessary after assessment that case law should be reviewed.³⁶² The Commission found the UK governments arguments as “supported by evidence”, and concluded that this amounted to a violation of Article 8 together with Article 14. After the rendering of this opinion, subsequent law fixes the age of consent at 16.³⁶³ The European Convention has since 1950 been augmented by 11 protocols. Article 2 of the First Protocol guarantees children the right to education and places an obligation on States to “ensure such education and

³⁶¹ No 25186/94 *Sutherland Vs. UK*, Comm Rep, 1.7.97. 24 EHHR CD 22.

³⁶² Kilkelly, U., *The Child and the European Convention on Human Rights*, Dartmouth : Aldershot, 1999, p 25.

³⁶³ Sexual Offences Amendment Bill, 1998.

teaching in conformity with their own religious and philosophical convictions.” Article 5 of the Seventh Protocol stresses on the best interests of the child.

“Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.”

But it is Article 8 of the ECHR, which states the right to respect for private and family life that has been invoked frequently in cases dealing with children. Additionally, judgements by the court in *Marck*,³⁶⁴ *Johnston*³⁶⁵ and *Inze*³⁶⁶ has clearly contributed to the eradication of the status of “illegitimate” in Europe. It has therefore contributed to the promotion of equal treatment of all children. Importantly, under Article 5 which deals with the right to liberty, the court had occasion to clarify the exercise of parental responsibility³⁶⁷ and the child’s right to withhold consent. Though the Commission and the Court different in their opinions in this case. The Commission attached importance to the evolving capacity if the Child, whereas the Court created a further exception to the right to liberty when the detention of the child was with parental consent was under consideration. Under this Article have also come up issues of questioning of child suspects,³⁶⁸ detention on remand of minors³⁶⁹ and related issues.

According to Kilkelly, rights set forth in the Convention are guaranteed to all at least in theory and in practice both the Commission and the Court have refrained from placing

³⁶⁴ No. 6833/74 *Marckx Vs. Belgium*, Comm Rep, 10.12.77. Series B no. 29 and European Court of Human Rights *Marckx Vs. Belgium*, judgement of 13 June 1979, Series A No. 31, 2 EHHR 330.

³⁶⁵ European Court of Human Rights, *Johnston Vs. Ireland* Judgment of 18 December 1986, Series A no. 112, 9 EHHR 203.

³⁶⁶ European Court of Human Rights, *Inze Vs. Austria*, Judgment of 28 October 1987, Series A, No. 126, 10 EHHR 394.

³⁶⁷ European Court of Human Rights, *Nielsen Vs. Denmark*, Judgment of 28 November 1988, Series A no. 144, 11 EHHR 175.

³⁶⁸ No 8819/79 *Sargin Vs. Germany*, December 19.3.81.

³⁶⁹ European Court of Human Rights, *Assenov Vs. Bulgaria*, judgment of 28 October 1998.

limits on the application of the ECHR for children. In fact “[t]hey have adopted several dynamic interpretative principles” leading to positive implications for childrens rights.³⁷⁰

II.C.ii. c. The European Social Charter

The European Social Charter was adopted on 18 October 1961 at Turin, Italy. It entered into force on 26 February 1965.

The rights emphasised in it are applicable to *all* and hence apply also to children. However specific protection is mentioned in part I section 7 wherein it states that “Children and Young persons have the right to special protection against the physical and moral hazards to which they are exposed.” In section 16, is underscored the fact that the family is the fundamental unit of society and section 17 emphasises that women as mothers and children have a right to appropriate social and economic protection. In Part II of the Social Charter it is Article 7 which deals explicitly with the rights of children and young persons. It reads:

“With a view to ensuring the effective exercise of the right of children and young persons to protection, the contracting parties undertake:

1. to provide the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education;
2. to provide that a higher minimum age of admission to employment shall be fixed with respect to prescribed occupations regarded as dangerous or unhealthy;
3. to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the benefit of their education;

³⁷⁰ *ibid*,4.

4. to provide that the working hours of persons under 16 years of age shall be limited in accordance with the needs of their development, and particularly with their need for vocational training;
5. to recognise the right of young workers and apprentices to a fair wage or other appropriate allowances;
6. to provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer shall be treated as forming part of the working day;
7. to provide that employed persons under 18 years of age shall be entitled to not less than three weeks annual holiday with pay;
8. to provide that persons under 18 years of age shall not be employed in night work with the exception of certain occupation provided for by national laws or regulations;
9. to provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control;
10. to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly to indirectly from their work.”

This article it seems is concerned with the economic and social measures necessary for ensuring protection to children. Further Article 16 refers to the rights of the family to social, legal and economic protection and Article 17 to the rights of mothers and children to social and economic protection.

There also exists the European Convention on the legal status of children born out of wedlock, but it will not be discussed here.

II.C.ii .d. The European Convention On The Exercise Of Children's Rights

The Parliamentary Assembly in its Recommendation 1121(1990) on the Rights of The Child, invited the Committee of Ministers to draft a legal instrument that would

supplement the United Nations CRC. The inspiration for this came from Article 4 of the CRC which reads:

“State parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, State parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”

Using Article 4 of the CRC as a basis the Council of Europe decided that *measures* were of fundamental importance for the effective application and practice of childrens rights. This resulted in the European Convention on the Exercise of Childrens Rights. This instrument was opened for signature on 25 January 1996³⁷¹ and will enter into force on 1st July 2000.

It consists of 26 articles, divided into five chapters. Chapter I consisting of 2 articles deals with the scope and object of the convention and definitions. Chapter II entitled Procedural measures to promote the exercise of children’s rights is further sub-divided into 5 sections.

- A. dealing with the procedural rights of a child
- B. the role of judicial authorities
- C. the role of representatives
- D. with the extension of certain provisions
- E. National Bodies
- F. other matters.

In all a total of 12 articles make up chapter II. Chapter III entitled the Standing Committee deals with the establishment and functions of the Standing Committee, the Composition, meetings and reports to both the parties and Committee of Ministers.

³⁷¹ Greece, Poland and Slovenia have ratified the Convention. Signatories include Austria, Croatia, Finland, France, Iceland, Italy, Luxembourg, Malta, Portugal, Slovakia, Spain, Turkey and Ukraine.

Chapter IV deals with amendments to the convention and Chapter V with Final Clauses. Chapter V consists of 6 articles dealing with signature, ratification and entry into force, territorial application, reservations, denunciation and notifications i.e. administrative matters.

The convention in its preamble emphasises the importance that it gives to both the participatory role of children and at the same time their right to protection. Though the concept of the “best interests of the child” is highly visible, it does restrict itself to the facilitating of their rights by stating “that children are themselves or through other persons or bodies, informed and allowed to participate in proceeding effecting them before a judicial authority”.³⁷² Additionally, in sub-para (3) it reads “for the purpose of this Convention proceedings before a judicial authority affecting children are family proceedings, in particular those involving the exercise of parental responsibilities such as residence and access to children.”

The significance of this convention can be found in the fact that according to Article 1 of this convention a child is someone who has not yet reached the age of 18. This has become an officially accepted age of majority in “virtually all member states of the Council of Europe”.³⁷³ In countries where the age of majority is higher than 18, such persons continue to benefit from the protection of this convention until the legal age of majority is reached for all purposes. Further, it is a very strong point in its favour that Article 24 does not allow any reservations to be made. The Convention places an obligation that a child be well informed and that children have a right to have their views to be taken into account when relevant maturity exists. Additionally, all actions to be considered and implemented are to be in the best interest of the child. It however does not deal with any controversial issue like the age of recruitment, though in some member states, children have been enlisted and have fought.

³⁷² article 1(2) of the Convention.

³⁷³ Council of Europe, *European Convention on the Exercise of Children's Rights and Explanatory Report*, European Treaty Series no 160, Council of Europe Publication, 1997, p 19.

II.C.iii. AFRICA

II.C.iii. a The Organisation Of African Unity

The Organisation of African Unity (OAU) was founded in 1963. It aims to promote self-government, respect for territorial boundaries and social progress on the African Continent. Membership is open to all independent African countries.

The OAU Charter in its preamble expresses firmly a commitment to the UN Charter and the UDHR. It aims in Article II to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa and to promote international co-operation.

In practice, it does not have that strong a reputation. It is a fact that until not so long ago it had adhered so much to the principle of non-interference in domestic affairs of sovereign states that they have failed to take action over important human rights issues.³⁷⁴ For example: Idi Amin was elected head of OAU when his regime was being described as extremely brutal and repressive. However in 1979 the OAU placed its member states under an obligation to adhere to international human rights standards. It is in the same year that they decided to draft a charter for Human and People's Rights and establish a Human Rights Commission. In 1981 was established the African Commission on Human and Peoples Rights. The OAU in April 1999³⁷⁵ urged all member states to adopt norms and prohibit the use of children under 18 as soldiers .

³⁷⁴ Costa Ricky Mahalu, "Africa and Human Rights" in Kunig, P., Benedek, W., Mahalu, CR., *Regional Protection of Human Rights By International Law: The Emerging African System*. Baden-Baden: Nomos Verlagsgesellschaft, 1985. p 24.

³⁷⁵ CM/Dec.482(LXX) Decision on the "African Conference on the use of Children as Soldiers".

II.C. iii . b. The African Charter On Human And Peoples Rights

The OAU's African Charter on Human and Peoples Rights 1981 also known as the Banjul Charter enshrines both civil and political rights and economic, social and cultural rights. It reflects a customary perception of the rights of child, though it does not include specific rights it relies on international treaties on the protection of children's rights.³⁷⁶

Articles with direct relevance to children can be found in Article 16 which lays the basis for the right to health both mental and physical. Article 17 deals with the right to education and Article 18 which reads:

- “1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.”

It is in sub-para 3 of Article 18 that the Banjul Charter lays out the duty for States to have international standards with respect to the rights of the child.

II. C. iii. c. Declaration Of The Rights And Welfare Of The African Child 1979

This declaration³⁷⁷ by the Heads of State and Government of the Organisation of African Unity, was made in Monrovia, Liberia in July 1979. It consists of a preamble and 12 articles.

³⁷⁶ Article 18.

³⁷⁷ AHG/ST.4 (XVI) Rev.1

In its preamble it speaks of its consciousness “for increased national, regional and international actions aimed at guaranteeing the rights and promoting the welfare of the child;

Determined to implement at national, sub-regional and regional levels and together with the national and international organisations the programmes undertaken to promote child welfare by providing facilities in the field of education, medical care, nutrition and other basic services;

Convinced of the need for member states to take effective measures such as the development of simple and appropriate technologies in order to curb unnecessary child labour ”.

Further, it declares in Article 1 that to make the problem of focusing and co-ordination of all resources to improve the situation of children, it considers the desirability of making “respective national commissions or machinery’s for IYC³⁷⁸ a permanent organ given the necessary legal powers.” In Article 2, it urges all member states to review existing legal codes and provisions relating to the rights of the child with specific reference to the 1959 declaration. It also talks of harmful practices that should be abolished. This declaration stresses on international co-operation and active support of both governmental and non-governmental organisations in terms of strengthening all kinds of efforts aimed at achieving the goals of the IYC.

II.C. iii.d. The African Charter On The Rights And Welfare Of The Child

The African Charter was adopted at Addis Ababa on 11 July 1990, and came into force on 29 November 1999.³⁷⁹ It consists of 48 articles divided into 4 chapters. The first deals with the Rights and Welfare of the child. In Article 1 it lays down the Obligation of State Parties. In Article 2 it defines a child and reads:

³⁷⁸ International Year of the Child.

³⁷⁹ as of 30 March 2000, it has been ratified by the States of Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Lesotho, Malawi, mali, Mauritius, Mozambique, Niger, Senegal, Seychelles, Togo, Uganda and Zimbabwe.

“For the purposes of this Charter, a child means every human being below the age of 18 years.”

This it is submitted is a much stronger article than the CRC definition of child and ensures stronger protection to children, by being unambiguous and explicit. Article 3 deals with non-discrimination, Article 4 with the best interests of the child, Article 5 with survival and development, Article 6 to name and nationality, Article 7 with freedom of expression. Article 15 deals with child labour:

“1. Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s physical, mental, spiritual, moral, or social development.

2. States Parties to the present Charter shall take all appropriate legislative and administrative measures to ensure the full implementation of this article which covers both the formal and informal sectors of employment and, having regard to the relevant provisions of the International Labour Organisation’s instruments relating to children, States Parties shall in particular:

- (a) provide through legislation, minimum ages for admission to every employment;
- (b) provide for appropriate regulation of hours and conditions of employment;
- (c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this article;
- (d) promote the dissemination of information on the hazards of child labour to all sectors of the community.

Article 16 deals with protection against child abuse and torture, Article 17 with the administration of juvenile justice. According to this article the child has to be treated in a special manner i.e. is consistent with the “child’s sense of dignity and worth and which reinforces the child’s respect for human rights and fundamental freedoms of others.” Further in Paragraph 2 (3) it reads:

“ The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.”

Article 18 deals with the family, Article 19 with the right to parental care and protection. Article 20 lays down parental responsibilities. Article 21 is important protection. It is the right to protection against harmful social and cultural practices.

“1.State Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular :

- (a) those customs and practices prejudicial to the health or life of the child; and
- (b) those customs and practices discriminatory to the child on the grounds of sex or other status.

2.Child marriage and betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.”

Article 22 deals with armed conflicts and reads:

“1.States parties to this Charter shall undertake to respect and ensure respect for 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 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 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.”

It should be emphasised here that though this article provides protection to individuals upto the age of 18, its weakness lies in paragraph 2 where it allows firstly, indirect participation of children and secondly, uses the word “refrain”. This article could have placed stronger legal obligations if instead of “refrain” for example the word “prohibit” had been used or by forbidding in no uncertain terms the recruitment of children for the purpose of any kind of participation in armed conflict of any kind.

Article 23 deals with refugee children and speaks of ensuring appropriate protection and assistance as laid down under international instruments. Reunification with family has been prioritised. Further Article 25 speaks of special protection for children separated from their parents. Article 27 speaks of protection from sexual exploitation. It reads:

“ State parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent:

- (a) the inducement, coercion or encouragement of a child to engage in any sexual activity;
- (b) the use of children in prostitution or other sexual practices;
- (c) the use of children in pornographic activities, performances and materials.”

For children in armed conflict, this article provides important protection as the sexual abuse of children, as sexual slavery has become a common phenomenon. Article 28 deals with drug abuse, Article 29 with the sale, trafficking and abduction of children. This has also become very pertinent to providing children protection in today’s conflicts. It reads:

“ State Parties to the present Charter shall take appropriate measures to prevent:

- (a) the abduction, the sale of, or the traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child;
- (b) the use of children in all forms of begging.”

Article 31 deals with the responsibilities of the child and lays down duties of the child. It should be mentioned here that the African Charter on the Welfare and Rights of the Child extends stronger protection to children in conflicts as it covers “riots, disturbances and sporadic acts of violence as well as international armed conflict and non-international armed conflict.” The drafters of this Charter gave priority to the rights of the child and not the kind of conflict, hence the African Charter gives more comprehensive and coherent protection. It very clearly specifies that all humans below the age of 18 are children.

To conclude this section on protection under international human rights law, it seems that in theory children’s rights seem to be improving. It seems that the frequency of the occurrence of children’s rights in political debate and international legislation indicates that the treatment of children is no longer, correctly, merely a matter of exclusive domestic concern. And it can be concluded from the above that the general human rights instruments and specific legal instruments focusing on children highlight certain fundamental principles that are essential to the protection of children in times of armed conflict.³⁸⁰ Also there is a change in the way protection for children is being viewed, it is now increasingly specific. But the weakness in the protection offered is that though it accepts that it is a harmful practice it allows children to participate as either indirect participants or active participants if they are between 15-18.

III. Protection Extended Under International Humanitarian Law

The aim of International Humanitarian Law is the regulation of armed conflict. Today the main thrust of protection extended by Humanitarian Law is that civilians are protected

³⁸⁰ UDHR Art 25(2), ICESR Art 10(3) ICCPR Art 24(1), UDHR Art 3, ICCPR Art 6, UDHR Art 5, ICCPR Art 6.

from the ravages of war as far as possible.³⁸¹ The protection can be found in ancient texts until modern times.³⁸² Initiatives in the modern times can be seen from the Lieber code to the St Petersburg Declaration of 1868 which sets out the principle that “means and methods of warfare” were not unlimited and the principle of “unnecessary suffering”. The 1907 Hague Convention gave birth to the “Martens Clause” which reads;

“Until a more complete code of the laws of war is issued, the high contracting parties think it right to declare that in cases not included in the regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usage’s established between civilised nations, from the laws of humanity and the requirements of the public conscience.”³⁸³

The IV Convention of the Hague contains a number of provisions aimed at civilians. These instruments were followed by the 1949 Geneva Conventions (GC) and their Additional Protocols (AP) of 1977. The 1949 GC’s have the status of customary international law. It is the IV GC, 1949 that is devoted exclusively to the protection of civilians. Article 27 of the IV GC, 1949 is said to be the basis on which the “entire convention rests.” It reads:

“Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, their manners and customs. They shall at all times be humanely treated, and shall be

³⁸¹ see generally, Van Dongen, Y., *The Protection of Civilian Populations in time of Armed Conflict*, Amsterdam, 1991. Mayer, M., (ed.) *Armed Conflict and the New Law*, London, 1989. Green, LC., *The Contemporary Law of armed Conflict*, Manchester, 1993. McCoubrey, H., White, ND., *International Law and Armed Conflict*, London : Dartmouth, 1992, McCoubrey, H., *International Humanitarian law: The regulation of Armed Conflicts*, Aldershot: Dartmouth, 1990. McCoubrey, H., *International Humanitarian Law: Modern Developments in the Limitation of Warfare*, 2nd ed. Aldershot: Dartmouth, 1998.

³⁸² See Chapter One “Introductory Remarks” pp 14-16.

³⁸³ This is from the preamble to the 1899 Hague Convention II. Another version of this can be found in the preamble of the 1907 Hague Convention IV.

protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.”

Children therefore hold a double protection in theory, one as civilians and the second by virtue of their childhood.³⁸⁴ They are extended protection under the 1949 GC IV and by the 1977 AP I and the AP II. The two APs of 1977 extend additional measures for the protection of children.³⁸⁵ General protection extended to children can be found in the 1949 GC IV which contains seventeen articles substantive in nature, mainly Articles 14, 17, 23, 24 26, Part III under section status and treatment of protected persons, Section II dealing with aliens in the territory of a party to the conflict, Article 38 and section III dealing with occupied territories, Articles 49, 50, 51, 68, 76, 81, 82, 89, 94 and 132. The API of 1977 contains seven articles namely, 8(a). Part IV, Section II, Article 70, Section III, Ch I, Articles 74, 75 (5) and Ch. 2, Articles 77(2) and (3). APII contains one article namely Article 4(3) (c) and (d).

³⁸⁴ see generally, Plattner, D., “Protection of Children in International Humanitarian law” in 240 *The International Review of the Red Cross*, May-June 1984, pp140-152.

³⁸⁵ for drafting history see Mann, H., “International Law and the Child Soldier”, in 36 *ICLQ* 1987. pp 32-57.

The main protection being extended by Article 77 AP I which also seems to be the basis of Article 38 of the CRC, reads:

“1.Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or any other reason.

2.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 have not attained the age of eighteen years, the parties to the conflict shall endeavour 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 fifteen 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.

4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.

5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.”

in addition Article 4(3) of APII which reads:

“ Children shall be provided with the care and aid they require and in particular:

- a) They shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;
- b) all appropriate steps should be taken to facilitate the re-union of families temporarily separated;
- 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;
- d) The special protection provided by this article to children who have attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;
- e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area in the country and ensure that they are accompanied by persons responsible for their safety and well being.”

The rules of humanitarian law are specific to armed conflict situations. Armed conflict situations can be international or a non-international. Armed conflict situations can also be those of internal disturbances but for the purpose of this thesis it will not be considered so. According to the classification, a higher or lower threshold applies. This chapter will not go into these provisions but will look at children specifically those participating in war, as combatants.

III.A . International Armed Conflict

International armed conflict is regulated among others by the 1949 GC and the 1977 API. The core of the four GC's is that protected persons are to be treated as humanely as possible and that no unnecessary suffering is inflicted on the fighting forces. Torture is prohibited. Fundamental judicial guarantees are emphasised as a Right.

Article 77 of API states that state parties take "all feasible measures" to ensure that children below the age of 15 years do not take part in hostilities directly. As far as recruitment is concerned the wording of the article is that States should "endeavour to give priority" to older children. Whether this includes voluntary enlistment is unclear. There also exists the opinion that the obligation to refuse the enlistment of child volunteers no longer exists as it is not mentioned in Article 77 of API.³⁸⁶ Mann seems to be of the opinion that voluntary enlistment is permitted.³⁸⁷ According to Mann, the choice of the age of fifteen combines two elements of humanitarian law as it covers the concept that fifteen and below need protection, and military necessity plays a dominant role.³⁸⁸ It has been suggested that though the recruitment of children is not expressly forbidden but only "tends to prohibit the recruitment of children under fifteen into the armed forces in so far as possible".³⁸⁹ This interpretation it is submitted is due to use of the terms *feasible measures* and the further addition of the term "a direct part" has weakened the protection further. Gehring seems to suggest that a narrow definition of both "hostilities" and "direct part in hostilities" is required and feels that supporting ones military by for example; supplying or transporting supplies is not enough to lose one's civilian status but does admit that spying and sabotage would be an abuse of the civilian protection and hence unacceptable.³⁹⁰ Another view³⁹¹ is that as a minimum this phrase includes attempting to kill, injure or capture the enemy, sabotage, observation i.e. reconnaissance, logistic

³⁸⁶ Sandoz, Swinarsky and Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Protocols of 12 August 1949*, 1987, p 900.

³⁸⁷ Mann, H., "International Law and the Child Soldier", 36 ICLQ 1987, pp 47-48.

³⁸⁸ See also Herczegh, G., *Development of International Humanitarian Law*, 1984 pp 154-155.

³⁸⁹ Pastre-Burros, S., "The Protection of Children in Armed Conflict" 46 *International Child Welfare Review*, September 1980. pp 33-35.

³⁹⁰ Gehring, "Loss of Civilian Protection Under the Fourth Geneva Convention and Protocol I" 90 *Military Law Review*, 1980, p 70-83.

³⁹¹ Bothe, Partsch, Solf, *New Rules for Victims of Armed Conflict*, 1982, pp 302-303.

support, delivery of arms. This list is based on the activity's immediate threat to the opponent. In the context of children the obligation lies on the party to the conflict to ensure that they do not commit such acts. The crux of the matter is that if a civilian indulges in "direct participation" they forfeit the status of civilian and hence lose the general protection extended to them and become a valid target. Hence when parties allow children to volunteer, children forfeit their right to general and special protection extended to them.

Captured child soldiers can be categorised as prisoners of war (POW) or civilian internees. Children between the ages of 15-18 and or under 15 if combatants and captured and considered POW's, Article 77 (2) of API makes it clear that the state must bear responsibility for their underage soldiers and the children themselves should not be punished but treated according to their age and hence given special consideration. This is also indicated by Articles 16 and 49 of the 1949 GC III. Captured child soldiers must be detained in proper facilities in accordance with the provisions of GC IV i.e. Articles 82, 85, 89, 94 and 119. Articles 50, 51, 68 and 76 being applicable in occupied territories. Child soldiers must not be subjected to capital punishment according to the GC IV Article 68 and Article 77(5) of API. Repatriation of child soldiers is not expressly legislated, but Article 109 of GC III and 117 seem to lay the basic foundation for this.

III. B . Non-International Armed Conflict

Article 4(3) of the 1977 AP II has been classified as 'human treatment' and a fundamental guarantee. This Article is a much stronger provision than the others as it expressly forbids the participation of children as either direct, indirect, volunteer or conscripted participants. Its one weakness being that it does not refer to children between the ages of 15-18.³⁹² The basic rule seems to be that children below the age of 15 should not participate at all in armed conflict of any kind and in case they do then their age must be

³⁹² see Mann, H., "International Law and the Child Soldier", 36 *ICLQ*, 1987, p49-50.

kept into account; while penal measures may be the norm under national laws, educational and or rehabilitative methods should be adopted.

Internal disturbances falling below the level of an armed conflict are regulated by domestic or national laws and general principles of international law.³⁹³ A measure of humanity is imperative even in internal disturbances and tensions and “[i]t remains a customary norm that parties to a conflict are required at all times to distinguish between civilians and combatants in their means and methods of warfare”.³⁹⁴ National law with its institutions and mechanisms must work for the prevention and repression of abuses. The UDHR makes it incumbent upon the international community to do so. The hard-core of human rights are that the minimum standards must be maintained that is it is a *must* to safeguard human dignity. In the Corfu Channel³⁹⁵ case the ICJ stated that there are “[c]ertain general and well recognised principles namely elementary considerations of humanity” therefore there are certain fundamental rights from which a state may never derogate. Humanitarian Law also has a core of fundamental rights, i.e. Article 3³⁹⁶

³⁹³ See generally Brett, R., *Discussion Paper on Ways of Improving the Implementation of Human Rights and Humanitarian Law*, Geneva: UN Quaker office, January 1994. Also Institute for Human Rights, Abo Akademi University, *Declaration of Minimum Humanitarian Standards*, Turko/Abo, 1991; UN Doc E/CN.4/1995/L.33, 1995; ICRC, “New Draft Declaration of Minimum Humanitarian Standards”, 282 *IRRC*, May-June 1991; Gasser, H., “A Measure of Humanity in Internal Disturbances and tensions: Proposal for a Code of Conduct”, 28 *International Review of the Red Cross*, 1988; Meron, T., “Towards a Humanitarian Declaration on Internal Strife”, 78 *AJIL* 1984.

³⁹⁴ Gardam, JG., *Non-Combatant Immunity as a Norm of International Humanitarian Law*, Dordrecht : Martinus Nijhoff, 1993. p 8.

³⁹⁵ ICJ Report 1949, p 22.

³⁹⁶ Article 3 reads :

In the case of armed conflict not of an international character occurring in the territory of one of the high Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages

(c) outrages upon the personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

(2) The wounded and sick shall be collected and cared for.

common to all four Geneva conventions which is both customary international law and a principle of *jus cogens*. The Nicaragua³⁹⁷ case too establishes “Article 3” as the minimum yard stick.

International Humanitarian Law, as seen from above recognises that children need special care and protection. It extends protection to children as civilians i.e. non combatants and as a special category of persons. But when children fight or participate they lose this special protection. The GCs do not make a specific reference to child soldiers. The APs of 1977 specifically refer to children in Article 77 AP I and Article 4(3) AP II. Yet are they protection enough? Are children the priority or is it that military necessity and state sovereignty that are getting priority in these provisions? The provisions of API and APII though an improvement are not protection enough. Firstly, Article 77 of API allows children below 15 to take an indirect part in hostilities. It only prohibits the direct participation of children under 15 in armed conflict. The reality is that once on the battlefield, the difference of being a direct or indirect participant does not make any difference to the child. Further the use of the word “refrain” is not as strong an obligation if the word adopted had been “prohibit” or “shall not”, so effectively this article does not further the protection extended to children very much. Article 4 of AP II is stronger protection as it prohibits all kinds of participation of children under 15. But it overlooks children between 15-18, leaving a large number of vulnerable children without any protection whatsoever against being abused as child soldiers.

IV. The International Criminal Court (ICC) .

The statute of the ICC agreed upon in Rome, 15 June - 17 July 1998, compliments national criminal justice systems and has jurisdiction significantly over serious crimes committed in the context of even non-international armed conflict.

An Impartial humanitarian body, such as the ICRC, may offer its services to the parties to the conflict. The parties to the conflict should further endeavour to bring into force, by means of special agreements, all or parts of the other provisions of the present convention.

The application of the preceding provisions shall not affect the legal status of the parties to the conflict.

³⁹⁷ ICJ Reports 1984.

For child soldiers specifically it is Article 8 (2) (b) (xxvi) :

“Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.”

this makes the use of children a war crime. This statute grants the ICC jurisdiction³⁹⁸ over the war crime of conscripting or enlisting children under the age of fifteen years into national armed forces or armed groups also includes intentional attacks on educational institutions and schools, which are frequently targeted for recruitment purposes and to terrorise civilian populations. It however has no jurisdiction by virtue of Article 26 over children under 18 at the time of the commissioning of the crime. This represents an important leap forward for children's rights.

It importantly includes also measures³⁹⁹ for the protection of child victims and witnesses. These measures include providing for in camera proceedings or presentation of evidence by electronic or other special means.⁴⁰⁰ The Statute also mandates the establishment of a Victims and Witness Protection Unit, which would provide protective measures and security arrangements, counselling and other appropriate assistance.

IV. Conclusions:

Both Global and regional instruments indicate that children are entitled to special protection and care in general. (The 1948 Convention on the Prevention and Punishment of the crime of genocide acknowledges the fundamental importance of children to any group.) The 1979 Convention on the elimination of all forms of discrimination against women makes special provision for children as well. In armed conflict these can only be magnified. Legally children are entitled to special treatment and have a distinct status yet

³⁹⁸ Articles 12, 13 generally .

³⁹⁹ Article 68.

⁴⁰⁰ A group of Experts met at Siracusa, Italy between 1-6 February 2000 to formulate a draft to be tabled at the UN prep-com on the ICC in March 2000.

the practical and to some extent legal situation of children in armed conflict leaves a lot to be desired.

Who is a child? The answer to this question is ambiguous. The International community has not been able to reach a consensus on the two most important issues, i.e. when does childhood begin and when does it end.⁴⁰¹ Both the 1924 and the 1959 Declaration on the Rights of the Child do not define when childhood ends. However, despite this disagreement, one factual agreement is that childhood differs from adulthood by being more vulnerable and less able.⁴⁰² A universal definition it has been said can be undesirable for the reason that it would then be inflexible but on the question of age we have to reach a consensus, else the rights of children will continue to be vulnerable to abuse. In the case of child soldiers it is important to have a definite age agreed upon, as else they will continue to be used and abused. But as submitted in the previous chapter, 18 seems to be the age which is universally accepted as the age of majority. It is often considered as the stage when the right-balance between the legal concerns of age of majority and the important biological concerns of physical and mental maturity seem to be struck.⁴⁰³

The Convention on the Rights of the Child (CRC) which is the most important legal document today, extending an all encompassing form of protection to children fails them, as it fails in its Article 1 to define who is a child, leaving children open to abuse. "The definition of childhood in international law is critical because it determines which specific rights attach to the status of childhood and which legal remedies are available to children as a class".⁴⁰⁴ Article 1 of the CRC is the most critical article of this convention because it decides who will be protected by this convention, yet it allows states to decide when childhood ends. The "age of majority" provision provides states with a legal lacuna.

⁴⁰¹ See Detrick, S., (ed.) *The UN Convention on the Rights of the Child: A Guide to the Travaux Préparatoires*, Martinus Nijhoff, 1992. ←

⁴⁰² Skolnick, "The Limits of Childhood: Conceptions of Child Development and Social Context", 39 *Law and Contemporary Problems*, 1975, p 38.

⁴⁰³ see CDDH/III/SR.45, para 31.

⁴⁰⁴ Van Bueren, *International Law on the Rights of the Child*, 1995.

In Article 37(1), the CRC prohibits the imposition of the death penalty or life imprisonment for anyone below the age of 18 years, a similar clarity in Article 1 would have been a major step forward in the field of child protection.⁴⁰⁵ According to Article 1 of the CRC “every human being below the age of 18... unless majority is obtained earlier.” The underlying theory to this is that States with a high mortality rate and a low life expectancy allow childhood to end earlier. However the age of 18 seems to be the trend and social reality globally.⁴⁰⁶ However supporters of the age of 15 years representing the end of childhood argued that in many cases 14 was the age when compulsory education ended and also the minimum age of marriage. But there are international treaties that set the age limit higher than 15, for example the ICCPR prohibits the death penalty on anyone below the age of 18. The Supplementary Convention on the Abolition of Slavery 1956 prohibits exploitation of persons below the age of 18 years. The ILO Convention on the Minimum Age for Admission to Employment 1973, puts the minimum age as 18 for any form of employment that is likely to jeopardise an individual's health, safety or morals. There was also the argument proposed during the drafting of the CRC by the Netherlands⁴⁰⁷ that majority should not be defined by age, as other criteria could accommodate young people as de- facto adults, it is found for example in English Law, in the United States and in France where individuals who are 16 years old can with parental consent take up either military service or marriage. This compromise to accommodate as many values as possible has left a wide lacuna in law in the protection of children, as children may attain majority earlier under national legislation and hence fight as soldiers. Additionally the concept of majority includes two aspects, a legal one and a cultural one. The age of majority can differ under these aspects, for e.g.: a child may be considered an adult at 13 for the purposes of a religious ceremony, but for the purposes of voting may not be able to do so until 18 or even later. The International community has yet to come to agreement on the definition of the age of childhood, but it does appear that 18 is acceptable to the vast majority. And yet during the

⁴⁰⁵ Porterfield, T., Stanton, GH., “The Age of Majority : Article 1”, *New York Law School Journal of Human Rights*, vol. 7, 1989-90. pp 30-34.

⁴⁰⁶ see Chapter 4 .

⁴⁰⁷ Detrick, S., *The United Nations Convention on the Rights of the child: A Guide to the "Travaux Préparatoires"* Dordrecht: Martinus Nijhoff, 1992, p 116, 118.

debates in the ICC, the age of 18 was not adopted as there was opposition to it, as the US took the stand that the 17 year old volunteers in its national forces represented a “military edge” that they were not willing to loose. Is military feasibility more important than providing children protection, when international law and a international moral code states that children rights are to be protected, especially in times of war.

Article 77(2) of API prohibits children under the age of 15 years from direct participation in international armed conflicts. Article 4 (3)(c) of AP II prohibits their participation direct or indirect in non-international armed conflicts. Disappointingly, Article 38 of the CRC merely repeats what has been previously established in Article 77 API of 1977, it does not represent an advance. There has been much debate on this issue. Many states recruit soldiers who are 16 and above, this means they would be required to change their national policies, while some are faced with civil wars at home and use children on the front line, irrespective of their consent. The African Charter on the Rights and Welfare of the Child in contrast *forbids* the recruitment of children below the age of 18.

Recruiting it is submitted is the *defining* moment, if children were not recruited they would not be fighting in wars. During the negotiations on the text of the CRC, the most controversial issue raised was the age of recruitment. Article 38 of the CRC does not add any further clarity to the situation.

The opposition to raising the age of recruitment from 15 to 18 was from the United States of America, UK, Netherlands, New Zealand, Cuba and China. According to the ICRC and many NGOs Article 38(4) of the CRC has lowered the existing standards of protection.⁴⁰⁸ However a broad consensus exists that the age of participation should be 18 and not 15.⁴⁰⁹ The Optional Protocol to the CRC is now ready and awaiting the necessary number of ratifications. It covers all kinds of conflicts and is not limited to only international

⁴⁰⁸ UN Doc E/CN.4/1989 WG 1/WP 65.

⁴⁰⁹ As of June 1997, the main opponent to raising the age of recruitment to 18 and hence the optional protocol remains the USA, interestingly it is one of the three countries that have not become party to the CRC.

conflicts. When ratified by a State, the State Party to it would be bound by it and not Article 38 of the CRC which is a very weak protection.

The main issues that are covered by the OP to the CRC include age for participation, restrictions on participation, recruitment of volunteers, nature of participation and implementing measures. It does seem strange that persons who cannot vote to influence a political decision, should be compelled to fight and die for the same political theory! According to Goodwin-Gill and Cohn⁴¹⁰ the only reason children are used is that they are *expendable and exploitable*. Children under the age of 18 need special care and protection and “military necessity” can never justify the use of children in armed conflict. It is a moot point that restrictions placed by treaties on the minimum age of recruitment interferes with the child’s right to freedom of association and expression, but is this a valid issue ? It has been submitted that even the voluntary participation by children is actually a response to their economic and social situation wherein the child discovers that his/her only means of survival is to join a fraction and fight. It has been submitted earlier that armed conflicts have an inherently brutalising effect and that “their very nature makes it impossible for those under 18 to give free and informed consent”.⁴¹¹ The OP to the CRC which is yet to come into force does allow in Article 1 itself under 18s to be recruited by the regular armed forces of a State as long as there is no element of coercion in it, and the consent is an informed one. Interestingly the European Commission on Human Rights has observed that use of children over 15 in the military does not equal forced labour, as long as consent is present.⁴¹² The official age of conscription in the UK is 16⁴¹³ and in the Falklands War and in the Gulf Conflict, the UK has lost soldiers below the age of 18 in the line of duty.

⁴¹⁰ Goodwin-Gill, G., Cohn, I., *Child Soldiers : the Role of Children in Armed Conflicts*, Clarendon Press : Oxford, 1994.

⁴¹¹ Van Beuren, *The International Law on The Rights of The Child*. 1995. p 335.

⁴¹² X, Y and Z v. United Kingdom. Application Nos. 3435-38/67 CD 28.

⁴¹³ *Daily Telegraph*, London, 19 October 1999. Jason Burt, 17 years old died in the Falklands. He was not allowed to donate blood as he was told he was too young but was sent to the front. *Daily Telegraph* of 21-22 October and 21 November 1998 which reports the rape of a 17 year old recruit by her 29 year old instructor, a Sergeant. For death while undergoing training see both *The Daily Mail* and *The Guardian* of 16 October 1998, reporting the death of 16 year old marine Nathaniel Burton. See also “Roll Call of Deaths During Military Exercises” in *The Guardian*, 1 April 2000. For brutality while undergoing training see,

A major problem is how to ensure that non-governmental groups do not violate these laws by conscripting children, perhaps it is time for provisions to be made in national laws for the prohibition on child soldiers by all groups. The OP to the CRC does respond to this need in Article 4. It is, however, too early to attempt analysing the possible effect it will have on the ground. However, any child that participates in war loses her/his childhood and is denied all rights due to it as a child. The biggest problem facing this law is the lack of documentation to establish age. Most conflicts today are in the developing world. According to the Brett and McCallin in their case study of Mozambique they found that it was usual for age "to be estimated based on stature, psycho-motor development, and in the case of girls, on the appearance of breasts". In the case of Turkey they found that in the case of the death of an elder boy, to avoid the tedious process of state identification etc. the younger brother simply took over the identity of the deceased brother and in Ethiopia it was the case that if individuals above 18 were not available for recruitment, children below the age of 18 were conscripted, with the falsified age of 18. Case studies in El Salvador and Turkey, Burma, Guatemala, Mozambique and Paraguay have established that under age recruits were often classified as "volunteers". The most common method of forced recruitment by both governmental troops and non-governmental groups have been described as "press ganging". A group of armed men pick up any individual in any area that they come across and take them away to join the force. This was found in Ethiopia, Sudan, Uganda, El Salvador, Mozambique and Burma to name a few. Children are often abducted from their homes and taken away from their parents.⁴¹⁴ In the case of Afghanistan it was found that when children submitted identity cards to prove their age of minority, the cards were taken away and the age amended to prove them adults. In almost all cases it was found that persons evading conscription were tortured and or killed outright. There are instances of pressure being brought on families if children are evading conscription. In one vivid testimony, a 16 year old boy stated that "a

"Army Recruits sue MoD over Initiation Beatings" in *The Sunday Times*, 19 October 1997. "Army Boots out Barrack Bullies: new recruits were Forced to dance naked Conga" in *The Herald*, 4 February 1999. "Squaddies Flee Lonely and Humiliating Fate" in *The Observer* 4 June 2000.

⁴¹⁴ See Human Rights Watch Reports, Radda Barnen Reports and Quaker United Nations Office reports.

neighbour visited our home and told our father that militia would be visiting our home at night (for recruitment)". The boy and his 14 year old brother were hidden by the parents, but after a few days where the younger brother returned to check, he found that their parents had been imprisoned. The boy went and gave himself up and enlisted. He was killed subsequently in combat.⁴¹⁵ Groups are also known to "warehouse" children as recruits for later use. In El Salvador, "orphans between the ages of 0-12 were taken into refugee camps and day-care centres ... military training was sometimes secretly given by (opposition) combatants ... many of the children joined the opposition group later at the age of about 12 years". Dr Pictet suggests that "International usage has now settled on an age limit of fifteen years as defining what is meant by 'children' when no further description is given".⁴¹⁶

The continued and frequent use of children as combatants in armed conflict, contrary to the obligation of the present provisions i.e. specifically Article 77 API and Article 4 AP II and Article 38 of the CRC suggests that there is the urgent need of further action for improvement and implementation.

How appropriate are the existing standards? Article 77(2) reads: "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 the armed forces. In recruiting among those persons who have attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest". This is a weak provision because it does not protect children over the age of fifteen. Article 38(3) of the CRC requires states to "endeavour to give priority to the oldest if recruiting between the ages of 15-18" yet the tragic reality is that the "legal obligation is weak."⁴¹⁷ It has been accepted that on attaining the age of 15 the development of faculties is more or less to its peak and that the need for special protection and measures no longer

⁴¹⁵ Case Study for Ethiopia, Brett, McCallin and O'Shea Study. p 25.

⁴¹⁶ Pictet, *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in time of War*, ICRC 1958. p395.

⁴¹⁷ Brett, R., "Child Soldiers: Law, Politics and Practise", *The International Journal of Children's Rights*, vol. 4, 1996 p 117.

exists⁴¹⁸ hence it is seen that children below 15 appear to have special status and children between the ages of 15- 18 are not protected as Article 1 of the draft OP to the CRC allows children from 16 and above to volunteer and join the armed forces. The ICC too does not prohibit the recruitment between the ages of 15-18 .

Coming further to the issue of “voluntary”: the use of the term *feasible* instead of a term like *necessary* allows military interests to take precedent over the interests of the child. It does not ban indirect participation. According to some authorities it includes voluntary and involuntary recruitment.⁴¹⁹

It is interesting to note that in relation to offences committed by children in armed conflict, they had to be over 18 years of age for the death penalty or life imprisonment to be imposed and yet they are allowed to die on the front-line at the age of fifteen according to the existing law.⁴²⁰ Some of the rights granted by the CRC are the right to life and development. Article 19 of the CRC places a clear duty on the states to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardians or any other person who has the care of the child”. Article 19(2) develops this protection further by stressing that states establish effective social programmes to provide for children in need and in need of prevention, investigation and treatment. Article 22, while referring to refugee children seeks to ensure that all refugee children receive appropriate protection and assistance for the enjoyment of all rights set out in the convention. Article 32 protects children against economic exploitation, Article 33 against narcotic abuse, Article 34 against sexual abuse, and Article 35 places a clear

⁴¹⁸ Sandoz, Swinarski, Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC 1987. p 899, paragraph 3179.

⁴¹⁹ Ambassador Aldrich in a statement during the Asser Institute Colloquium on the Gulf War, 23 November 1990, quoted in Delissen, “Protection of Child-Combatants after the Protocols: Reaffirmation, Development or a Step Backwards”, in Delissen and Tanja (eds.) *Humanitarian Law of Armed Conflict Challenges Ahead; essays in honour of Frits Kalshoven*, 1991.

See also Dutli, “Captured Child Combatants”, 278 *International Review of the Red Cross* 1990.

⁴²⁰ Criminal responsibility in most states is 18 and above.

duty on states to take all appropriate national, bilateral and multilateral measures to prevent the abduction of, sale of, and trafficking of children for any purpose in any form. The States Parties under Article 36 have a duty to protect the child against all forms of exploitation. prejudicial to any aspect of the child's welfare. Article 37 of the CRC prohibits torture, cruel, inhuman or degrading treatment or punishment. Capital punishment and life sentences on persons below the age of 18 are not to be imposed. Article 38 extends protection in times of armed conflict. In Articles 39 and 40 it speaks of rehabilitation and penal measures, Article 41 is very important as it states that :

“Nothing in the present convention shall affect any provisions which are more conducive to the realisation of the rights of the child and which may be contained in
(i) the law of a state party (ii) international law in force for the state.”

During armed conflict, all the rights specified above are violated.

There are gaps in Humanitarian Law that need to be studied and rectified. The CRC needs stronger monitoring and enforcing powers, the laws must move into effective practice from mere paper protection. Further, as submitted even the OP to the CRC though a step forward, does allow children between 16-18 to volunteer. Political will and action is necessary for dealing with the root causes of this problem. A major step forward would of course be a complete ban on children under 18 as soldiers. The UN and its regional counterparts need to move quicker and more effectively and need to co-ordinate with national development and assistance agencies to ensure dissemination of international norms and compliance with international norms regarding children. Importantly national laws and international laws have to work in tandem to ensure effective protection for children in armed conflict or otherwise.

Chapter Four

RECRUITMENT: THE DEFINING MOMENT

“We will work carefully to protect children from the scourge of war and to take measures to prevent further armed conflicts, in order to give children everywhere a peaceful and secure future. We will promote the values of peace, understanding and dialogue in the education of children. The essential needs of children and families must be protected even in times of war and in violence ridden areas. We ask that periods of tranquillity and special relief corridors be observed for the benefit of children, where war and violence are still taking place”⁴²¹

I. Introduction:

The debates during the various drafting processes discussed in the previous chapter, indicate that children are allowed to volunteer and fight as they represent “a military edge”⁴²² or that they make “the best soldiers”. The point however is, whether it is justifiable to state military necessity as an excuse to use children as soldiers? And must we assume that since no law exists prohibiting it, the practice is within the keeping / protection of law ? Since it appears that we are granting it legitimacy, is it a legally acceptable practice though morally it be abhorrent to us? Do we prohibit it or accept it and should we therefore legalise it ?

In this chapter, a study of compulsory, forced, voluntary and induced recruitment with emphasis on the recruitment practices of non-governmental forces will be made. An analyses of the role of government and non-governmental forces in the practice of recruitment and subsequent participation will be made. Identification of states and non-state entities which conscript or accept the enlistment of children below the age of 18 is

⁴²¹ *World Declaration on the Survival, Protection and Development of Children*, Article 20 (8) , World Summit for Children : New York, September , 1990.

⁴²² The US Position on 17 year old volunteers, they state that the 17 year old volunteers are a military necessity see website : <http://www/hrw/org> and US campaign to stop the use of child soldiers : <http://www.us-childsoldiers.org/> .

beyond the scope of this chapter however; examples whenever relevant will include states other than Uganda, the case study. This chapter will attempt to state the rules and standards applicable to this practice, to explore the legal gaps in the scope and substance of law with reference to child participation in armed conflict and possible methods of implementation of human rights standards in the future.

II. Recruitment:

The Oxford dictionary defines a recruit as “a serviceman or woman newly enlisted and not yet fully trained”. It defines recruitment as “to enlist a person as a recruit” to form an army by enlisting recruits, get or seek recruits, to replenish or invigorate numbers (by the process). Recruitment can be of different kinds, the most common one is when people enlist to become a part of a regular i.e. professional armed force that form part of the state or governmental organs. Irregular forces indicate non-governmental entities. The basic difference between the two is the “belonging” to the state, the training, and the structure of the forces itself. Irregular forces can mean anything from opposition forces, guerrilla forces, mercenaries to auxiliary forces. Is there any difference in the experience of children serving with regular as opposed to those serving in irregular forces? According to the analysis presented in *The Defence Monitor*,⁴²³ there is no major difference between what children experience, as they fall under the same military laws as adult soldiers. Attempts to escape, as case studies of Colombia, Ethiopia show, are often met with death by shooting or severe beatings. Treatment of captured child soldiers is often brutal by either side.

Nowadays we see different kinds of recruitment in use. They are voluntary recruitment, conscription, and forced recruitment.

II.A. Voluntary Recruitment:

⁴²³ *The Defence Monitor*, vol. XXVI, No 4, Washington DC, July 1997.
Website: <http://www.cdi.org/dm/1997/issue 4>.

Voluntary recruitment indicates an enlistment by choice, a decision made without any coercion. Often individuals enlist to join as soldiers or pass tough exams to qualify for the armed forces. Most of these entrants are choosing to make a career as professional soldiers in a country's armed forces. Most countries with professional armies tend not to recruit individuals below 18. The lack or excess availability of man power normally depends on the pay scale and other socio-economic factors in the country and yet, there are states like the UK and the USA that allow individuals below the age of 18 to enlist in their armed forces.)

In the US 17 year old children/ individuals can volunteer to join the army with parental consent. In the UK a new kind of conscription policy seems to be evolving. Youngsters who are unemployed will be forced to enlist.⁴²⁴ The UK allows a person to enlist in the forces once they leave school. By the age of 17 years and 3 months they are eligible for active duty.)

There are instances when individuals enlist or volunteer. But there may be a number of reasons or motivations that an individual may feel motivated to enlist, they could be cultural, religious and political motives: "Dulce et decorum est pro patria mori".⁴²⁵ In fact, this "appeal to these fundamental drives has been necessary to induce men to engage in modern war and has also played a part in giving to modern war its peculiarly unrestrained character".⁴²⁶ Reasons for volunteering could also include, revenge, physical or structural violence, social and economic injustice, militarization of daily life, lack of options etc. Occasionally a government's failure to curb violent abuse of fundamental rights and disregard for its citizens has also led to rise in voluntary recruitment. Another example would be, Britain at war with Argentina over Falklands in 1982. This occasion resulted in a boost in terms of nationalism. Interestingly, this also led to Mrs Thatcher getting a lead in the popularity polls. This concept of politicians occasionally using nationalism and related ideas to achieve gains, is re-iterated by Hegel's idea that by arousing the passions

⁴²⁴ Conversation with Rachel Brett.

⁴²⁵ Horace *Odes*, iii, 2, 14. Homer *Iliad*, xv 583.

⁴²⁶ Nickerson, H., *Can We Limit War*, Bristol, 1933, pp 114 and 198.

of solidarity, war makes nations or at least revives them, India and Pakistan being classical examples. Hence, nationalism with a political clout does tend to increase the number of enlistments. Another example is that from Uganda where a number of volunteers were helped by a local NRA recruiting officer who organised for eleven boys from a village to escape at night in a lorry and join the rebels who were camping at Kasesse camp.⁴²⁷ And yet in most instances when children have been driven to leaving homes and families and fending for themselves, for example as street children, the reason has been hunger and war⁴²⁸ and other “push -factors” that lead to a breakdown of the family are famine, caused by drought and desertification, war, insecurity. Other reasons can be food, freedom, romanticised picture of urban life, school, education, money, jobs.⁴²⁹ These children are more prone to either volunteering and fighting in armed conflict and or also tend to get press-ganged into fighting. As has been submitted earlier in this thesis, children below 18 are not always capable of making the best decision in their favour, and when required, it is justified in intervening. Accordingly, when children between the ages of 15-18 volunteer, it is the duty of the State body or the recruiting body to reject the enlistment. International law as we know currently allows 15 and above to be recruited. Though there have been changes developing the issues of effective monitoring and preventing further recruitment remains.

II.B. Conscription

Conscription is the compulsory enlistment for state service, commonly known as “military service”. This form of military service is still prevalent in many countries around the world. For example in Italy, Greece, Turkey, Spain, Switzerland, Slovenia, Singapore, South Africa, Sweden, Thailand, Ukraine, Venezuela, Zaire, Poland, Portugal, Peru, Norway, Afghanistan, Austria, Algeria it is a common practice. Conscription policies vary from country to country and are usually laid down in the national

⁴²⁷ See page 14-15 of Monday, February 7, 1994, *The New Vision*, published in Kampala, Uganda.

⁴²⁸ Dodge , CP., Raundalen, M., *Reaching Children in War : Sudan, Uganda and Mozambique*, Sigma Forlag : Sweden , 1991, p43-44.

⁴²⁹ *Ibid*, Dodge and Raundalen have described them as “pull factors”.

constitution and is regulated by the national law of the country. For example, the age of conscription varies from an unclear position in Iran to 18 or 21 in most other cases. This normally involves spending one year to 18 months in military service. It is mostly aimed at males. The problem of course is in countries like Afghanistan, where age is not taken into account as long as there is a need for soldiers all males are conscripted to fight as has been known to happen in many other countries during war time.

II. C. Forced Recruitment:

Forced recruitment entails the threat or actual use of force or violation of the physical integrity of the individual or someone close to him or known to him. Nowadays this is found to be practiced by both national armed forces and armed opposition groups. There exists a very unclear line between what is voluntary and involuntary in many cases. In some states it has been noted that even though official legislation exists that draws a clear line as to the minimum age of recruitment being over 18, they do sweep up under-age adolescents along with other adults. In El Salvador,⁴³⁰ Guatemala, Ethiopia and Burma it has been reported that when numbers are needed to fill up the ranks in government forces, young men are picked up from streets, buses, playgrounds, churches, schools etc. For example in Burma, when a confrontation is expected, the recruitment drive is intensified in both the rebel and state forces.⁴³¹ The same has been noted in the opposition forces in Angola, Sri Lanka and Sudan. Forced recruitment as seen in Uganda⁴³² is that of abduction and use of physical and mental violence by the LRA to force these children to fight. It is submitted that as emergencies develop, voluntary recruitment is giving way more frequently to forced conscription and press-ganging. It has been reported that in Uganda in October 1998,⁴³³ streetchildren in Kampala were forced to join the army to

⁴³⁰ Americas Watch and Lawyers Committee for International Human Rights, *Free Fire, A Report on Human Rights in El Salvador*, August 1984, Fifth Supplement. See also "Youth under Fire: Military Conscription in El Salvador", Centre on War and The Child, Ark., 1989.

⁴³¹ Burma Issues representative in conversation, 1995. Mae Sot Refugee camp, Thailand.

⁴³² See Chapter six of this thesis for details.

⁴³³ Coalition to Stop the Use of Child Soldiers, *The Use of Children As Soldiers in Africa: A Country Analysis of Child Recruitment and Participation in Armed Conflict*, Geneva, March 1999, p 114.

fight on the side of the rebel forces in Congo. This allegation was denied by the Ugandan National Council for Children and by the Minister of State for Defence. However, in November 1998, 500 youths most who were under 18 are said to have been recruited by the UPDF in Hoima district, without the consent of their parents. The parents protested but the District Security Officer (DISO) in Hoima, confirmed this recruitment and stated that the youth were volunteers.⁴³⁴ This along with mechanisation, increase in the size of armies, militarization of societies, nationalisation etc. are leading to war attaining a more brutal form than ever before.

A disturbing aspect that emerges is the “simple idea that certain types of behaviour which are usually condemned are nevertheless permitted in war, since war is a special circumstance”.⁴³⁵ Today’s child soldiers experience great brutality and trauma, for example in Mozambique, a small number of boys are separated from the rest of the kidnapees, and trained as guerrillas. The initial process has been described as one where “they lock them 2-3 days in a house then they train. They give you a gun. After they give you a gun you are not allowed to run away. Because if you run away the bandits - the bandits know where you live and they go and look for you. And they kidnap or kill your family. Some children are afraid of running away because they know if they run away their family will die”.⁴³⁶ The young recruit is intimidated to the point where their socialisation pattern is broken down and they actually accept the gun willingly. Then they are forced to kill someone they know. This typically means going back to the home village or community and killing someone known to the recruit in front of the community. This effectively closes the possibility of returning back to or life within this community for this child. Over a period of time, it seems that a number of recruits start to identify with the captors and the cause of their fight.⁴³⁷

⁴³⁴ *ibid.*

⁴³⁵ Melzer, Y., *Concepts of Just War*, Martinus Nijhoff: Leyden, 1975, p64.

⁴³⁶ Quoted by Dodge and Cole, p 57.

⁴³⁷ Similar to the Stockholm effect. This was first noted by psychologists when a bank teller held hostage by an armed robber after a period of time identified with the perpetrator. Also seen in the Getty kidnaping case.

It should not be forgotten that the Hague Convention on civil aspects of International Child Abduction (1980) in its preamble aims “to protect the children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure prompt return”.

III . Cadet schools / Military schools

There are military schools in many states. They are usually a state run institution, associated with the government. They accept children at an early age, some accepting children as young as seven, others slightly older. These children grow up in a military environment. Not all but most tend to move straight into the military academies from these schools. For e.g. in the State of Benin, the “Centre National d’Instruction des Forces Armes” provides education to children from the age of 13 onwards. In the “Prytanee Militaire” of Bembereke, children from the 6th grade are selected. These children are not members of the armed forces, but are *encouraged* to join the military forces post graduation. Most graduands are 19-20 years old. Rwanda and Burundi however, show that military schools serve as “backdoor recruitment into the armed forces of tens of thousands of children”.⁴³⁸

Even ordinary schools may have cadet programs, for e.g. in India it is the National Cadet Corps (NCC) which are found in schools and colleges. Children and young people have one day a week of regular training where they wear a uniform and undergo special training. There exists a special quota for NCC cadets to join the defence forces. In the US for example, exist quasi - military organisations like “Young Marines” or “Junior Reserve Officer Training Corps”. The latter is a program administered by the Pentagon in high schools. Its staff consists mainly of retired military personnel. Subjects include - cross country navigation, marching, uniforms, marksmanship training, military history etc. Why do we need cadet schools or programs? The answer to that is that it is believed that they

⁴³⁸ Coalition to Stop the Use of Child Soldiers, *The Use of Children As Soldiers in Africa: A Country Analysis of Child Recruitment and Participation in Armed Conflict*, Geneva, March 1999, p 6.

are “seen as ways to occupy children, to socialise them and to teach them discipline”. Can “discipline or socialisation” be taught only through this military training?⁴³⁹

IV. Why Do Children Join Armed Forces And Groups?

In the many conflicts around the globe today, children are either being forced to fight or being coerced to fight; some volunteer for various reasons ranging from revenge, being a man, national pride, to that of survival. According to Goodwin-Gill and Cohn⁴⁴⁰ most young soldiers are not forced to join by force or blatant coercion but are skilfully manipulated by the recruiters, who use, religion, ethnic divides, their personal experiences and circumstances to make fighting with a gun the only sensible option.

“Children’s subjective reality is influenced by their social milieu or what has come to be called children’s ecologies, and by developmental processes. The ecologies of children’s lives - their parents, families, peer groups, school, religious communities and other community based institutions - might exert pressures or send messages that lead to children’s participation in hostilities. For example: relatives, family and friends are disappearing or have been tortured so revenge is foremost in the minds of these children. They have seen their family member or have themselves suffered abuse and humiliation at the hands of armed forces. All these factors result in a vulnerability to propaganda used by opposing sides in encouraging recruitment. Members of children’s ecologies may also influence how a youth appraises the choice to participate in hostilities or not”.⁴⁴¹

In Liberia for example, a representative of the NPFL has been quoted as “the boys make their own decisions - to bring honour to their families, to their parents that have been

⁴³⁹ See Colonel, DM Smith "The Culture of Children with Guns" 26 March, 1998. CDI website.

⁴⁴⁰ Goodwin-Gill and Cohn, *Child Soldiers: The Role of Children in Armed Conflicts*, Clarendon Press : Oxford, 1994.

⁴⁴¹ Goodwin-Gill and Cohn, *Child SoldiersThe Role of Children in Armed Conflicts*, Clarendon Press : Oxford, 1994, p30.

killed".⁴⁴² Some children in Liberia reported that they were forced to join up and fight but a big majority admitted that they had joined because of the advantage. This was explained as "avenge the killing" of a family member, to protect their families, to get food for themselves and their families. According to a UN Official, "[c]hildren joined for survival and protection" another said "[c]hildren went to fight because their economic situation was so bad".⁴⁴³ Oftentimes, a child has joined because of a promise made to them. For example, one child joined because the rebel forces had promised to take him to a football match or in Sri Lanka where a child soldier stated that he joined as he wanted to ride a motorbike!⁴⁴⁴

The different developmental stages that a child goes through influences the child's understanding of "objective experiences" and these influences are responsible for a child responding in a specific manner i.e. in this case joining to fight. It is also important to remember that at this stage the youngster has the ability to "project a meaningful future for themselves is also powerfully and intricately tied up with their role in the conflict".⁴⁴⁵ Children often get involved in fighting when they begin to believe that this is an extreme situation and there is no solution in sight. A feeling of despair and frustration at non-existing future prospects leads to physical involvement involving violence. South Africa since 1976 until recently and the West Bank from 1987 to-date are classic examples of this kind of involvement.

Another basic reason may be that they are at a loose end and have nothing constructive to do, as their schools are destroyed or have been closed down. Fields that they might work on are now dangerous as they have been made unsafe due to landmines.

⁴⁴² Human Rights Watch Children's Right Project, *Easy Prey: Child Soldiers in Liberia*, HRW/AW, September 1994, p22.

⁴⁴³ *ibid*, p27.

⁴⁴⁴ Goodwin-Gill and Cohn, *Child Soldiers: The Role of Children in Armed Conflicts*, Clarendon Press : Oxford, 1994, p36.

⁴⁴⁵ *Ibid*, p30-31.

A factor that needs to be looked at in more detail is *What* influences a child? Some of the basic influences that have contributed to a rising number of volunteers are :

IV .A. The Militarization Of Daily Life:

A classical example of the militarization of society would be Japan at the time of WWII. Public education, which was available to at least 90 percent of all Japanese children by the year 1900, included military training for boys. A systematic inculcation of “militarism and emperor worship” for both boys and girls. Arithmetic classes took up battle field situations as problems, science included information on wireless communication, landmines and torpedoes etc. *Shinto* and *Kokutai* the former a religion though accepted as something more secular and deeply rooted in the Japanese way of life and the latter which parallels the European “nation state” concept demanded absolute fealty from its citizens and thus dying was no tragedy if one died for the emperor. A document dated 1937 reads “[o]ffering our lives for the sake of the Emperor does not mean so-called self-sacrifice, but the casting aside of our little selves to live under the august grace and the enhancing of the genuine life of the people of the state”.⁴⁴⁶ Not suprisingly, some 6000 young Japanese volunteered for suicide missions in W.W.II.⁴⁴⁷

Militarization today means that military as in the army or heavily armed police or soldiers on the streets, roads, public buildings, at check points etc. making their presence an acceptable fact of everyday life.⁴⁴⁸ Barbara Ehrenreich, uses American patriotism as an example of this in her thesis.⁴⁴⁹ The celebrations on particular days like the Fourth of July, Flag Day, Veterans day, all glorify the war and hence make it sacred. This also

⁴⁴⁶ Japanese Ministry of Education, quoted by Ehrenreich, B., *Blood Rites Origins and History of the Passions of War*, Virago Press ; London, 1997, p215.

⁴⁴⁷ See Blomberg, Caterina., *The Heart of the Warrior: Origins and Religious Background of the Samurai system in Feudal Japan*, Sandgate, Folkestone, Kent: Japan Library 1994.

⁴⁴⁸ In Uganda, I spoke to some 5-10 year olds at an orphanage in Gulu and was told by many a five year old, that they wanted to be soldiers when they grew up as "soldiers always had food and were smartly dressed!" They lived opposite an army barrack.

⁴⁴⁹ Ehrenreich, B., *Blood Rites : Origins and History of the Passions of War* , Virago Press : London, 1997.

means that children view weapons and violence as an everyday issue and accept it as “normal”.

In Sri Lanka’s LTTE zone, there have been reports that the LTTE broadcast Ramboesque movies of combat, parade young soldiers in school play grounds, conduct military training inside school grounds and also give talks to the students about their need for manpower!⁴⁵⁰

In Liberia, during the late eighties and early nineties it was an honour to be part of the military. The military’s reputation of being the most prestigious group influenced the children. “Children looked to the military as a model. So a lot of boys went to fight because of that.”⁴⁵¹

In Peru,⁴⁵² the school curriculum in areas under guerrilla control included, mathematics, military-style callisthenics, sewing of uniforms, bandages and backpacks. Classes are held up in lieu of popular assemblies and students are recruited.

IV.B. Physical And Structural Violence:

Many children are influenced by their personal experience of violence or as a witness; which may include executions, disappearances, killings, rape, torture. Such experiences often result in a deep desire for revenge. For example, in Liberia, on 24 December 1989, Charles Taylor and the NPFL launched an incursion into Nimba County. The Armed Forces of Liberia, i.e. the AFL responded with a “ruthless counterinsurgency campaign, indiscriminately killing civilians, burning villages, raping women and looting. The brutality served to swell the ranks of the NPFL recruits, many of whom were Gio and

⁴⁵⁰ Goodwin-Gill, G., and Cohn, I., *Child Soldiers The Role of Children in Armed Conflicts*, Clarendon Press : Oxford, 1994, p31.

⁴⁵¹ HRW, *Easy Prey: Child Soldiers in Liberia*, New York , 1994, p 29.

⁴⁵² Brooke, James., "Shining Paths Rebels Infiltrate Peru's Schools" *New York Times*, 30th August 1992, p8.

Mano boys orphaned by the fighting and the random and reprisal killings that accompanied it, or enraged by the AFL's conduct."⁴⁵³

IV.C. Lack Of Options:

Social and economic injustice may result in an individual enlisting and fighting, sometimes just to get a square meal for the day! In Liberia it was reported that 7 year olds were fighting because "those with guns could eat" and that "the promise of loot was irresistible".⁴⁵⁴ Elizabeth Marcelino in "Children at War" documents this cycle. Social injustice, poverty, insurrection, increasingly non-functional and non-available social services resulting in increased volunteerism among the youth in the Phillipines.⁴⁵⁵ In Liberia for e.g. a 15 year old boy stated that he had joined the ULIMO in 1992, when he was 13 , in Grand Gedeh County of Liberia, to "protect himself from the NPFL".⁴⁵⁶ Another 14 year old who joined when he was 10 said he had joined "to fight ULIMO, because they beat my mother and father. Besides, there wasn't any food, and if I joined I could get food for my family, at least a bag of rice. My mother and father did not want me to go".⁴⁵⁷ Another 14 year old who joined as a 10 year old testified he had joined "because I wanted to get food for my family, but they never gave it to me. And I wanted to protect my family".⁴⁵⁸ The Liberian experience also emphasises that some kids joined as they had become separated from their parents, or had lost their parents in the fighting and were orphans and had no one to take care of them. There were only fighters around them, and the children became a part of them and the conflict.⁴⁵⁹

IV . Why Are Children Used as Soldiers ?

⁴⁵³ HRW, *Easy Prey: Child Soldiers in Liberia*, New York , 1994, p 8.

⁴⁵⁴ Director, Liberian Red Cross quoted by Goodwin-Gill, G., and Cohn,I., *Child SoldiersThe Role of Children in Armed Conflicts*, Clarendon Press : Oxford, 1994, p33.

⁴⁵⁵ UN "Report of the panel of Governmental experts on Small Arms." New York, July 1997. Draft.

⁴⁵⁶ HRW, *Easy Prey: Child Soldiers in Liberia*, New York , 1994,26.

⁴⁵⁷ *ibid*, p27.

⁴⁵⁸ *ibid*, p 27.

⁴⁵⁹ *ibid*,p29.

Hobbes⁴⁶⁰ compared the oscillations of war and peace to the weather! History proves him right. War differs in the way it is conducted from the way it used to be fought.⁴⁶¹ Wars before the mediaeval times to 14th century were fought in a very different manner from wars pre and post the 1400s.⁴⁶² It has slowly changed from a contest fought away from the cities and populations to a civil war fought with brutality among the very civilians that are legally protected from it. There are a lot of reasons for this.

A civil war today, with children as active participants has been described as “there are no rules, no structure, no chain of command. There is no supply system; the fractions don’t need it. Normally you need six or seven soldiers to support three fighting soldiers. Logistics is the most important factor. But here it is the reverse. The factions take what they want from the area they are in. They kill people, take their houses and their food. And the children take part in all of this.”⁴⁶³

Col Fuller,⁴⁶⁴ speaking on the techniques of war, mentions will or tenacity movement towards the enemy, hitting the enemy yet preventing injury to self, all as being elements of war and indeed emphasises the close relation of the power to hold, move and to protect this very power to hit at the enemy as a technique and an implement of war, besides weapons in the classical sense. Modern civilisation it is presumed began in the 15th century with the utilisation of inventions that aided man in his conquests or wars. Ever since there has been what may be termed as a steady improvement of this “utilisation

⁴⁶⁰ Hobbes, *Leviathan* Part I, Chapter 13.

⁴⁶¹ See generally Sun-Tzu, *The Art of Warfare*, (Roger T Ames: Trans.) Random House: New York, 1993. Machiavelli, N., *The Art of War*, Penguin: 1995, Ehrenreich, B., *BloodRites: Origins and History of the Passions of War*, Virago Press: London, 1997. Clausewitz, CV., *On War*, Penguin: London, 1982. Messenger, C., *The Century of Warfare*, Harper Collins: London, 1995. Wright, Q., *A Study of War*, University of Chicago Press, 1965., Chaliand, G., (ed.) *The Art of War in World History: From Antiquity to Nuclear Age*, University of California Press, 1994. Coates, AJ., *The Ethics of War*, Manchester University Press: Manchester, 1997. These works give the reader a sense of war historically and bring the reader up to date, compare these with material on *The Gulf War*, *The Vietnam War* and other material available on the conflicts in Rwanda and The Former Yugoslavia for additional clarity.

⁴⁶² For war in the olden times see Chapter 1. "Introductory Remarks" pp 13-16.

⁴⁶³ Interview conducted by Human Rights Watch in Monrovia 19 April 1984, quoted in *Easy Prey: Child Soldiers in Liberia*, HRW: New York, 1994, pp 32-33.

⁴⁶⁴ Fuller, Col. *The Reformation of War*, New York, 1923.

through development of speed , accuracy.... and the adaptations of military organisations to such utilisation”.⁴⁶⁵

The history of modern military technique falls into four periods, each being characterised by a certain physical or social invention and leading to military and political consequences.

firearms and religious wars: 1450- 1648

professional armies and dynastic wars : 1648 - 1789

industrialisation and nationalistic wars 1789 - 1914

aeroplane and totalitarian war : 1914 -

Fuller’s point of hitting the enemy with as less harm to oneself is only re-iterated in today’s wars. The aim is not to merely impose one’s will but to eliminate the enemy and to do it with as less cost to oneself. This has been possible with the help of advance’s made in science and technology.

It has been said that “[t]he most important single change in the circumstances and methods of warfare in recorded history was made by the invention of the gun”.⁴⁶⁶ The AK-47 continues to prove this right, though it has been admitted that “*the proliferation of small arms is the fuel of conflict, not the starter.*”⁴⁶⁷ Even though it has also been accepted that “the abundance of arms *at every level of society* means that any increase in inter-communal tensions and hostility will entail an increased likelihood of armed violence and bloodshed”.⁴⁶⁸

⁴⁶⁵ Wright, Q, *A Study of War*, University of Chicago Press : London, 1965, p293.

⁴⁶⁶ Rear Admiral Bradley A Friske, *The Art of Fighting*, New York, 1920, p361.

⁴⁶⁷ Renner, M., *Small Arms, Big Impact: The Next Challenge of Disarmament*, World Watch paper 37: Washington DC, October 1997, p8.

⁴⁶⁸ Michael Klare, Director of the Five College Program in Peace and World Security Studies in Amherst, MA. See also the findings of the Gulbenkian Foundation, London, *Report on the Commission on Children and Violence*, November 1995, Turnaround Distribution Ltd: London.

What are small arms? This term usually indicates a weapon that can be carried by an individual. The term encompasses pistols, revolvers, rifles, assault rifles, hand grenades, machine guns, light mortars and anti-tank weapons like grenade launchers and recoilless rifles. Small arms also include anti-personnel landmines. The term "small arms and light weapons" therefore covers a rather broad spectrum of weapons. For a number of reasons these weapons are difficult to track down and control. Some of these reasons are that these weapons are not as expensive as the major weapons like tanks, missiles and others. It has been estimated however that perhaps \$3 billion worth of small arms and light weapons are being shipped across international borders each year. This figure it has been submitted is roughly equivalent to about one eighth of all international arms sales. The relative low cost of these weapons means that they are an "affordable" item to many groups. An example used by Renner is that for \$50 million i.e. the cost of a single jet fighter one can equip a small army with some 200,000 assault rifles.⁴⁶⁹

Small arms do not require major organisational, logistical or training capacities to operate. They can be used by a large number of people with or without formal training. This is one of the major reasons for their popularity with guerrilla groups. The size and weight of these weapons make them easy to conceal and smuggle. Major weapons tend to become obsolete relatively quickly and are in constant need of spare parts and repairs, these are sturdier and have relatively lesser parts and a longer life. The maintenance needs are also subsequently fewer, an AK- 47 Kalashnikov has only 16 moving parts in comparison to a F-5 jet fighter which has 60, 000.

The military strength of a nation is generally weighed up by the number of high-tech jet fighters or dazzling nuclear warheads. These weapons it is true not only outdo but actually dwarf the capacity of the small assault rifles and other small arms in terms of

⁴⁶⁹ The easy availability is mentioned in Chapter One. specifically the Machel Report. An AK47 is available or the price of a chicken in Northern Kenya for the price of a goat! Also Edward Laurance of the Monterey Institute of International Studies (California, 1996) has been quoted on El Salvador and the hand grenades "are commonly carried by many citizens in their pockets and on their belts, and increasingly are used to settle personal arguments." A Politician in the Philippines has said that acquiring weapons is as "easy as buying fish in the market." Quoted by Renner, Renner, M., *Small Arms, Big Impact: The Next Challenge of Disarmament*, World Watch paper 37: Washington DC, October 1997, p 19.

firepower, reach, precision targeting and yet, studies show that it is these hundreds of low-tech, inexpensive and sturdy and easy to use weapons that are the tools in use in contemporary conflicts all around the world. They are said to cause as much as 90 percent of the deaths in these conflicts.⁴⁷⁰ In fact, the impact of these weapons is inversely proportional to their size.⁴⁷¹

Because of lack of information, regarding small arms and weapons, it is hard to be exact but it does seem that the quantities involved maybe about 500 million military - style firearms in addition to other million designed for police and or civilian use. It has been submitted that in countries like Mozambique and the United States of America, there are as many guns as are people or maybe more guns!⁴⁷² This rising tide of small arms is an extremely serious phenomenon. The reasons for this would be that production is "unrestrained" and private and public arsenals are growing. Since small arms are a long-lived product one finds that some WWI weapons are still in use. Though rogue dealers exist, governments are just as responsible; for example the United States of America⁴⁷³ and the Former Soviet Union. The network of illegal trade in small arms is so wide spread that it hard to control where the weapons are going to end up. For example, second hand weapons from the former Soviet Union are sold cheaply to other countries, also at the end of a civil war leftovers make their way back to the black-markets, and re-surface in new hotspots! for example arms intended for Nicaragua and El Salvador have been found in Columbia and other parts of Latin America. But a more worrisome trend is the fact that on one hand armies seem to be disarming while civilians seem to be arming

⁴⁷⁰ Renner, M., *Small Arms, Big Impact: The Next Challenge of Disarmament*, World Watch paper 37: Washington DC, October 1997, p5.

⁴⁷¹ Karp, A., "Small Arms - The New Major Weapons." In Boutlwee, Klare and Reed, eds. *Lethal Commerce: The Global Trade in Small Arms and Light Weapons*, Cambridge, MA: Committee on International Security Studies, American Academy of Arts and Sciences, 1995. Also see Zawels, Stedman, Daniel et al., *Managing Arms in Peace Processes: The Issues*, UNIDIR: Disarmament and Conflict Resolution Project: New York and Geneva: UN, 1996.

⁴⁷² Singh, J., (ed.) "Introduction in *Light Weapons and International Security*, Indian Pugwash Society and British American Security Information Council: Delhi, December 1995.

⁴⁷³ According to the information published by the SIPRI of Stockholm (Sweden), the most authoritative study centre on international peace and security, the annual volume of the world market for weapons has gone down from about \$45 billion in 1985 to about \$22 billion in 1995. According to their figures, in the 90s, the main arms merchant of the world was the US. The US manufactures more than 50% of the war hardware present in the world market.

themselves. In Angola, citizens were able to get their hands on weapons intended for military use. In the course of the civil wars the government itself was responsible for making such weapons available to its citizens.⁴⁷⁴

That small arms are lightweight and easy to strip and assemble makes them an easy weapon for children to master. Hence this nature of "small weapons" has made it possible for more and more children to fight on the front-line with fearsome effects. This is, it is submitted, one of the major reasons that the recruitment in irregular forces of children as young as 7-10 has gone up in the recent years. While it seems there has been a decline in the recruitment of children in even the 15-18 age group in most regular armed forces globally, the recruitment in rebel factions of children below 18 continues to rise.

Besides this factor, various case studies have suggested that there exists a clear recognition that children make good soldiers as they are obedient, dependable, and since they don't understand the consequences of their actions,⁴⁷⁵ they tend to be fierce and brave, hence making them dangerous to the enemy. Durbin and Bowlby⁴⁷⁶ have submitted that there exists a difference in the way adults fight and the way children and animals - fight. "In the first place the aggression of adults is normally a group activity. Murder and assault are restricted to a small criminal minority. Adults kill and torture each other only when organised into political parties, or economic classes or religious denominations, or nation states. A moral distinction is made between the individual killing for himself and the same individual killing for some real or supposed group interest. In the second place, the adult powers of imagination and reason are brought to the service of an aggressive intention. Apes and children when they fight, simply fight."

V. Why "No" to Fighting?

⁴⁷⁴ UN "Report of the panel of Governmental experts on Small Arms." New York, July 1997. Draft.

⁴⁷⁵ In the course of my interviews in Uganda, many children said that they simply pressed the trigger and the person fell down. They would not say they killed the person.

⁴⁷⁶ Bowlby, J, *Attachment and Loss*, vol 2, Basic Books :New York, 1973, p12.

The answer to this question is that children should not participate in armed conflict because of the conditions and consequences of fighting. It is common to find adults who are not fighting, but have been mere spectators or exposed to the fighting as civilians suffering immensely. The effect on children is devastating whether they are participants, perpetrators or victims.

Further, It has already been established that exposure to violence results in violent adults. Children suffer immensely during this exposure to violence and extreme cruelty which forms a part of the “fighting”.

International Law⁴⁷⁷ demands that children be protected from the ravages of war and similar armed conflict first as civilians and non-fighting, non-participating individuals in conflict of any kind and also as a specially vulnerable category. The APs both modernise and give greater precision to existing legislation by developing further concepts as found in, for example, parts of the Hague Convention of 1907 and the 1949 GCs.⁴⁷⁸ API deals with international armed conflicts like the GCs of 1949 except for common Article 3 which is limited to internal armed conflict.⁴⁷⁹ API includes within its ambit in Article 1(4) “armed conflicts in which people are fighting .. colonial domination, ... self-determination”. It also limits means and methods of attacks and lawful targetry. AP II is devoted to regulation of internal armed conflicts. Its ambit being defined by the level of intensity, and factors like territorial control. Both the APs are aimed at protecting civilians. Protection of civilians as included in API is regarded as customary international law.⁴⁸⁰ Further, with reference to civil wars the same rule seems to apply as protection of civilians was stressed on even during the drafting debates of the AP’s. And when applicability was urged by the ICRC, it did not result in much opposition.⁴⁸¹ Further

⁴⁷⁷ See Chapter Three for details.

⁴⁷⁸ *UN Treaty Series*, vol. 75 (1950), 1, Nos 970-3.

⁴⁷⁹ see also, Baxter, RR., “Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law”, in *Harvard International Law Journal*, vol. 16, 1975, p 19.

⁴⁸⁰ Cassese, A., “The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law” in *Pacific Basin Law Journal*, vol. 3., No 55, 1984, p86.

⁴⁸¹ 4 *ILM*, June 11, 1965, p1171.

civilians cannot be taken hostage, reprisals against civilians are prohibited.⁴⁸² Children when they fight lose this immunity as “civilians”.

Children have different psychosocial needs, capacities and limitations. True they react differently to different situations but their common needs of love and security and acceptance in their communities are universal. An example of how conflict can effect a child's life is that of a former girl soldier, Kadiatu,⁴⁸³ about 17 years old, today she does not want to get married and to have children. Her childhood ended abruptly five years ago. Her village in Western Sierra Leone was attacked by the rebels. She saw her neighbours dying. Her sisters, uncle and eight other survivors succeeded in escaping in a bus. In the ambush that followed soon after the others were all shot dead and she was the only survivor. She was barely 13 when she was brought to the camp as a “spoils of war.” From the first evening when she was given to one young rebel as his wife rape was an everyday occurrence. Kadiatu prefers not to talk of or dwell on this part of her life, instead she tells of how she learnt to shoot and how she became so good that she was in charge of a commando. *“We hid sometimes on the main road and when a car came, we killed everyone and took everything we needed.” “There, as women, we had to cook for the men. We were very badly treated, we were allowed to eat only the scraps, we were always persecuted and hit for almost nothing. When we struck back, they threatened to kill us.”* Every thought of escape was smothered. *“One day, four of us escaped from the camp, they were quickly caught, brought back and killed in front of us”.*

To fight, to steal, to shoot, to clean, to be at the disposal of men for sex, for three and a half years that was routine. Nothing changed even when she got pregnant after two years. She lost the baby, *“luckily”*, she says, *“the baby did not come to earth from love.”* She escaped when the group was ambushed by the government militia.

⁴⁸² Art 3, para 1(b) (c) (d).

⁴⁸³ Monika Ötli, “Und dann töten sie mich: mit sieben Jahren ans Gewehr - die Kindersoldaten in Sierra Leone”, *Die Zeit*, 14 January 1999.

This is the experience of many girl-soldiers today, though even boys suffer sexual abuse. Besides the sexual abuse there is the additional experience and trauma of narcotic addiction, of being tortured, torturing, being mutilated, beaten, going hungry, being raped, raping and being forced to kill. The children are haunted by the acts committed by them. They suffer immense physical, psychological and emotional damage. These injuries often stop a child from functioning “normally” in his or her community. At the end of a conflict they often emerge as the “victims” twice over as they have no skills suited to civilian life, their rehabilitation and reintegration remains a herculean task.

With the regular armed forces of a government, for example in Uganda and Sudan children tend to be better looked after than their counterparts in the rebel forces. But the trauma that “fighting” produces in the children is not lessened. In armies like that of the UK or US, the children do not undergo the extreme harshness found as a rule in rebel forces, but the same effect is present in terms of the PTSD, which as submitted earlier is found often in adult soldiers i.e. after Operation Desert Storm, it is expected can only be magnified in children. Further the right to life is a basic right, and the UK for example lost soldiers under 18 in the Falklands war on the front-line.

VI. Shopping for Raw Recruits - Unaccompanied Children , A Vulnerable Source

Experience in the many wars and disasters have shown that unaccompanied children i.e. travelling alone without parents, adult family members or guardians exist. It is important for a child to have the support both physical and emotional of family or adults.

A brief attempt to provide basic understanding of age-specific needs, capacities and limitations of children is going to be made. During infancy, it has been established that :

“the most critical accomplishment... is basic sense of trust a general feeling that ones needs will be met and that the world is a safe place to be”.⁴⁸⁴ Further “a very young child has no innate sense of right and wrong and no prior knowledge of what

⁴⁸⁴ Erikson, E., *Childhood and Society*, Norton: New York, 1950.

is permissible and what is prohibited. Rather, a knowledge of right and wrong is acquired through interaction with parents and family members. In general terms, *socialisation* is the process by which children are helped to become responsible members of their society. The essential ingredients of socialisation are *self-control* and *social judgement*, and these ingredients are acquired in large measure through parents disciplinary practices and their role as models of self-control, restraint, as well as caring, loving human beings".⁴⁸⁵

From the age 6 onwards, a child's positive nature can be enhanced or an inferiority reinforced. Erikson has described adolescence as a "natural" period of uprootedness and suggests that as the young person gradually leaves the heavy dependency of the family and attempts to achieve full status as a member of the adult society, he looks to his culture's values, religion, and ideology as a trusted source of support.⁴⁸⁶

But there remains no doubt that "stable parent ties provide the child with an opportunity to receive and return love, and in the process, come to realise his own self - worth and individual competency". The Whittings in their comparative study of *Children in Six Cultures*, found that "the complexities of the socio-economic system of a given culture has profound effects on children's' social behaviour".⁴⁸⁷ It is very important for a child to have adult role models. The family and or familiar members of the community are an essential requirement of a child. As "the adult-child relationship remains the root of the child's self-knowledge and respect of the social order and is critical in fostering healthy, independent, intellectual, social and moral development".⁴⁸⁸

⁴⁸⁵ Ressler, EM., Boothby, N., Steinbook, DJ., *Unaccompanied Children - Care and Protection in Wars, Natural Disasters and Refugee Movements*, Oxford: Oxford University Press, 1988, p140.

⁴⁸⁶ Erikson, E., "Identity and Uprootedness in our Time", *Insight and Responsibility*, New York: Norton, 1964, p146.

⁴⁸⁷ Whiting, BB., Whiting JWM., *Children of Six Cultures: A Psychocultural Analysis*, Cambridge: Mass: Harvard University Press, 1975, p26.

⁴⁸⁸ Ressler, Boothby and Steinbock, "Analysis of the Problem" in *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements*, Oxford University Press: Oxford, 1988, p143.

The family forms the first ring of security and the community the second. Anna Freud and Dorothy Burlingham in *War and Children*, state that “ war acquires comparatively little significance for children as long as it only threatens their lives, disturbs their material comfort, or cuts their food rations. It becomes enormously significant the moment it breaks up family life and uproots the first emotional attachments of the child within the family group”.⁴⁸⁹ Children separated from their families in times of war are placed at increased psychological risk.⁴⁹⁰ Some distress reaction or responses are common to these children. But it should be noted that these reactions are simply visible manifestations of a deeper emotional and mental struggle.

Thus, as submitted earlier in this chapter, an unaccompanied child is therefore a very vulnerable individual. Emergency situations result in children being separated from their families and though each situation is unique there are many similarities for e.g. the ways that these separations occur, why they occur, the needs of these unaccompanied children and the problems of providing them with adequate response. The positive side to this is that “the recurrence of similar issues and problems in the past and present emergencies affirms the usefulness of examining past experience as a basis for improving the assistance provided to unaccompanied children in present and future emergencies”.⁴⁹¹

History shows that children have been abducted over the years during periods of armed conflict. In WWII, children between the age of 2-12 were kidnapped for a secret Nazi adoption program and adolescents were abducted as slave labour. In Zimbabwe (the war for independence) children were kidnapped from their homes and schools and forced to fight in the guerrilla movements!⁴⁹²

⁴⁸⁹ Freud, A., Burlingham, D., *War and Children*, Medical War Books : New York, 1943, p37.

⁴⁹⁰ Ressler, Boothby and Steinbock, "Analysis of the Problem" in *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements*, Oxford University Press: Oxford, 1988, p154.

⁴⁹¹ Ressler, Boothby and Steinbock, "Analysis of the Problem" in *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements*, Oxford University Press: Oxford, 1988, Chapter 10, p113.

⁴⁹² *ibid*, p116.

‘Parent-Child Separations’ is a continuing phenomenon in most war, refugee and other disaster situations. There are 9 categories of unaccompanied children:

- 1. Abducted Children**
- 2. Lost children**
- 3. Orphaned children**
- 4. Runaway children**
- 5. Placed Children**
- 6. Abandoned children**
- 7. Entrusted Children**
- 8. Surrendered Children**
- 9. Independent Children**

It has been submitted by scholars that there are many causes of parent/child separations: They have narrowed them down to 7 main categories which are

- 1. social, psychological and cultural factors**
- 2. parental inability to provide care**
- 3. emergency related circumstances**
- 4. perceived opportunities**
- 5. military/government policies**
- 6. relief operations**
- 7. child’s initiatives.**

The most relevant one to child soldiers seems to be no. 3 i.e. emergency related ones, often caused by a conflict. But these categories can overlap, given the specific circumstances that exist. It is widely accepted that children of different ages have different needs. Broad trends can be identified, abandoned children may often be infants, abducted children may however be of any age. Depending on whether the experience has been happy or unhappy and the lack of presence of loving care leaves a long term effect on the child. For example some children separated from their parents or caretakers in a

relatively organised fashion with their assent have described their experience as “tended to suffer such trauma, commenting that they almost “died of fear”, or suffered from a lifelong lack of confidence, or cried for weeks, or still have a feeling of insecurity, or vomited for years, or lacked parental counsel when entering young manhood or womanhood. Some few still live at home with siblings, being unable to live independently”.⁴⁹³ It is submitted that unaccompanied children as we saw from section IV C are more vulnerable to recruitment drives. Additionally this also establishes that armed conflict has a particularly negative effect on the development of the child as a wholesome personality.

VI.A. Psychological Struggles Of (Unaccompanied) Children In Emergencies

Children rely on families and parents in many ways both conscious and unconscious.⁴⁹⁴ Parents remain the child’s primary source of emotional security, in day to day life. Parents enhance the ability of children to master and overcome new, difficult and troubled experiences by their mere physical presence and contact with children. Studies have pointed out that in time of extreme stress or unusual conditions, children have an increased need for intense physical contact with their parents. Children who are with their families may still react to the stress. Norman Farborrow and Norma Gordon in their *Manual for Child Health Workers in Major Disasters*, summarised that this anxiety may result in changed behaviour such as trembling, shaking, weeping, nightmares, general restlessness, mood swings and or regressive behaviour like thumb sucking, loss of bladder and bowel control and aggressive and or childish behaviour. Loss of a parent or loved one results in “serious psychological disturbances, particularly in the form of enuresis, stubborn silence and excessive shyness are likely to arise. The same is true of

⁴⁹³ Blanc, H., "Abandoned Babies in a Thai-Kampuchean Camp: High Risk Children", *Medicins sans Frontiers, A Six-Month Study: November 80 - April 81*, 1981, p6.

⁴⁹⁴ Ressler, Boothby and Steinbock, "Analysis of the Problem" in *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements*, Oxford University Press: Oxford, 1988, p147.

children of school age and adolescence".⁴⁹⁵ Children who are "utterly uprooted, and this fact is at least partly responsible for the tremendous difficulty they have in learning and in adjusting themselves to new circumstances".⁴⁹⁶

Law as applicable to children who are unaccompanied is first at the national level and then at international level. It is therefore the duty of the state under whose jurisdiction they fall under by their mere physical presence to meet their requirements. The care and protection of the child therefore falls under the state. Within the framework of both, it is family and child welfare law i.e. concerning the relation of the child to his family and the community and state. Also the Law's of Emergency i.e. laws regulating behaviour in natural disasters, armed conflict and population movements would apply. When it comes to Jurisdiction and the choice of Law: "the law concerning the authority to take action on and for the child, and which national law to apply".⁴⁹⁷ Article 24 of the GCIV lays out the basic obligations for all parties to the conflict: "The parties to the conflict shall take all necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition". Further, it is imperative that "children in all cultures need sustained adult care if they are to progress emotionally, mentally, and socially in a healthy and adaptive manner".⁴⁹⁸ To re-iterate, unaccompanied children are vulnerable and need care and protection. States should therefore provide care for them. Both States and humanitarian organisation on the ground should ensure that along with the relevant care, physical protection against recruitment should be made available to these children. It has been the experience for example, of UNICEF workers on the Operation Lifeline Project in Southern Sudan, that providing unaccompanied children in camps with protection

⁴⁹⁵ Fisher, M., "Erfahrungen Bei Kriegsgeschädigten Jugendilichen Flüchtling Und Ruchwanderern", *Sonderdruck Aus Gesundheit Und Wohlfahrt*, 2, pp 51-54, Jarag, 1948.

⁴⁹⁶ Mierhoff, M., cited in, *The Psychological, Educational and Social Adjustment of Refugee and Displaced Children in Europe*, Geneva: UNESCO, 1952, p39.

⁴⁹⁷ Ressler, EM, Boothby, N, Steinbock, DJ., *Unaccompanied Children : Care and Protection in Wars, Natural Disasters, and Refugee Movements*, Oxford University Press : Oxford, 1988, p211.

⁴⁹⁸ p318.

against recruitment drives and forced recruitment is a major problem.⁴⁹⁹ Though there is this gap in some major instruments, it has been submitted earlier that children between the ages of 15-18 are particularly vulnerable to recruitment drives, and like other children, the need for family and emotional, mental and social support is just as dire in this age group as they are impressionable, developing personalities. International law has tended to overlook the rights of this age group, efforts are currently being made to rectify it, rightly.

VII. Conclusions:

The concept of childhood⁵⁰⁰ can be said to be both a legal as well as a social construct.⁵⁰¹ It has been widely accepted that a child needs protection. In particular the concept of the best interests of the child runs through almost all national and international legislation concerning children. It has also been established that a child lacks mental and physical capacity to make a choice about issues in his /her interest. In fact when it comes to adolescents or those between 14-18 it has been accepted that through more mature and

⁴⁹⁹ personal conversation with UNICEF staff co-ordinator for Operation Life Line Sudan, in Gulu, Uganda.

⁵⁰⁰ For the definition of child or the answer to the question - who is a child? See generally:

P Aries, *Centuries of Childhood*, Johnathan Cape : london, 1962

L De Mause (ed.) *The History of Childhood*, Psychohistory Press : new York, 1995.

MDA Freeman, *The Rights and Wrongs of Children*, Francis Pinter : London, 1983

R Farson, *Birthrights*, Penguin : Harmondsworth, 1978.

J Hold, *Escape from Childhood: The needs and Rights of Children*, Penguin: Harmondsworth , 1975.

RH Moonkin, "Thinking About Childrens Rights - Beyond Kiddie Libbers and Child Savers", *Stanford Lawyer* 24., 1983.

JM Eekelaar and T Murray, "Childhood as a social Problem: A survey of the history of Legal Regulation", *Journal Law and Soc*, 207.1984.

Foster and Free, "A Bill of Rights for Children" 6 *Family Law Quarterly*, vol. 6, 1972, p343.

Controversy about childrens rights - see WNR Lucy, "Controversy About Children's Rights" in D Freestone (ed.) *Children and the Law*, Hull University Press, 1990.

According to Andrew Bainham everyone recognises the moral rights of children with respect to certain rights i.e. love and affection and other moral rights as well as legal ones. (p82, *Children The Modern Law*, Jordan Publishing: Bristol, 1993)

N MacCormick, "Children's Rights: A Test Case for Theories of Rights" Chapter 8 in *Legal Right and Social Democracy: Essays in Legal and Political Philosophy*, Clarendon Press :Oxford, 1982.

J Eekelaar, "Legal Rights" , *Oxford Journal of Legal Studies*, vol. 4, No 1.1984.

J Eekelaar, "The Emergence of Children's Rights" *Oxford Journal of Legal Studies*, vol. 6, 1986.

⁵⁰¹ Verhellen, E, "Changes in the Image of the Child", in Freeman, MDA., and Veerman, P., (eds.) *The Ideologies of Childrens Rights*, Martinus Nijhoff: Dordrecht, 1992, p79.

more capable than younger children, this age group is also not able to always make the best long term decision for themselves. According to Freeman children have a potential capacity to taking responsibility as do free and rational adults but the actual capacity may be limited due to various reasons.

Civil war today contributes to both morbidity and mortality and has the worst impact on the most vulnerable and largest single demographic group i.e. children.⁵⁰² It has been submitted that most rebel forces indulge in forcing children to fighting for them. Though few countries allow under 18s to volunteer and join the regular forces, most claim not to allow them on the front-line until after they are 18. But this is not protection enough. If children are recruited, they will fight.

Generally, children have been forced to join and fight on the front-line as reported in Burma, Guatemala, El Salvador, Ethiopia, Mozambique, Sri Lanka, Sudan, and Uganda.⁵⁰³ However, there are also children volunteering to fight as reported in Liberia and Palestine.⁵⁰⁴ The reasons for both lie in their social, economic and political issues ruling their lives. A major factor has been that joining has been their only chance of survival. Further, it has been established that the so called "volunteer" is not really a genuine volunteer as has been shown, their reasons for volunteering have often been a lack of options or manipulation. International law currently allows the recruitment of 15-18 year olds, but as this thesis submits, 15-18 year old are not really capable of making a rational and voluntary choice regarding participation in armed conflict. Further it is interesting to note that an interesting parallel has been drawn between recruitment into armed forces and police forces. For e.g. in Netherlands the age of recruitment into the police forces has recently been raised from 16 to 19, the main reason is a concern about the maturity of young officers, yet the age of recruitment into the army has been raised only to 17. Similarly in the UK the age for the armed forces is 16 and for the police forces

⁵⁰² Dodge, CP., "National and Societal Implications of War on Children", in Dodge and Raundalen, *Reaching Children in War: Sudan, Uganda and Mozambique*, 1991 Sigma: Norway, p19.

⁵⁰³ For Uganda, see case study i.e. Chapter Six.

⁵⁰⁴ Goodwin-Gill, G., and Cohn, I., *Child Soldiers The Role of Children in Armed Conflicts*, Clarendon Press : Oxford, 1994, p23.

is 18, for the US, the main opponent to this raising of age, the age of recruitment into the armed forces has been raised to 17, but for joining the police force it varies between 18 and 21.

It is clear that with few exceptions, national laws today prohibits only under 15 year old from joining. However law prohibits the death penalty of any crime committed by an individual under the age of 18,⁵⁰⁵ on the grounds of immaturity and a developing capacity to reason. Further, the legal age for voting as set by an overwhelming majority of States is 18, marking a formal transition from childhood to adulthood. Further, the general effects of participation, the psychological needs of all children for healthy, normal development discussed above and the effect it has on them is reason enough not to allow recruitment of under 18 year olds.⁵⁰⁶ During a war, children get conditioned or socialised to violent behaviour as an acceptable practice. Sometimes it is the case that they see their father, uncle or elder brother preparing to fight and fight or listen to the elders in the family degrading the enemy for their existing condition. In this way, it becomes a matter of pride to get revenge by fighting. This absorption of a cultural indoctrination of hate and violence based on a religious or ethic base helps them to fight and commit atrocities that they would consider unacceptable under normal situation.

How can this practice be contained? Improving the law to raise the age from 15 to 18 would be a big step forward. The draft OP to the CRC as seen in the previous chapter indicates advance in this area, and yet even this draft OP allows 16 plus to volunteer to join the regular armed forces with informed consent, though it prohibits rebel groups to do the same. A clear ban on participation by all children under 18 in all kinds of forces and conflicts is required. Secondly, as we have seen one of the most crucial factors has been the advance in technology leading to the weapons like AK- 47 assault rifle, and M16 which are light and easy to use. Children as young as 10 are using them on the front-lines

⁵⁰⁵ currently only 4 countries Iran, Iraq, Pakistan and Saudi Arabia are known to allow the death penalty for under 18.

⁵⁰⁶ this position is strongly supported by the ICRC, UNICEF, UNHCR, The Expert of the Secretary-General on the Impact of Armed Conflict on Children and the Special Representative of the Secretary-general for Children and Armed Conflict.

with ease. The effect is that more and more children can be used with lesser training time spent on them. Also, armed groups find it easy to obtain small arms.⁵⁰⁷ If the international community could find means of curbing the arms trade, the effectiveness of children on the front-line would be drastically reduced, and so the motivation to use them would be lowered. Thirdly, a very useful and practical contribution towards this aim would be interventions aimed at structural reform i.e. improving the causes or situation that give rise to negative experiences. Aiming at education, such that the younger individual's appraisal of participation in armed conflict as the only means of bringing about positive change is transformed. Interventions that counter children's feelings of helplessness, vulnerability and frustration⁵⁰⁸ would help reduce the rising number of child soldiers.

The Machel Report offers a very pertinent example of how one can reduce the number of child soldiers. While referring to Guatemala (May-June 1985), the Machel Report states that effective monitoring bodies and back-up legal remedies and institutions strong enough to tackle the issues can be effective. The Human Rights Ombudsman Office in Guatemala intervened in 596 cases of forced recruitment of which 148 children under the age of 18 were released. But it all depends on the political motivation that the international community has.

⁵⁰⁷ see Chapter One of this thesis and the Machel Report.

⁵⁰⁸ Goodwin-Gill, G., and Cohn, I., *Child Soldiers The Role of Children in Armed Conflicts*, Clarendon Press : Oxford, 1994, p31.

Chapter Five

CAPTURED CHILD - COMBATANTS

1. Introduction:

In the previous chapter, a study was made of the various forms of recruitment. One must it seems come to the conclusion that children are fighting actively on the warfront even though a prohibition exists under customary and international law. Today's wars are mostly non-international wars or civil wars which use guerrilla tactics. In guerrilla warfare, children are an important link between the civilian population and the rebels. The support of the civilian population is vital for the survival of the guerrillas. Child-combatants though mostly found in the ranks of non-governmental forces are also part of the legitimate governmental forces in many instances. It should be emphasised that participation of a voluntary or in-voluntary nature are all a violation of the rights of a child. When children participate in armed conflict, they lose the protection extended to them by the Geneva Conventions and the APs, as participation makes them "combatants" and non-civilians and therefore legitimate military targets.

Under the national laws of most countries, children who become involved in crime do not lose their right to be treated as children. Society, it is true, is entitled to protect itself from crime of any kind, but it has been submitted that it is "both unrealistic and inhumane to ignore the essential differences between child and adult offenders".⁵⁰⁹

This chapter will look at child-combatants who have been captured. It will examine the treatment and due process followed in the case of captured child combatants, after looking at the legal protection available to them in order to analyse what treatment is due to them and what is their legal right .

⁵⁰⁹ Fortin, J., *Children Rights and the Developing Law*, Butterworths: London 1998, p 435.

II. Protection Of Children Under The Fourth Geneva Conventions (GC) 1949

Children have a special status under international humanitarian law. Firstly as children and as “civilians” i.e. non-combatants. They are therefore the beneficiaries of a double protection, due to their protected status. The GCIV of 1949 extends general protection to children as civilians not taking part in hostilities and also extends to them special protection in 17 other articles. In addition to this, children are supposed to benefit from Common Article 3 to all the four GCs again as non-combatants in situations of internal conflict as persons “taking no active part in the hostilities”.

Firstly common Article 3 reads:

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised people.

2. The wounded and the sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not effect the legal status of the Parties to the conflict.

Common Article 3 therefore lays down an express obligation on all parties to a conflict to adhere to the basic norms of humanity and the emphasis is on the protection of civilians and non-combatants. By virtue of GCIV, which comprises of a total of 150 Articles which are all applicable to children as civilians generally, a broad range of provisions cater to the various need of children generally. Some of the articles where there is a more specific character to the protection extended to children are for e.g. Article 24 which states that children are to be given special care. This article emphasises on the protection of children below the age of fifteen. Article 24 of the GCIV lays out the basic obligations for all parties to the conflict:

“The parties to the conflict shall take all necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.”

Article 27 deals with the entitlements of protection by protected persons. It speaks of

“in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be treated humanely and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity”.

Article 29 places the responsibility for the treatment received by protected persons upon the occupying power itself. Articles 31, 32, 33 and 34 safeguard the physical integrity of all protected persons, including children. Further in Article 38(5) it reads:

“Children under fifteen years, pregnant women and mothers of children under seven shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.”

Article 50 places an obligation on the occupying power to take all necessary steps to facilitate the proper functioning of all institutions responsible for the care of children. It also speaks of education, and the identification of children. Article 51 reads:

“The Occupying power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.

The occupying power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour. The work shall be carried out only in the occupied territory where the persons whose service have been requisitioned are... In no case shall requisition of labour lead to a mobilisation of workers in an organisation of a military or a semi-military character.”

Article 51 is an important safeguard against the abuse of children and others under the power of an occupying power. It is very clear in its prohibition of occupied persons being forced to fight for the occupying power. By virtue of Article 68, an offence committed by a protected person, but which does not have serious repercussions even if the intent was to harm the occupying force, is punishable but only provided the imprisonment or internment is proportional to the offence committed. The death penalty may not be pronounced against a protected person. Article 68 states :

“in any case, the death penalty may not be pronounced against a protected person who was under the age of eighteen years of age at the time of the offence.”

Articles 69, 70, 71 provide penal procedures and related provisions to deduction in time from sentence, offences committed before occupation etc.

From the above summary it seems that GCIV provides care and protection to children under 15 very specifically and for those under 18 but above 15 it offers protection in Article 68 and Article 51. But the problem is, that the GCs provide protection to children so long as they are non-combatants. The GCs do not cater to the reality of many children on the front-line as combatants. The minute children start fighting they lose their special status both as children and as non-civilians. In the case that a conflict exists in a State which is a non-party to the APII or even to both, the children will be protected only by common Article 3, which does not contain any specific and special protection for children.

III. Protection Of Children Under The Additional Protocols Of 1977.

The APs were a direct result of change in warfare. In the 1960s in the light of new forms of conducting warfare, the protection of children had to be re-addressed. Firstly, children were (and continue to be) a particularly vulnerable category. Secondly, their roles in military operations being conducted needed re-defining with the utmost urgency and

finally, the need was felt that some provision had to be made “taking into consideration their immaturity if they did commit offences during the period of an armed conflict”.⁵¹⁰ The APs clearly were meant to respond to the issue of child combatants and inadequacy of the GCs of 1949 in the face of new changes in warfare.

III.A. Additional Protocol I :

III.A.i. Article 77 of API

- “1. Children shall be the object of special respect and shall be protected from any form of indecent assault. The parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.
2. 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 who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.
3. If, in exceptional cases, despite the provisions of paragraph 2, children who have attained the age of fifteen 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.
4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.
5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen at the time the offence was committed.”

⁵¹⁰ Singer, S, “The Protection of Children During Armed Conflict Situations”, in *IRRC* No 252, May-June 1986, p 141.

API at the outset should be reiterated applies to international armed conflict. It offers special protection and status to children. In para (2) it recognises that children may be on the front line as combatants. According to the commentary on the APs of 1977, it is stated that the ICRC considered the participation of children in armed conflict as “an inhumane practice” but “[n]evertheless, the ICRC proposals encountered some opposition, as on this point governments did not wish to undertake unconditional obligations”.⁵¹¹ API however fails in its attempts to provide children with the protection they need as it places a weak obligation on States by basically agreeing that States should do what is possible for them to do i.e. the use of the word *feasible*.⁵¹² Further it places a prohibition *only* on direct participation. This is a legal loophole. This concept of direct and indirect participation, have created legally the possibility of the massacre of many innocent children. Direct participation means a direct participatory role, as a soldier, fighting with weapons, repulsing the enemy etc. Whereas indirect could mean anything from being a messenger, carrying supplies, gathering and transmitting military information, to transportation of arms. As clarified earlier, participation, irrespective of kind i.e. direct or indirect is not protection from the horrors or the effects of armed conflict. Further, on the front line it does not take long for an indirect role to change to that of a direct participant as soon as military necessity rules, all participants will fight. Additionally, in today’s kind of war i.e. guerrilla warfare, indirect roles can be just as dangerous if not more dangerous than a direct role, if the person is captured. So in effect this provision allows under 15 year olds to participate in war albeit in a so-called indirect form,⁵¹³ and places a weak obligation on States to dis-allow under 15s from taking a direct role. Further it states that given a choice between an 18, 16 or 15 year old, one should recruit the 18 year old. Effectively providing 15-18 year old no protection at all. The commentary does throw light on this paragraph. It says; “the second sentence of the paragraph is the result of a compromise; in fact in an amendment one delegation had proposed that the limit of non-

⁵¹¹ Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (protocol I) , 8 June 1977. paras 3183, 3184 . see website <http://www.icrc.org/IHL.nsf/> .

⁵¹² the ICRC had suggested “all necessary measures” see Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (protocol I), 8 June 1977. para 3184 . see website <http://www.icrc.org/IHL.nsf/>

⁵¹³ *ibid*, para 3187.

recruitment should be raised from fifteen to eighteen. The majority was opposed to extending the prohibition beyond 15 years, but in order to take this proposal into account it was provided that in the case of recruitment of persons between fifteen and eighteen, priority should be given to the oldest”.⁵¹⁴

With reference to the status of POW, the commentary indicates clearly that POWs may be very young or very old and that “age is a factor which justifies privileged treatment”. Even once captured and not granted a POW status, the under-fifteen continues to benefit from the provisions of this Article. It states that if an under-fifteen has participated in armed hostilities and does not have a POW status, he/she would still benefit from the GC IV. If however she/he does not have either or both a POW status and a protected status then Article 45(3) of AP I which provides for favourable treatment in accordance with GCIV and Article 75 of API relating to fundamental guarantees would come into play. The committee however decided to leave the more controversial issue of age of criminal responsibility to national legislation. Hence, the issue of a serious or grave breach of international law being committed by an under fifteen has taken place, the course of action to be followed remains unclear, except, for taking into consideration the age as an issue of maturity in understanding the consequences of ones actions.

Article 77 therefore fails to provide children with a few essential forms of protection that it should have. Firstly, it does not define children. Secondly, it fails to prohibit clearly all participation for firstly under 15s. Thirdly, it does not consider those between 15 and 18 except to say that death penalty should not be awarded to them in any case. It does not place a strong obligation on States in terms of preventive measures, and it does not extend as clear and strong enough protection to captured combatants as possible.

III.B. Additional Protocol II:

III.B.i. Article 4 (3)

⁵¹⁴ *ibid*, para 3188.

Article 4 speaks of the fundamental guarantees that it provides, with reference to children it is very clear and states in paragraph three that:

3. Children shall be provided with the care and aid they require, and in particular:

- (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care.
- (b) All appropriate steps shall be taken to facilitate the reunion of families temporarily separated;
- (c) Children who have not attained the age of fifteen year shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
- (d) the special protection provided by this article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured.;
- (e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.”

AP II applies to non-international armed conflict. With reference to child combatants we can see that it is stronger protection as in Article 4(3)(c). It strictly states that no child under 15 should be a participant, in any conflict. The commentary of the ICRC clarifies however that “it is important not to exclude the possibility that aid is required by children over the age of fifteen” and that the “setting of an age-limit gave rise to a lengthy discussion.” Importantly in (d) it states that even if these children have fought, in breach of this convention, if captured they shall continue to be protected as “children” and hence having special privileges. Additionally Article 6 of APII in 6(4) states clearly that the death penalty may not be awarded to those below 18 at the time of committing the crime,

and in Article 6(5) it asks the authorities in power to “endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.” APII provides in the guise of Article 4(3)(c) stronger protection than API, but the problem is that APII is not always applicable. And in the case of non-applicability the same issues as discussed above arise.

In all one can say that given the four Geneva Conventions of 1949 and the two Additional Protocols of 1977, there are some 25 Articles which specifically provide protection for children. These provisions have three main objectives,⁵¹⁵ namely general protection of children as civilians; special protection against the effects of hostilities of any kind as a particularly vulnerable group, and for the protection of children who are participating in the hostilities. To re-iterate, children must be treated humanely: they should not be made to suffer any violence to their lives, person or dignity. It is prohibited to expose them to torture or punishments of any kind to do with reprisals. As a particularly vulnerable category their right to care and assistance remains undiminished. As participants in armed hostilities it is Article 77 of API paragraph 2 that sets the limit on the age of participation, it is however Article 4(3)(c) of APII that makes the prohibition absolute. Yet one grey area remains. It has been submitted in this thesis that an international consensus exists on the age of eighteen as the age of maturity. Yet there exists this equally if not more vulnerable⁵¹⁶ age group of children between the age of 15-18 who are left in ambiguity, as there is no clear prohibition on their possible participation, including roles they may play and the course of action to be taken upon capture. The commentary offers the suggestion that it is hoped that this age group would also benefit from protection. Further, it accepts that children under 15 if captured will continue to benefit from their special status, but does not extend any protection to children between 15-18 except for protecting them from the death penalty.

⁵¹⁵ Dutli, MT., Bouvier, A., “Protection of Children in Armed Conflict: The Rules of International law and the Role of the International Committee of the Red Cross”, in *The International Journal of Children's Rights*, Vol. 4, 1996, p 184-186.

⁵¹⁶ it is easier to convince them to join because of their eagerness to prove their maturity and adulthood.

However, there is still also the issue of which protocol would be applicable in an armed conflict. This is a big hindrance to providing children protection: if APII is not applicable, children are simply dependent on Common Article 3 and other International human rights treaties as relevant and applicable to the parties. It is fairly safe to say that the CRC would apply, and as seen in previous chapters it has no derogation clauses and is to be applied in its entirety, it however fails children too in Article 38 by not providing any protection to 15-18 year olds and although Articles 37, 39 and 40 provide children with crucial protection neither of these provisions offer child combatants either a special status or a POW status.

IV. Captured Child-Combatants:

The capture and detention of members of parties to a conflict occurs on both sides and at regular intervals. History indicates that prior to the Peace Conferences of 1899 and 1907, the defeated were considered the chattels of the victors. Now the GCs impose limitations on treatment rendered by States to their prisoners. This is regulated by the GCIII of 1949.

IV.A. Status :

Given that legal rules exist, and that the reality is that children are fighting today as active combatants. The question then is, what is their status under International Law and how are they treated under international and national laws ? The eligibility for the status of POW is laid out in Article 4 of the III GC.⁵¹⁷ In section A of the same it reads:

“A. Prisoners of War, in the sense of the present Convention, are persons belonging to one of the categories and who have fallen into the power of the enemy: These include.....”

This status is not dependent on age, except

⁵¹⁷ The protection extended by the III GC extends from the time of capture to the time of final release and repatriation.

“that a child has to be sufficiently mature to be able to understand and to know the laws and customs of war.”⁵¹⁸

Any combatant captured in an *international conflict* has the status of Prisoner of War (POW) . Captured child soldiers do in fact have the status of a combatant⁵¹⁹ and hence can be categorised *ipso facto* as prisoners of war or civilian internees. Children between the ages of 15-18 and or under 15 if combatants and captured are considered POWs. The only difference between those over 15 years and those below 15 years perhaps is the justification for preferential treatment. As the recruitment of those below 15 is prohibited. It is important to note that children below 15 who have borne arms cannot be sentenced for this fact.⁵²⁰ Article 77(2) of API makes it clear that the state must bear responsibility for their under-age soldiers and the children themselves should not be punished but treated according to their age and hence given special consideration. In international armed conflict, a child should also be granted the status of a civilian internee if they are not considered as “prejudicing the security of the state”. According to Article 77(3) of API captured child combatants continue to benefit from the special status as children as specified. The responsibility for this breach is clearly on the party which recruited and enrolled these children. This is also indicated by Articles 16 and 49 of the 1949 GC III. According to Bothe, Partsch and Solf,⁵²¹ it is an obligation on the parties to the conflict to ensure that children do not commit prohibited acts. In fact they point out that the essential aim of Article 77(3) API and Article 4(3)(d) APII is that children who have committed such acts should not suffer because their participation or committing of such acts is the failure of the parties to the conflict, and they should be held responsible, an approach adopted by the draft ICC Statute as well. Further, all child combatants must be the beneficiary of privileged treatment as provided by international humanitarian law and the

⁵¹⁸ Van Beuren, G., *The International law on the Rights of the Child*, Martinus Nijhoff: Save the Children UK: London, 1995, p 338.

⁵¹⁹ Krill, F., “United Nations Convention on the Rights of the Child: A Controversial Article on Children in Armed Conflicts”, in *Dissemination*, No 12, August 1989, pp 11-12.

⁵²⁰ Dutli, MT., “Captured Child Combatants”, in *IRRC*, No: 278 , 1990, p 427.

⁵²¹ Bothe, M., Partsch, K., Solf, W., *New Rules For Victims of Armed Conflicts: Commentary on the Two Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff: The Hague, 1982, p 477.

norms of humanity. However, as it has been submitted earlier in this thesis, children are being forced to fight, and these children may now be 18. So will the actions of those between 15-18 also be regarded in the same light? Also, how will children who are below 15 and have committed serious or grave breaches of the rules of war be treated? What if the breach of the laws of war or international Humanitarian Law amounts to a war crime?

In *Non-International Armed Conflicts* the status of combatant is not recognised and hence the subsequent derivative status of POW is non-existent. According to De Vattel, the sovereign is under a duty to obey the laws of war even when fighting subjects who have taken up arms against him.⁵²² A captured child soldier in an internal armed conflict is under the protection of Common Article 3 and the APII if applicable. Children benefit from Article 4, 5 and 6 of APII. Article 4(3)(d) contains the same provisions as Article 77(3) specifying the special status of children. Further since national laws apply, all children should benefit from protection as “children” and the State’s obligations under the CRC. Article 5 protects the rights of children who have been detained or imprisoned. Article 6 prohibits in 6(4) the death penalty for individuals under 18 and 6(5) asks for the “broadest possible amnesty” for participants in armed conflict.

To summarise children if fighting, are protected by the GC s of 1949 and the API or II if relevant, or only common Article 3, and the CRC and relevant international instruments. Currently most conflicts are non-international in nature, and yet the APII as we know is not customary in nature and is applicable only to States that are parties to it. State parties have to accept that the conflict meets the thresholds specified in APII before it can be applicable, effectively leaving children with Common Article 3 and applicable human rights treaties. However are they appropriate to child soldiers? None of these International Human Rights Instruments offers POW status to children, and therefore none of the associated privileges. Children once captured, in internal conflict become “criminals” and face criminal charges. Should this theme be regulated by International Humanitarian law?

⁵²² De Vattel, *Le Droit des Gens ou Principes du Droit Naturel*, 1785. Carnegie edition 1916.

But are the provisions currently available in both the APs detailed enough and do they do justice to the special needs of children that we recognise?

IV.B. Due Process Of Law:

A speedy and fair trial, not to suffer abusive interrogation, the right not to be tortured, to have access to translations and interpreters, legal representation, and proper detention conditions are some of the basic requirements of due process.

One of the relevant articles regarding the treatment of combatants is to be found in Article 45 of GCIII which has the status of customary international law.⁵²³ GCIII in Article 5 provides that in the case where the status of the prisoner has not yet been established by a competent tribunal, they should benefit from the presumption that the combatant or combatants have the status and attached privileges of POW.

A fundamental guarantee to children is found in Article 12-16 of GC III which applies to all POWs and Article 4 (3) of APII. Article 11 of API prohibits the subjecting of persons to any medical procedure which is not needed due to reasons of health, it prohibits - mutilation, experimentation, removal of organs, involuntary or forced donation of blood, skin or organ. It prohibits strongly any act that violates the physical or mental health of any person in the power of the party. A violation of this Article is considered a "grave breach."⁵²⁴

Children like other POWs are not excluded from penal proceedings in respect to serious breaches⁵²⁵ of international humanitarian law, war crimes and offences against the

⁵²³ Cassese, A., "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law" in *Pacific Basin Law Journal*, 1984, Vol. 3, p 75.

⁵²⁴ A grave breach is defined in Art 50 of GC I: Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention : wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

⁵²⁵ The most serious violations of humanitarian law are called "war crimes" for e.g.: the statute of the ICC makes recruitment of individuals under the age of 15 years a war crime. Serious violations are called "grave

legislation of the detaining power. However, responsibility for such acts has to be evaluated according to age and circumstances and Article 40 of the CRC places an obligation on States to have “preventive” policies. The age factor should be taken into account while deciding on any disciplinary action or punishments.⁵²⁶

The Beijing Rule No 7, Article 14 (3) of the ICCPR and Article 40 of the CRC also safeguard a child’s right to due process of law, though not drafted with child POWs in mind, they cater generally to all children in conflict with law.

IV.C. Detention And Treatment:

Under a situation of *internal armed conflict*, children may be detained as well as adults for suspected subversive activities. Torture, though prohibited, does occur in complete violation of all norms and rules of law and humanity. In cases of situations not covered by international humanitarian law, national penal law applies. However Common Article 3 of the Geneva Conventions and Article 37 and 40 of the CRC and the juvenile standards endorsed at Beijing and Riyadh should apply at the least. If applicable Article 5 of AP II would also be in force.

Under International Human Rights Law, detention is regulated by Article 37 of the CRC, Article 7, 10 (2) (b) and 10 (3) of the ICCPR and the Convention Against Torture (CAT) in whole and Article 11 specifically. Other applicable laws would be the United Nations Standard Minimum Rules for the Administration of Juvenile Justice of 1985 also known as the Beijing Rules, Articles 8(d) and 85(2) of the 1955 Standard Minimum Rules for Treatment of Prisoners. The UN Rules for the Protection of Juveniles Deprives of their Liberty of 1990.⁵²⁷ All require that in all detention facilities individuals below the age of eighteen should be detained separately from adults. Though a few states have differed on

breaches” they are to be found in Articles 50, 51, 130, 147 of GC I, II, III and IV respectively and Article 11 and 85 of API.

⁵²⁶ Article 119, GC IV.

⁵²⁷ Van Beuren, G., *International Documents on Children*, Martinus Nijhoff : Dordrecht , 1993, p 217.

this account, such as Denmark which stated that it was “not convinced it was in the best interests of the child”.⁵²⁸

Article 37 of the CRC places an obligation on all State parties to ensure that:

“ (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interests not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”

⁵²⁸ The concept of the best interests of the child, may have many operational levels based within the dynamics of the society in which it operates. For example see : *X, Y and Z vs. The United Kingdom*, Judgement of 22 April 1997, Reports II, (1997).

Article 40 of the CRC recognises the right of every child who has been accused of having infringed the penal law

“to be treated in a manner consistent with the promotion of a child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.”

To achieve this, it lays out a number of guarantees which the child should have as a basic minimum, for example presumption of innocence, to be informed promptly of charges, to have appropriate legal assistance, have the matter determined without delay, not be forced to confess or give testimony etc. Lastly, it clearly enunciates “care, guidance and supervision orders; counselling; probation, foster care, education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offences.”

Article 10 of the ICCPR in paragraph 2(b) states that “[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.” In paragraph 3, is stated the aim of the system i.e.: “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”

The 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice, also known as the Beijing Rules, provide a model for states of a humane response to juveniles in conflict with the law. Some of these rules have been incorporated into the 1989 CRC for example, Article 40(3)(a) of the CRC. Limitations on the ability of the

state to detain or deprive juveniles of their liberty are found in Article 37 (a) and (b) of the CRC.

Captured child soldiers fighting in international conflicts must be detained in proper facilities in accordance with the provisions of GC IV i.e. Articles 82, 85, 89, 94 and 119. Articles 50, 51, 68 and 76 being applicable in occupied territories. Child soldiers must not be subjected to capital punishment according to Article 68 of the GCIV and Article 77(5) of API. Children can be detained /interned for security reasons or for breaking the penal code. Article 76 of GCIV indicates that special treatment of minors, Article 89 looks at basics such as food and diet, Article 94 their physical well-being, Article 82 - accommodation. Article 77(4) of API places an obligation on States regarding the separating of children from adult prisoners but in some cases Article 75 (5) of API accedes to the possibility that it is better for the child to be detained with the family or a family environment.

Captured child soldiers can be categorised as either prisoners of war or civilian internees. Children between the ages of 15-18 and or under 15 if combatants and captured are considered POWs. Article 77 (2) of API makes it clear that the state must bear responsibility for their underage soldiers and the children themselves should not be punished but treated according to their age and hence given special consideration. This is also indicated by Articles 16 and 49 of the 1949 GC III. Captured child soldiers must be detained in proper facilities in accordance with the provisions of GC IV i.e. Articles 82, 85, 89, 94 and 119. Articles 50, 51, 68 and 76 are applicable in occupied territories. Child soldiers must not be subjected to capital punishment according to the Article 68 of GCIV and Article 77(5) of API. Repatriation of child soldiers is not expressly legislated, but Article 109 of GC III and 117 seem to lay the basic foundation for this.

In 1989, the Secretary General of the United Nations appointed a Special Rapporteur on the application of international standards concerning the human rights of detained

juveniles.⁵²⁹ The United Nations Guidelines for the Prevention of Juvenile Delinquency otherwise known as the Riyadh Guidelines aim at protecting abandoned, neglected, abused children and who live in marginal circumstances. The Riyadh guidelines focus on early protection and preventive intervention paying particular attention to children in situations of “social risk”. Together, these three i.e. the Riyadh Guidelines, the Beijing Rules and the Deprivation of Liberty Rules form a “triptych” on which is laid the approach both humane and coherent to child justice.

These rules, guidelines and conventions provide children with protection but the degree of appropriateness for child soldiers remains to be clarified. For example, they do not contain specific reference to the unique position and condition of child soldiers. Since the aim of special procedures for children is to eventually integrate them into society, yet, there is no clear guidelines currently present on how to provide rehabilitation and reintegration. Further, as has been pointed out, children are not immune from penal proceedings, and the death penalty too is prohibited for children below 18 on the basis that “are often too young to realise fully the consequences of their actions and are more susceptible to domination by others, consequently the imposition of the death penalty would be wholly inappropriate”.⁵³⁰ The answer to the question of how best to deal with children who have committed serious breaches of international law remain unclear.

V. Criminal Responsibility Under National Legislation

The age of criminal responsibility is the age when an individual is legally recognised as having the mental ability to understand the nature and effect of ones act(s). Having attained this age of legal capacity (act, age and mental condition being relevant factors) they can be held accountable for their actions. The age of criminal responsibility⁵³¹ is different under different jurisdictions, for example in Ireland, Northern Ireland, Cyprus,

⁵²⁹ see resolution of the Subcomission 1989/31 of 1/9/89 appointing Concepcion Bautista as Special Rapporteur. Also UN Doc. E/CN.4/Sub.2/1991. p 24.

⁵³⁰ Van Beuren, G., *International Law on the Rights of the Child*, Martinus Nijhoff & Save the Children : Dordrecht, 1995, p187.

⁵³¹ Cavadino, P., “Goodby Doli , Must we Leave You?” 9 *CFLQ* , 1997, p 165. for a table of age of criminal responsibility.

Malta, Switzerland, Liechtenstein and Scotland it is less than 10 years. France draws the line at 13; Germany, Austria, Italy and other Eastern European countries at 14, the Scandinavian countries at 15, Spain, Portugal and Andorra at 16, Belgium and Luxembourg at 18.

Age is considered as an indicator of maturity and reasoning. As has been submitted earlier in chapter two, it is relative indicator however as nature knows no fixed limits. The *Gillick* competence test and later cases prove that though children are capable of taking good decisions they are not always the best judges of what is good for them in the long run. As chapter one showed often children have volunteered to fight and have actually enlisted for reasons such as watching a football match or riding a motorbike! Not all join for such reasons, but this is part of the problem, that they are so impressionable and malleable and can be made to do anything. A practice not to punish those under 18 by the death penalty exists, and yet criminal responsibility allows given the gravity of the action committed, the right to try children. Children are not excluded from the penal process for committing crimes against humanity or grave breaches of the laws of war. In fact the *Thomson and Venebles Cases vs. UK*⁵³² is a relevant example. It is the very gravity and horror of the act that the two 10 year old boys committed that resulted in the fact that they were not given a children's procedure but faced an ordinary criminal court i.e. adult court. The European Court of Human Rights recently ruled that the right to a fair trial had been violated in this case, the relevant issues being that both the boys were suffering from post-traumatic stress disorder plus the trial had distressed and frightened them, and were unable to communicate with their lawyers. More or less spelling out that "justice for adults was not justice for children."

V.A. The Death Penalty:

In the instance that child-soldiers have committed crimes, they are not excluded from penal procedures but it is expected that due consideration will be given to their age, maturity and circumstances. Article 68 of the IV GC and Article 77(5) of API ensure that

⁵³² see No. 24724/94 *T vs. UK* and No 24888/94 *V vs. UK*, Comm reps. 4, 12, 98 unreported and ECHR 16/12/99.

they cannot be condemned to death, as long as they were under the age of 18 at the time of the commissioning of the crime. In the case of non-international armed conflict, and if AP II is applicable, then Article 6 (4) provides the same protection.

It is submitted that educational measures and rehabilitative measures should be used instead of penal measures.⁵³³

VI . Release From Detention:

The Beijing Rules and the 1985 United Nations Standard Minimum Rules for the Administration for Juvenile Justice have both been incorporated in the CRC. In the form of Article 40(3)(a) and Article 37 of the CRC states have accepted limitations placed on their discretion in both the use and length of time for which children can be deprived of their liberty.

Article 132 of the GC IV also places a clear obligation on States to release as soon as possible children . It reads:

“Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.

The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.”

Repatriation of child soldiers is not expressly legislated, but Article 109 and Article 117 of GC III seems to lay the basic foundation for this. When early repatriation is to take place, the consent of the child is important, Article 109(3) of GC III states that

⁵³³ Dutli, MT., “Captured Child Combatants”, in *IRRC*, No: 278 , 1990.

repatriation during ongoing hostilities may not take place against the will of the person being repatriated. Once repatriated children under the protection extended by Article 117 of GC III must not be allowed to re-enlist and fight. POWs must all be repatriated at the end of hostilities, except if they are involved in criminal proceedings.⁵³⁴

VII . The Experience Of Child Soldiers In Present Day Conflict:

Treatment of captured child soldiers varies. Captured by governments they may be treated as terrorists or criminals. They could be held in adult prisons, military prisons, subjected to torture, rape, abuse, threatened or held for prolonged periods in isolation and in detention. There have been reported cases of opposing sides capturing children and forcing them to fight for their side as seen in Mozambique and Afghanistan. Children are viewed with suspicion but sometime viewed as innocents forced to fight, but nevertheless made to undergo de-briefing at the least.

VII.A. Child POWs in the Iran-Iraq War

During the Iran - Iraq war, a large number of Iranian children were held in camps as POWs. These children spent many years in these camps, as the Khomeini government refused attempts at repatriation. Newspaper reports⁵³⁵ reported on the “healthy conditions” of the camp. The children however did make excellent media footage for the Iraqi government. The Iraqi authorities felt bound by the GC III to encourage educational activities. International NGOs like Defence for Children International, Terre des Hommes stepped in and the children benefited greatly .⁵³⁶

VII .B . Liberia

In the Liberian Civil War, FW a boy of 15 who was forced to fight with the forces of Independent National Patriotic Front of Liberia (INPFL) headed by Prince Johnson, was captured by the ECOMOG Soldiers during the 1992 October Crisis.⁵³⁷ He was taken

⁵³⁴ Article 119 (5) GC III

⁵³⁵ 8 March 1984 *The New York Times*, and *The Washington Post* 7 July 1984.

⁵³⁶ see Goodwin -Gill, G., Cohn, I., *ChildSoldiers :The Role of Children in Armed Conflict*, Oxford:Clarendon Press, 1994, pp 100-101.

⁵³⁷ Operation Octopus - NPFL attack on Monrovia

initially to their base and then sent to a transitional home for war-affected children and was seen by a counsellor.

In other instances, for example, in the case of KN,⁵³⁸ the treatment rendered is outright cruel amounting to torture. If the treatment meted out by groups to children fighting for them alongside them is so harsh it can be assumed that children who are captured by them must suffer only worse. The instances of children being captured and forced to fight for a different side is also possible. For example, corroboration charges in the occupied territories are common. There were allegations of the same in Uganda. Collaborators were killed or mutilated. Liberia acceded to the Geneva Conventions in March 1954, to AP II in June 1988 (applicable to All parties to the conflict). Liberia became a party to the CRC on 4 July 1993 and signed and ratified the African Charter, 1990.

VII.C. Palestine-Israel

HAMAS has a policy of recruiting under sixteens. Israel has put under administrative detention these minors under the age of sixteen. They are accused of activities conducted for HAMAS.

Under *Israel's Youth Law (Trial, Punishment and Modes of Treatment)* 1971,⁵³⁹ prisoners under the age of eighteen are to held separately from adults or those older than eighteen. This applies to Israel proper but in the occupied territories children aged 16-18 are held together with adults in the Israeli forces Detention Centres. This has been the norm until recently that Children aged 16-18 are held together with adults in the Israeli forces Detention Centres until recently in the occupied territories and since re-deployment in late 1995. According to the military law in the occupied territories 16 year olds qualify

⁵³⁸ Human Rights Watch, *Easy Prey : Child Soldiers in Liberia*, 1994, pp 25-35

⁵³⁹ Viviani, M., *The Juvenile Justice System in the West Bank and Gaza since the Establishment of the Palestinian Authority in 1994: Opportunities and Challenges for UNICEF Action*, UNICEF West Bank and Gaza, Jerusalem, October 1997.

as adults in most matters. The Israeli Military Order 132 specifies that children between twelve and sixteen must be detained separately from older prisoners though exceptions can be authorised by the military commanders. Israel is said to be adhering to these regulations for under sixteen years.⁵⁴⁰

The conditions of the prisons however leave a lot to be desired. Yet, the Palestinian situation has given rise to an interesting debate, namely, when can and when should one deviate from established international norms? International law dictates that minors should be detained separately from adults, and yet, given the cultural backdrop, the Israeli section of Defence for Children International (DCI) and its Palestinian counterpart, DCI-Palestine have been embroiled in this debate.⁵⁴¹ The latter being in favour of joint incarceration with adults, while the former insisting that international norms should be adhered to.⁵⁴² Additionally, children of the Intifada were interrogated regularly using the same physical and psychological pressures as applied to adult prisoners.

⁵⁴⁰ see generally, Sebba, L., "Juvenile Justice Policy: Mapping the Criteria" in Freeman, M and Veerman, P., (eds.) *The Ideologies of Children's Rights*, Martinus Nijhoff: Dordrecht, 1992, pp238-242.

⁵⁴¹ *ibid.* pp 237- 254. Additionally, the issue in such a debate boils down to simply what is in the best interests of the child. The DCI-Palestine, argue that children have benefited from being incarcerated with adults. Further, it is the cultural background to the complex situation that makes this particular debate difficult to resolve, for example, Palestinian children grow up in are a small, often one room or two room tenements. Children are used to the proximity and security of family and siblings. Once out of this environment, the solitary or new surroundings add to the fear of the child, therefore, increasing the trauma of being in detention. In the case of Israeli prisons, it was seen that Palestinian children were more prone to abuse and violence when compared to being detained in Palestinian centres. Adults in this instance have been known to encourage literacy in children often providing them with tuition, influence them in a positive manner away from bad habits and provide psychological and moral support to children living in fear away from their families. The DCI-Israel argues in opposition to this point of view . One can see from Bush . K., and Saltarelli , D., (eds.) *The Two Faces of Education in Ethnic Conflict*, ICDC: Florence , (September 2000). This challenges the widely-held assumption – that education is inevitably a force for good. The editors show how education can be manipulated to drive a wedge between people rather than drawing them closer together. Similarly, it has been argued as also been re-stated as a cause of worry for the DCI-Israel, that children are further hardened by exposure and contact with transgressors. Children are impressionable and influenceable and international laws regarding separating children from adults in prisons has been a response to avoid this occurring. However since, the Palestinian situation shows that children have benefited , it seems it is in the best interests of the children to be with detained with adults. However, the element of risk no doubt remains, but international law also needs to be flexible and adaptable and as always it is the best interests of the child that have to prevail. As article 41 of the CRC states: any provision that is more conducive to a child's well-being should be adopted.

⁵⁴² see the Swedish initial report on the CRC, 1992 which submits that a blanket prohibition may go against the best interests of the child as in some case it be of more help to the child to be with adults.

Brett, McCallin and Shea have submitted that “one of the consequences of child recruitment into armed opposition groups can be that the age of criminal responsibility is reduced” (as in the Occupied Territories, Nicaragua, Peru and Turkey), “or that anti-terrorist or emergency legislation is introduced which does not take into account the age of the captured persons and in effect reduces the age of applicability below that for “normal” criminal offences.”⁵⁴³

VII D. Sri Lanka

In some cases like that of the Sri Lankan LTTE the captured combatants commits suicide. All recruits are given a cyanide capsule, which they wear around their necks. As soon as capture seems a possibility, they bite into it. In some instances, the captors torture and kill their prisoners. In other instances, child soldiers have been detained, but it depends on the particular circumstances. The Sri Lankan Government has also been involved with running rehabilitation centre for these detained soldiers.⁵⁴⁴

VII.E. Uganda

In Uganda, in the North most children are treated as innocents who have been forced to fight. The army reportedly treats them well, gives them food, access to medical facilities and hands them over the NGO centres working with child soldiers. But they all usually go through a debriefing with the intelligence arm of the army before being handed over to the centres. There were only one or two of the children I interviewed who complained of some tension in the army barracks,⁵⁴⁵ but as a whole, children had no complaints. There was some mention of being given the choice to fight for the army to the older children, but I was unable to ascertain this fact. Children in the north did not face any charges, until April 1998, when 25 boys were charged with “treason”. All these boys were abducted as children and forced to fight by the LRA. Their charges include “failing to release information about child soldiers and or having fought with the rebels.”⁵⁴⁶ Some of these

⁵⁴³ Brett, McCallin, O'Shea, *Children: the Invisible Soldiers*, Radda Barnen : Stockholm, April 1996, p 60.

⁵⁴⁴ see *Reborn: Rehabilitation of Youth in Sri Lanka*, Dept. of the Commissioner General of Rehabilitation, Ministry of Youth Affairs & Sports. Undated report.

⁵⁴⁵ personal interviews.

⁵⁴⁶ Coalition to Stop the Use of Child Soldiers, *The Use of Children as Soldiers in Africa, A Country Analysis of Child Recruitment and Participation in Armed Conflict*, March 1999, p 114-115.

boys have been in detention for years.⁵⁴⁷ In 1997 there were reports of treason charges being pressed against child soldiers from the West Nile Front. In January 1999, five teenage boys between the ages of 14 and 17 were executed by the Ugandan army, on suspicion of being Allied Democratic Front (ADF) rebels. The circumstances were yet to be clarified in the mid-99. This needs further investigation by NGOs and the Ugandan High Commission for Human Rights. The Ugandan High Commission has promised to look into the matter.⁵⁴⁸

VIII. Conclusions:

International law offers children some level of protection. It is important that it cater to the fact that children might be found fighting even though it is prohibited. Making the body that recruited them responsible is crucial, as children must not suffer for the actions of adults. Interestingly the AP attaches the responsibility of ensuring respect for the non-recruitment and non-participation of children squarely on the recruiters. Therefore if children have participated, it is either the government or opposition authority who are responsible and the children who have participated in hostilities continue to receive the protection that is due to them.⁵⁴⁹ The ICCPR of 1966 is the enshrinement of provisions regulating the administration of child justice in a universal treaty. The provisions as seen above concentrate on issues of detention. They promote the separation of juveniles from adults and provide trial procedures keeping their age in mind and rehabilitation is prominently promoted. According to Van Bueren, they are useful but limited in their focus.⁵⁵⁰ The CRC fails children in Article 38 and Article 1.⁵⁵¹ We express great concern over our children and yet more and more groups continue to use children under 15 years as soldiers, what is the solution ? Is an optional protocol to the CRC the answer ?

⁵⁴⁷ Lees, C., "Boy Soldier Traitors face death in Uganda", *Daily Telegraph*, 22 March 1998.

⁵⁴⁸ email communication from WORLD VISION; Kampala, on 15 April 2000.

⁵⁴⁹ Goodwin-Gill, G., Cohn, I., *ChildSoldiers: The Role of Children in Armed Conflict*, Oxford: Clarendon Press, 1994, p 64.

⁵⁵⁰ Van Bueren, G., *International Documents on Children*, Martinus Nijhoff : Dordrecht, 1993, p xvii .

⁵⁵¹ see Chapter three of this thesis.

We find that the problem of child-soldiers is not so much a matter of military necessity as much a matter of lack of political commitment. Keeping in mind that one of the main aims of the Diplomatic conference to draft the Additional Protocols was to ensure that children did not lose their special status and general and special protection deriving from it and yet the result as we can see falls short of its mark. Aldrich⁵⁵² explained it as follows: "In the negotiations on the laws of war, there are at least three major precepts that are widely shared. One may call them the precepts of humanity, military necessity and sovereignty." He submits that military necessity means different things to different people and that of sovereignty as "a equality of states and the inequality of anything other than a State. And as with every negotiated multilateral treaty the protocols are a compromise and in relation to APII, the concepts of sovereignty and then military necessity has prevailed over that of humanity!"

It is my opinion that it would be a big step forward to raise formally the age from 15 to 18. The drawing of this line is acceptably arbitrary, but as this would extend protection to a larger number of children, children can only benefit from it in the long run. Further the ICC statute Roma, has declared the deployment of children below 15 to be a war crime, but the implementation process need to be looked into with urgency as children are today, they cannot wait for tomorrow. In many instances the application of international human rights law and humanitarian law with specific regard to child-soldiers may simply boil down to what the ICRC can achieve informally, under its "right of humanitarian initiative" than on treaties. In these circumstances it might well be that improving existing conditions of treatment recognising the norms of humanity are respected on all sides of the conflict might safeguard these children better than another protocol.

There also remain some problem areas: what does one do with a 17 year old or an 18 plus who joined as a 10 year old and is now over 18? Do we treat them as an adult soldier or as a child recruit? During the third session of the diplomatic conference concerning

⁵⁵² Aldrich, G., "Establishing Legal Norms Through Multilateral Negotiation - The Laws of War" 9 Case WRJIL, 1977. p14.

Article 68(2) of Protocol I, the Democratic Republic of Vietnam proposed that “Persons under the age of eighteen who have been arrested for their patriotism or for their political non-submission shall be set free as soon as possible and before other civilians.”⁵⁵³ Treatment in penal matters have been significantly upgraded in Article 40 of the CRC, but in the case of child soldiers perhaps we have to be more creative and innovative and draft law that will be flexible enough to cater to a large range of options. Perhaps special courts with specially trained staff to cater to child soldiers needs would be an idea.

⁵⁵³ *Official Records of The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva 1974-1977, Doc. CDDH/III/304 , 1978.*

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Chapter Six

UGANDA : A CASE STUDY

“ Realising the needs of children and the importance of giving them comprehensive care are among the major ethical principles which are called human rights”⁵⁵⁴.

1. Introduction

As stated earlier,⁵⁵⁵ in today's conflicts more and more children are being pulled into the circle of violence as direct participants.

Every human being is born with the capacity to plan ahead. This ability is revealed in the state of childhood itself. Children take into account all events including natural disasters like floods and earthquakes and man made ones like war and repression when planning their future. One Ugandan child has been quoted as saying “if I am not a bunch of bones in the bottom of a grave, I will plan to have an education, a job and a family.” As children grow and develop, they combine all relevant aspects of their lives, capacities and experiences. Though we have been aware of the fact it is only recently in the guise of Article 39 of the CRC that we have accepted that war causes trauma to children and hence the need for a child to psychological recovery afterwards. Children are at varying stages of their development, and respond to and are effected differently by a situation. Also, children of the same physical maturity may respond differently to the same situation.⁵⁵⁶ So how can we make our goal of reaching out to children in conflict a more realistic achievement?

⁵⁵⁴ Badran , H., “Foreword” in Van Beuren, G., *The International Law on the Rights of the Child*, Martinus Nijhoff: Dordrecht, 1995 p xv.

⁵⁵⁵ see chapter one.

⁵⁵⁶ Dr Mona Macksoud a psychologist who has studied the effect of war on children in the Middle East, Central America and South Africa for seven years. see Macksoud, MS., Abner, JL., “ The War Experiences and Psychosocial Development of Children in Lebanon”, in *SO Child Development*, vol. 67 no 1, pp 70-88, February 1996.

II. Objectives:

I decided to use Uganda as a case study, because it has the unique experience of having had child soldiers and successfully re-integrating them. Many African countries are looking to it, to learn. Rwanda has chosen to adopt their methods. Uganda now has a second batch of child soldiers. It was interesting therefore to study, given their previous experience how the present government would face this challenge, specially since these children are fighting against them.

This case study, is not an end in itself. It is an attempt to answer some questions that will help us in our effort to reduce the use of children leading to the eventual ban on the recruitment and involvement of children below the age of 18 in armed conflicts of any kind. Some of the questions that it looks at are, what sort of conflicts are these children fighting? What is it that motivates them to fight? What is the nature of their involvement? Is the identification of psychological, social, cultural, religious, material and coercive factors that lead to this involvement possible?

Some of the other objectives are: to outline the short and long term consequences of participation, to set out the applicable laws and international standards of international and national laws and to assess the legal and governmental, non-governmental machinery available for monitoring and ensuring implementation. Also to discuss the possible legal and cultural gaps that make implementation improbable. This case study also identifies local and national projects that are involved in empowering and developing processes on behalf of child-combatants. All this is aimed at developing and strengthening the argument in favour of non-recruitment and non-participation of children below the age of 18 in conflict.

III. Methodology:

I spent over two and a half months in Uganda in 1997. During this time period I was at Kampala and Gulu, but field trips were made around Kampala and to Kitgum as well.

Secondary sources referred to were newspapers, books, articles and material available in the libraries of Makerere University, The Centre for Basic Research, NGO libraries and Documentation Centres. A list of NGOs visited and discussions held with are attached as an annex. Informal and formal discussions were conducted with a number of officials both in Kampala and Gulu.

The primary source of information was information collected directly from people in the cities, villages and refugee camps etc. Initially, I planned to use formats and forms but in the end, semi-structured interviews were conducted with a cross section of the population, children, men, women, officials and the local populations etc. over a period of 2 months from Gulu, Kampala and Kitgum. Some of the issues discussed were the current situation as well as their hopes for the future, their fears and problems. Most interviews with children in Gulu were conducted in Luo, the local language spoken by the Acholi's, a few were conducted in Kiswahili both with the help of interpreters. Most of the others were conducted in English.

IV. Organisation Of The Case-Study:

The present chapter begins with a brief introduction to the ethnic tribes of Uganda, followed by a section on the political history because, to understand the tragedy of any war or conflict, it is important to have a historical analysis of the socio-economic conditions in which it takes shape. Laws do develop as a social activity,⁵⁵⁷ but more attention will be given to political factors as they have played a larger hand in the resulting instability in Uganda.

This study then focuses on the first child soldiers of Uganda that were hailed as the "liberators" and "heroes" of modern day Uganda. It then analyses the conflict in Northern Uganda and address the on-going problems of the child soldiers of the Lords Resistance

⁵⁵⁷ Marx, K., *Historical Materialism*, Col II Conforth Lawrence Wisharf, London 1977. p 29.

Army (LRA) and the response of the government, the NGOs and the international community. It finally ends with a conclusion which looks at the questions that the aims and objectives of this case study raised.

V. An Ethnological Synopsis To Colonial Times:⁵⁵⁸

The present day Uganda comprises of three distinct language families, namely the *Bantu*, the *Nilotic* and the *Central Sudanic*.

The *Bantu* are found mainly in the south, south-eastern and south-western parts of Uganda. They are primarily though not exclusively agriculturist. The *Bantu* consist of a centralised society headed by a King or Kabaka. The well organised societies among the *Bantu* are the *Baganda*, the *Banyankole*, *Bunyoro* and the *Batoro*. The less centralised among the *Bantu*, i.e. social organisation varying from chieftanships to extended family set-ups in the south-east were the *Basoga*, *Bagisu*, *Bagwere*, *Basamia* and *Bagwe*, in the south-west existed the *Bakiga*, and in the west the *Bamba* and the *Bakonjo*. Among both these main divisions existed the specialised pastoralists the *Bairu* and the *Batutsi*. Both groups established supremacy over the agriculturalists of the area that they settled in i.e. the *Bairu* and the *Bahutu*. The *Bahima* and the *Bairu* are collectively referred to as the *Banyankole*, and the *Batutsi* and *Bahutu* as the *Banyarwanda*.

The *Nilotic* comprise of two main groups. The western nilotes in the north-west of Uganda i.e. the *Acholi*, *Langi*, *Alur* and *Jonam*. They speak Luo and are closely related to the Kenyan Luo. They are mixed agriculturists and are loosely organised into chiefdoms. The second group comprises of southern nilotics, from the east, the *Karamajong* and the *Iteso* both related to the Kenyan Turkana. The southern nilotics were all originally pastoral.

The *Central Sudanic* Ugandans are the *Lugbara*, *Kakwa* and the *Madi*. All found in the north of the West Nile area extending across the border into Sudan and Zaire. The *Central Sudanic* are mainly agricultural with a non-hierarchical social organisation.

⁵⁵⁸ Davidson, BMJEF, *The Growth of African Civilization : East and Central Africa to the Late 19th Century*, Longmans Green and Co. Ltd. , 1968 2nd Ed.

All these groups existed as separate kingdoms. Their languages and social organisation were both different.

VI. Political History- Colonial Times To Independence

Uganda as it exists today was created by the British.⁵⁵⁹ But the first contact with outsiders was made in the late nineteenth century first with the Arab traders and then by the European traders. Henry Stanley an Englishman, first met Muteesa I the Kabaka of Buganda in 1875. He wrote to the London based *Daily Telegraph* appealing for missionaries to arrive in Uganda.⁵⁶⁰ It has been suggested that the Muteesa at that stage equated the white man with the power of the gun and welcomed him, keeping in mind that he needed help to keep the Egyptian expansion⁵⁶¹ at bay. The first missionaries, the Church Missionary Society (CMS) arrived in June 1877. The Protestant missionaries were followed in February 1879 by the White Fathers, French Roman Catholic missionaries. Both groups soon became rivals. The Arabs who has so far shown no interest in proselytising jumped into the fray as well. The arrival of Christianity gave religion prominence in political rivalry. The death of Muteesa I found these fractions all fighting for supremacy.

Uganda of course was of strategic importance to the imperial powers as it was the source of the river Nile. It has been suggested that the “British obsession with security of the Indian Empire and of Egypt”⁵⁶² led to the importance of Uganda as “to ensure the security

⁵⁵⁹ see, Low, DA and Pratt C., *Buganda and the British Overrule*, Oxford University Press, 1995; Barber, J., *The Imperial Frontier*, East African Publishing House, 1968; Karugire, SR., *A Political History of Uganda*, Heinemann: Nairobi , 1980, Wright, M., *Buganda in the Heroic Age*, Oxford University Press, Nairobi, 1971; Karugire, SR., *Roots of Instability in Uganda*, Fountain Publishers, Kampala, 1996.[hereinafter Karugire, SR., *Roots of Instability*] see Kasfir, Nelson., *The Shrinking Political Arena: Participation of Ethnicity in African Politics: A Case study of Uganda*, University of California Press, 1976.

⁵⁶⁰ Hooper E, Pirouet,L., *Uganda*, Minority Rights Group Publication, Report No 66, London, July 1989, p 5. There have been reports of a Captain Speke in 1862/3 who had suggested to the Christian Missionary Society (CMS) that they go to the Kingdom of Buganda. see Karugire, SR, *Roots of Instability in Uganda* , Fountain Publishers : Kampala, 1996, p 8.

⁵⁶¹ Samuel Baker, an agent of the Egyptian Empire in 1872 had alarmed the Kabaka by his activities in the North.

⁵⁶² Karugire, SR, *Roots of Instability*, p 7-8.

of India it was essential to ensure the control of the Suez Canal which in itself necessitated the control of Egypt and the hinterland of Sudan. To control both Egypt and Sudan it was necessary to control the source of the Nile”.⁵⁶³

The first to be converted were the Baganda chiefs and their pages. In the existing political system, the palace was a training ground for future leaders. The conversions began with the leaders and then filtered down to the ordinary Bugandan. This meant that the new converts were all in positions of power.

The heir to Muteesa I, the Mwanga inherited a divided kingdom, with the foreign missionaries taking what he probably felt to be an “unhealthy interest” in the Kingdom’s political arrangements. He was however too late to consolidate his position. By 1888 his chiefs had all formed private armies. On 10th September 1888, the Mwanga was deposed, this is referred to as the Christian Revolution in Uganda. The fight ended in a Protestant victory largely as a result of the support of Captain Lugard, his Sudanese troops and his gun!⁵⁶⁴

Lugard had arrived in Uganda as an agent of the British Chartered Company (Imperial East African Company) which was acting on behalf of the British Government. The wars in Buganda in the period from 1888-1892 “married religion to politics in a manner that was to prove irreversible in the whole of Uganda to the present day”.⁵⁶⁵ Political affiliation continued to be linked to religious faith and this was integrated into the rural areas as well. Missionary schools multiplied all over the protectorate and generation after generation of Ugandans were weaned on it. Meanwhile the number of battles and military campaigns conducted by Lugard had driven the company to bankruptcy. The CMS was putting pressure on the British Government to take responsibility for administering

⁵⁶³ *ibid.* see also, Bwengye, F., *The Agony of Uganda*, London:Regency press, 1985. Pound, JGN., *Political Geography*, New York: McGraw Hill, 1963. Moorehead,A., *The White Nile*, London: Penguin, 1950. Okoth, PG., “Uganda’s Geopolitical Significance since 1894” in Okoth, Muranga and Ogwang (eds.) *Uganda a Century of Existence*, Makerere University: Fountain Publishers, Kampala, 1995.

⁵⁶⁴ see Wright, *Buganda in the Heroic Age*, Oxford University Press : Nairobi, 1971 for a detailed account.

⁵⁶⁵ Karugire, SR., *Roots of Instability*, p 13.

Uganda. By 1 April 1893, Sir Gerald Portal, had taken over as a representative of the British Government.⁵⁶⁶ In 1900, the Buganda chiefs negotiated and signed the Buganda agreement, thus effectively subjugating themselves to British Rule. The Kingdom of Buganda at this instance was one of the most dynamic: modernisation or westernization began first in this kingdom. This caused resentment in the rest of Uganda. The British played the ethnic rivalries to the hilt and thus kept themselves in the stronger position. They established the “Kiganda system of hierarchical administration”. Basically, this system consisted of a local government of a hierarchy of chiefs in descending order of seniority and importance i.e. the country chief, the sub-county chief and the parish chief. Below the parish chief were the Batabgole or unofficial minor chiefs. They were the link between the grassroots and the chiefs.

For effective administration, the British introduced the *Native Authority Ordinances of 1901 and 1919*, *The Local Government Ordinance of 1949* and the *1955 District Councils Ordinance Act*. The 1949 Ordinance was the first formal recognition of the district as the basic unit of local government under the protectorate of the British government. This in turn meant that this ordinance was the legal enactment formalising the introduction of ethnic local governments and councils in Uganda. The Ordinances of 1949, 55 and 59 being the most relevant to the present day as they were unable to achieve what they were intended to achieve. They became impossible to operate due to excessive interference by local politicians in the activities of the chiefs. So, the 1955 Ordinance was ended and the 1959 enacted. With this ordinance, an appointment board was instituted in each district and kingdom (except Buganda) and the members of each board were appointed by the governor from a panel of names submitted to him by the district councils. Once appointed, they were responsible to the protectorate government. The system worked well, except for the fact that the seemingly independent units that the protectorate had established meant that all these local governments shared was the governor. Mamdani indicates that “[t]o pit one region against another, one nationality against another, one religion against another to

⁵⁶⁶ for further information on the territorial area was decided upon see Karugire, SR, *A Political History of Uganda*, Fountain Publishers : Kampala 1980.

ensure the unity of the rulers and the division of the ruled was the conscious purpose of colonial rule.”⁵⁶⁷ The Bugandan kingdom was the only unit with a degree of autonomy though the Kabaka had been exiled in 1953.

The economy of colonial Uganda was proving to be a problem as it was costing the British £400,000 annually in grants-in-aid. In 1899, Sir Harry Johnstone in an effort to change this, introduced, cash crops. This proved to be a resounding success and this meant that “who kept her (Uganda) there in the twentieth century were obsessed with the need to create an economy which would draw her directly and profitably into the British system of international trade”.⁵⁶⁸ Though the British used Africans as the producers, marketing and processing was placed in the hands of the Asian community, thus “building upon colonial differences, Britain turned the southern part (Buganda, Busoga and Ankole) into cash crop growing areas. But cash crops were discouraged in northern areas (West Nile, Acholi and Lango) and in Kigezi in the west which were developed as labour reserves, from whence were recruited not only soldiers and policemen (excluding kigezi) but also workers for factories and plantations in the South”.⁵⁶⁹ When Uganda gained independence from the British on 9th October 1962, this divide was deeply entrenched in Uganda’s social set-up.⁵⁷⁰

VII. The Evolution Of The Military In Uganda⁵⁷¹

Pre-colonial Uganda was characterised by warfare i.e. tribal warfare.⁵⁷² For example, “[t]he Buganda engaged in several wars. A war with Bunyoro was a yearly event; first one people and then the other made a raid into the country of their rival to be followed by strenuous battle which often ended in favour of the Buganda. Civil wars also broke out

⁵⁶⁷ Mamdani, M., *Imperialism and Fascism in Uganda*, Heinemann Education Books, 1983. p 10.

⁵⁶⁸ Brett, EA., *Colonialism and Underdevelopment in Eastern Africa: The Politics of Economic Change, 1919-1939*, Nok Publishers, 1973, p 54.

⁵⁶⁹ Mamdani, M, *Imperialism and Fascism in Uganda*, Heinemann Education Books : Nairobi, 1983. p 10.

⁵⁷⁰ see Burke, FG., *Local Government and Politics in Uganda*, Syracuse, 1984, p 14. “The establishment of districts based wherever possible on tribal residence has contributed to a sense of district nationalism and separatism in many cases did not exist prior to the arrival of the British.”

⁵⁷¹ see Mazrui, AA., *Soldiers and Kinsmen in Uganda: The Making of a Military Ethnocracy*, Sage Publications, 1975.

⁵⁷² for example the Acholi’s have a long history of being a marital race see; Eustabe Rutiba, *Towards Peace in Uganda*, Nile Valley Pyramids Publishing House Ltd, Kampala, Uganda, 1986.

from time to time in Uganda between rival princes who laid claim to the throne. These latter wars were by far the most disastrous that could happen to a country; and during the few weeks that they lasted, untold damage was done and great loss of lives took place".⁵⁷³ In pre-colonial Uganda, no formally defined legal rights existed, but it had its own humanitarian concepts and laws.⁵⁷⁴ Accounts of battles between the Jia and Acholi indicate that most tribes respected the principles of humanity and chivalry was common. The right to life in pre-colonial times was a deeply entrenched right: for example, there are well-documented medical efforts to save life;⁵⁷⁵ Among the Basoga the death of a child or a new-born was a serious crime, infanticide was punishable by death.⁵⁷⁶

The code of honour was based on humanity, compassion and tolerance towards the weak and vanquished. For example the Lango developed specific rules regulating warfare.⁵⁷⁷ The rules gave extensive protection to children, women and the elderly and the crippled. Neutrals were warned of the existence of aggression between rivals. "Assault, especially against an older man, was more of a sin. All offences were in the nature of sins and their sinfulness lying in their rejection of the agnatic kinship values".⁵⁷⁸ Because of this belief of the consequences of sin, there was a general respect of the right to life.⁵⁷⁹ ⁵⁸⁰ Further,

⁵⁷³ Roscoe, J., *The Baganda An Account of their Native Customs and Beliefs*, MacMillan Co. Ltd, London , Cambridge Press, 1923 p 346.

⁵⁷⁴ Khiddu-Makubuya, E., "The Concept of Humanitarian Rights in Traditional Africa" in *Makerere Law Journal*, 1974, vol2, no2, p 9.

⁵⁷⁵ Roscoe, J., *The Baganda An Account of their Native Customs and Beliefs*, MacMillan Co. Ltd, London , Cambridge Press, 1923.

⁵⁷⁶ A Busoga elder , Mr Sadhaibi Kyebbagadha of Muira Village, Kigulu County. , quoted by Bagadawa L in paper "Right to Life in Uganda" Makerere University , 1987.

⁵⁷⁷ Duberg, H., *The Lango: A Nilotic Tribe of Uganda*, London 1923, p 261.

⁵⁷⁸ Middleman, John., *Lugbara Religion Ritual and Authority among an East African People*, International African Institute, Oxford University Press, London, 1960, p 19.

⁵⁷⁹ See also, Lawrence, JCD., *The Iteso : Fifty Years of Change in the Nilo-Hamitic Tribe in Uganda*, Oxford University Press, London, 1957; Roscoe, J., *The Northern Bantu: An Account of Some Central African Tribes of the Uganda Protectorate*, Rector of Orington, New York : Cambridge University Press, 1915.; Goldschmidt. W., and Berkley, *Sebei Law*, University of California Press, 1967; Osita C Eze, *Human Rights in Africa : Some Selected Problems*, The Nigerian Institute of International Affairs, Lagos, 1984.

⁵⁸⁰ for the nature, concepts and violation of the Right to Life In Uganda under pre-colonial, colonial and post-colonial periods. See Bagadawa, LP., *The Right to Life in Uganda*, Paper submitted for LLB Makerere University, 1987. It also looks at various pieces of legislation that have contributed in protecting this right. Further it studies remedies and compensation available to people.

there are accounts of attacks on defenceless villages being prohibited.⁵⁸¹ The intention to wage war had to be made known similar to a formal declaration of war that present day international humanitarian law demands.⁵⁸²

Pre-colonial Uganda was politically a flexible paradigm that adapted to prevailing situations. One characteristic of these societies was that they were not militarised. According to Professor Kanigire in *A Political History of Uganda*, there were in Buganda no standing armies, but armies were drummed up as and when needed for defence or offence. He states that in this system every able bodied adult male was eligible for military service.⁵⁸³ This view is supported by Girling⁵⁸⁴ in his study entitled *The Acholi of Uganda*. It should however be noted that in African society the age at which a child becomes an adult is relative. It depends on the circumstances in which the child lives.⁵⁸⁵ In fact, even today, "in a number of developing countries, especially in Africa, children of 14 are already adults.... in these countries boys of 14 would automatically be combatants".⁵⁸⁶ Mobilisation in the Acholi clan was the responsibility of the head of the local clan, the *Rwot*. The *Rwots* function was military in nature. When he sounded the alarm it was the duty of every able bodied male to respond by running to the *Rwots* house with his weapons i.e. spear and shield. The nature of warfare however changed by the latter half of the 19th century. Otunnu,⁵⁸⁷ on the other hand, suggests that some societies that were

⁵⁸¹ Diallo, Y. "African Traditional and Humanitarian Law", in *East African*, vol. 11, Geneva, 1978, p 7.

⁵⁸² see generally Bello, Emmanuel *African Customary Humanitarian Law*, Geneva, Oyez Publishing Ltd and ICRC, 1980. Ellias, T.O., *The Nature of African Customary International law*, Manchester University Press 1965. Baxter RR, "Humanitarian Law/Humanitarian politics" in the *Harvard International law Journal*, Cambridge Vol. 16 No 1, 1975. Falk, R., *The International Law of Civil War*, John Hopkins Press, Baltimore and London 1971; Khiddu, Makubuya "Some Aspects of Humanitarian Law" in *Uganda Law Focus*, Vol. 2, No 2.; Engorit, Carol., *The Impact of International Humanitarian Law on the Internal Conflicts in Uganda*, 1988, Paper submitted in partial fulfilment of LLB, Makerere University, Kampala, Uganda.

⁵⁸³ Karugire, Prof. SR, *A Political History of Uganda*, Hienemann Educational Books, Nairobi, 1987, p 23.

⁵⁸⁴ Girling, *The Acholi of Uganda*, Colonial Office Research Studies, No 30, 1936, p 83.

⁵⁸⁵ See Ennew, J., "Shame and Physical Pain: Cultural relativity, Children, Torture and Punishment", in Van Beuren, G., (ed.) *Childhood Abused : Protecting Children Against Torture, Cruel, Inhuman and Degrading Treatment and Punishment*, Ashgate: Aldershot, 1998, pp 12-19.

⁵⁸⁶ International Union for Child Welfare, cited in Bothe, M., Partsch, K., Solf, W., *New Rules For Victims of Armed Conflicts: Commentary on the Two Additional Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff : The Hague, 1982, p 477.

⁵⁸⁷ Omara Otunnu, *Politics and Military in Uganda*, MacMillan St Anthonys Press, 1985, p 92.

stratified like the Buganda and Bunyoro had amassed guns and ammunitions and set about establishing regular armies with the help of the colonial forces. Roscoe⁵⁸⁸ argues along similar lines, i.e. that the Bugandan army was a hierarchical organised army responsible directly to the prime minister and the King. But it has been submitted by some that actual militarization of Ugandan society began only after the advent of colonialism.

In non-stratified societies which existed mostly in the north of Uganda, work was communal and people existed as a clan. Politically it was democratic in outlook; though consensus on matters of importance was the norm.⁵⁸⁹ Social welfare was the dominant issue. The societies were indigenous and authentic states. However, this changed in the 1890s.

In the stratified societies that existed mainly in the south, a state structure of sorts existed. Buganda and Bunyoro being classic examples of this society. They formed a unified society under a government headed by a King. The Bugandan system functioned on the basis of merit, although some distinction was made between the peasants and the chiefs. But as in the case of the non-stratified societies, even the stratified south did not have a standing army.

In 1840, the first contact with the Europeans was made. Trade links with the Arabs and the Europeans lead to a reservoir of arms building up. The army that was built up still was based essentially on a patron-client basis. It was an obligation owed by a subject to his chief, who in turn extended protection and economic assistance to his subjects. Osita Eze sums the society as “humanistic” as a whole.⁵⁹⁰

The Bunyoro on the other hand were championing the development of the standing army. This lead to uncertainty and imbalance between the Bunyoro and the Buganda. 1888 saw

⁵⁸⁸ Roscoe, J., *The Baganda An Account of their Native Customs and Beliefs*, MacMillan Co. Ltd, London, Cambridge Press, 1923, p 83.

⁵⁸⁹ Omara Otunnu, *Politics and Military in Uganda 1890-1985*, MacMillan Press, London, 1987 p 185.

⁵⁹⁰ Osita Eze, *Human Rights in Africa*, Nigerian Institute of International Affairs, 1984, p 32.

the first military coup d'état, when all political fractions tried to depose the Kabaka Mwanga. This led to the rise in recruitment of soldiers.

The 1884 Berlin conference, had given Uganda to the British. The origins of the present day army can be traced from the last quarter of the 19th century. Lord Lugard was sent to Uganda as the representative of the British Protectorate. His main task was to consolidate its hold on the country. In 1900, the Buganda Agreement was signed, which effectively subjugated the sovereignty of the Buganda Kingdom to the British Empire. Laws were now developed to incorporate the policy of "indirect rule" and also based on maximum profit to the Empire. New structures were created to incorporate the British needs. To match the new structures a number of new laws had been created, these accomplished giving legal definition to the responsibilities and powers to the chiefs in the protectorate. Military activities in this era were referred to as "pacification of natives".⁵⁹¹ A standing army was now created under the aegis of the East African Company. It consisted initially of Swahili askaris who had accompanied Lugard. They were augmented by Sudanese, Indian, Nubian and much later Bugandan compatriots. Initially their task was to assist the company in its commercial objectives. Later, they were used to crush colonial-resistance. The army was therefore a tool used to keep the British in power and the people divided against each other. The British needed a labour force and also it was beneficial to them if they were able to keep the tribes warring. By the Uganda Rifles Ordinance, which was enacted in 1895, the soldiers swore allegiance to the British sovereign. Article 58 of this ordinance made this ordinance the stepping stone of effective establishment of the colonial rule. Since existing troops of the protectorate were absorbed into this army, Sudanese troops formed the backbone of this Ugandan Army. The Ugandan Rifles Ordinance was repealed and replaced by the Uganda Military Force Ordinance of 1868. According to this ordinance the military needed to be diversified.

In 1900, Sir Harry Johnstone concluded an agreement with the Buganda regime. This agreement made it illegal for the Kabaka to raise an army without prior consultation with

⁵⁹¹ Delgado, S., *Coups and Army Rule in Africa- Studies in Military Style*, 1975, p 1209.

the Protectorate. After being firmly established, the imperialist felt the army could be Africanised and hence legislation was passed allowing the dominated nationals to join the ranks and file of the army. The King's African Rifles Ordinance was one such piece of legislation. It incorporated all the troops enlisted under the Uganda Rifles Ordinance of 1895. In 1903 the protectorate created the "Volunteer Reserve Force Ordinance" the objective of this auxiliary force was to quell any disturbance that might arise.

The Second World War changed a lot of things in the colony as soldiers had come back from abroad with new *ideas*. The new outlook was the concept of "de-colonisation." But the one inherent defect of this army was that the British had encouraged the northerners namely the Acholis to enlist and form the army, as they were loosely organised and were therefore never a political or military threat to the British, whereas the Buganda formed a possible threat. In this way the northern part of Uganda became economically less prosperous, less politically organised, as more un-educated, and semiliterate men were favoured for military recruitment. One discriminatory criteria was that of height, the minimum height was 5 feet 8 inches. This immediately favoured the taller Acholi over the smaller Buganda. The army was therefore dominated by the Acholi and the Langi tribes. By the time Uganda gained independence on 9 October 1962, the army was a hated institution; and by extension the tribes of Acholi and Langi were seen as perpetrators of destruction.

At Independence, Uganda inherited a small army of about 1000 men, the most senior among them having risen to the rank of a sergeant, as natives were believed to be incapable of rising to the higher ranks.⁵⁹² Officer class had comprised strictly of the British. The army now expanded on dubious criteria: nepotism and favouritism ruled recruitment and promotion. Exploitation of the civilian population by a few continued and the army continued to gain the reputation of "violators".

⁵⁹² see Kabwegyere, TB., *The Politics of State Formation and Destruction in Uganda*, Fountain Publishers: Kampala, 1995. chapters 3, 4 and 8.

The political system of Uganda has been militarised to a great extent.⁵⁹³ The dubious distinction of having achieved this goes to Milton Obote.⁵⁹⁴ Post-independence Ugandan politics have been marred by the struggle for power between various fractions fighting for economic benefits. The civil-military balance was very shaky. The army was of course very disproportionate in its representation of the tribes. Both Obote and Amin⁵⁹⁵ were northerners. The north-south divide was further deepened. The armed forces were given a licence to intimidate and they used it. Ultimately, however, Obote had to transform the role of the army. He put it out of the scope of a civil government. The Armed Forces Act which had been enacted to govern the forces became dead-letter. The Act which provided for a military code of conduct and punishment was never enforced. From 1966-1971, the army was an extension of the whims and fancy of the official heading it. It was a tool of repression. The Nakulabye Incident of 1969⁵⁹⁶ exposed the military for the undisciplined force that it was.

Ironically, the courts seem to have lent support to this indiscipline. The state of lawlessness (clear from the facts of the following cases) in the state response is reflected in the cases of *Ssengendo Vs AG*, HCC no 731 of 1970 and *Muwonge Vs AG* 1967 EA HCC No 731/1970 (unrep).⁵⁹⁷ In *Muwonge Vs AG* March 17, 1966, Civil Appeal No 10 of 1966, in which the father of the appellant was shot in his house by a policeman during the course of a riot, the President of the Court, Judge Newbold, held that "it was an improper manner of carrying out his duty and nothing else. This being so it was an act for which the Attorney-General, as representing the State, is liable".⁵⁹⁸ In the case of *Ssengendo Vs AG*,

⁵⁹³ for further information/details on the role of the army see , Hooper, E., Pirouet L, *Uganda, Minority Rights Group Rep No 66*, London, pp 6-16. According to Oloko-Onyango , J in *Armed Conflict, Political Violence and Human Rights*, CBR Working Paper No 12, Kampala, referring to Anil Sookdeo "Understanding the Violence in Uganda" in *TransAfrica Forum*, vol. 5, No 3 (Spring 1988) pp 17-31 at p 25 Amin is responsible for the "complete" militarizaion of society.

⁵⁹⁴ Milton Obote, first Prime Minister of Uganda from 23 April 1962 - 25 January 1971. His second round of power was as President of Uganda from 1980-1985.

⁵⁹⁵ Idi Amin Dada, was Milton Obote's trusted aide, his Military Commander. Amin successfully overthrew Obote in his absence and took over as President . His regime was to last from January 1971 - 1979.

⁵⁹⁶ Nakulabye is a suburb of Kampala, a large number of Buganda were hunted out of their home's and shot. The officer in charge during the incident was sent on promotion immediately after the incident.

⁵⁹⁷ For more information see Nabudeere, DW., *Imperialism and Revolution in Uganda*, Dar es Salaam, Onyx Press, 1980, p 249.

⁵⁹⁸ *Eastern African Law Reports*, 1967, p 21.

Charles Ssengendo sued the Attorney-General in his capacity as the representative of the Uganda Government. On 19th December 1969, he was driving along Kira Road in Kampala when he was shot at by some soldiers. He was hit by a bullet in the waist and his car was damaged as well. He fell out on the road when he was attacked further by the soldiers. He was hit by 6-7 bullets. Among the other issues before the court, there were point No. 3 namely, "Whether the soldiers were acting in the course of their duty when they attacked the plaintiff" and point no 4 i.e. "Whether the defendant was vicariously liable for the wanton, unlawful and unjustified action of the soldiers". For the former point, the judge ruled that "the soldiers were acting in the course of duty when they attacked the plaintiff." For the latter issue: "I hold that the defendant is vicariously liable for the act of the soldiers and that the plaintiff is entitled to claim general and special damages from the defendant". Both cases went on to hold the government liable for the wrongful acts and not the individual soldiers. Soldiers were absolved from liability as long as their actions were enacted as acts to defend the sovereign State. This was to form the backdrop of the entire spectrum of violation of human rights. The country was in turmoil, crime was on the increase, there was social and political violence.

The 1971 coup d'etat⁵⁹⁹ which brought Amin to power, was welcomed initially. But his regime went on to become one of the most brutal and repressive possible. It was characterised by the systematic erosion of democratic norms and structures. Martial law was declared and decree became the norm. Amin was ousted in 1979. Professor Lule then came to power followed by Godfrey Binaisa only to be replaced by Obote who was overthrown by Okello. Okello was overthrown by Museveni and his National Resistance Movement/Army (NRM/A)

⁵⁹⁹ Amin overthrew Obote while he was representing Uganda at the Commonwealth meet at Singapore. for details see Delacado. S., *Coups and Army Rule : Africa Studies in Military Style*, New Haven, Yale University Press, 1975, p 7. Also see Huntington, S., *Political Order in Changing Societies*, Longman, 1974. Kabwegyere, TB., *The Politics of State Formation and Destruction in Uganda*, Fountain Publishers: Kampala, 1995.

The army in Uganda has, it is submitted never been a cohesive homogenous group representing Uganda as a whole⁶⁰⁰ due to allegations of corruption, nepotism and tribal favouritism. The military in Uganda is today an integral part of the political set-up. The military is also reported to have committed violations of human rights.⁶⁰¹ The present day forces i.e. UPDF, (formerly the NRA) had an excellent track record. It has been suggested that the reasons why Africa is so coup-prone is because institutions other than the army are very weak. There is a low level of professionalism in armed forces as recruitment criteria and promotion are not necessarily merit-based. Low salaries are another reason.⁶⁰² According to Deleado,⁶⁰³ structural weaknesses, low levels of political development, institutional fragility lead to military take-overs and dictatorships, which in turn lead to violations of human rights in Africa.

Harrison and Twaddle⁶⁰⁴ have suggested that the nature of politics of post-war Uganda are not very different from that of Amin's time. Though accepting that security and democracy have seen drastic improvement, both on a political and personal front. The North and the West Nile Front are examples of gross violations of the rights of a civilian population. Politically, the north and the southern regions have maintained distinct characteristics and for most have been antagonistic towards each other. The hostility existing between the various tribes were not only encouraged but institutionalised and continues though in milder forms to the present day!

VIII. Politics - Independence To Present Day

The northerners have continued to enlist in the armed forces and the police, while the southerners have continued their monopoly of education and white collared jobs. Just

⁶⁰⁰ Ali Mazrui, *Uganda, The Birth of the Second Republic*, Sage Publications, 1975, p 73.

⁶⁰¹ see AI reports, also this conclusion is drawn from personal interviews conducted in August- September 1997 in Uganda.

⁶⁰² Mazrui, Dr Ali A, *The Africans : A Triple Heritage*, 1986 , Little, Brown and Company (Canada) Ltd. pp 179 -199 see generally Chapter 9 entitled "In Search of Stability".

⁶⁰³ Delacado. S., *Coups and Army Rule : Africa Studies in Military Style*, New Haven, Yale University Press, 1975, p 7. Also see Huntington, S., *Political Order in Changing Societies*, Longman, 1974,

⁶⁰⁴ Harrison. HB., Twaddle.M., *Uganda Now - Between Decay and Development*, Ohio University Press, 1982, p 294.

before independence, nearly half the country's undergraduates, businessmen and civil servants were from Buganda.

In preparation for independence, two main political parties were taking shape. One was the Democratic Party (DP) an organisation described as founded "for political action on a specifically Catholic basis".⁶⁰⁵ The second party was formed by a group of independents. In 1960, this group joined forces with another splinter group to form the Uganda Peoples Congress (UPC) under Milton Obote. Despite its claims to religious secularism, the *raison d'être* of the UPC was alleged to be in opposition to the Bantu Catholics.⁶⁰⁶ The Kabaka who was Protestant formed the Kabaka Yekka (KY) party. Besides their common desire for Protestant supremacy, the KY and UPC had divergent views on every other issue but formed a united front against the DP. On 9 October 1962, Dr Apollo Milton Obote became independent Uganda's first Prime Minister. The following year, he kept his side of the bargain by arranging for the Muteesa II to be elected President of Uganda.

At independence the scenario in Uganda was that politics had become polarised along religious lines, ethnic nationalism was a fundamental character and the army was ethnically unbalanced.⁶⁰⁷ Prime Minister Obote was in a difficult position, constantly having to manoeuvre to stay in power. Catholics and Moslems suffered discrimination, nepotism was rampant, administrative and judicial probity began to be undermined. On 22 February 1966, things spiralled into a climax. Obote had five ministers arrested and detained, allegedly for plotting against him. Two days later, Obote suspended the 1962 Constitution and dismissed the Muteesa II as President and ordered Col Idi Amin to lead an aerial and ground attack on the Kabaka's palace. The next 24 hours saw many dead and

⁶⁰⁵ Welbourn, FB., *Religion and Politics in Uganda, 1952-62*, Nairobi, 1965, p 18.

⁶⁰⁶ Hooper, E., Pirouet L, *Uganda*, Minority Rights Group Rep No 66, London: MRG, 1989, p 6.

⁶⁰⁷ GSK Ibingara has quoted a member of parliament as "...when the recruitment team goes to the north, they spend there two or three months recruiting, but when they come to Kampala, they spend here one day and they recruit mainly those whom they have directed to come to Kampala because they failed to recruit them in the north. When they go to Maska, they spend half a day to recruit only about three people - two for them probably being those Northern people who are living in Buganda. When they go to Mbarara, they spend half a day there to recruit only three people. This sort of recruitment must be stopped. They must give us quotas." in *African Upheavals Since Independence*, Westview Press, 1980 p 84.

the Kabaka fleeing to London. Buganda was now placed under a state of emergency, which was to last for the next 5 years. By 1967, Obote had abolished all the kingdoms and declared Uganda a Republic. Further, he saw a way out of the then “crossing the floor” tendency, i.e. constant changing over to different parties by members of parliament by declaring Uganda to be a one-party state. The political and economic situation deteriorated rapidly. Meanwhile, Amin who had been promoted to Chief of Staff, continued to step up the recruitment of people from the Central Sudanic tribes, i.e. from the West Nile in the army to consolidate his hold over the army. Obote and Adoko in turn encouraged the Nilotes to enlist. Obote departed in January 1971 to participate in the Commonwealth Conference in Singapore, and during this period was overthrown by Idi Amin.

Amin's regime was welcomed. His first moves were to release detainees and to lift the state of emergency, but he went on to become one of the most brutal and repressive leaders ever.⁶⁰⁸ Amin was eventually defeated at the hands of the Tanzanian forces and the so called Uganda National Liberation Front (UNLF) which comprised of “exiles and raw recruits”.⁶⁰⁹ Professor Lule who headed the UNLF came to power. The UNLF government had no army, police, judiciary, civil servants or chiefs. Everything had to be built from scratch. To achieve that, UNLF needed to be a united body. Unfortunately it was not. Besides the corruption that was alleged, the UNLF had another problem: the army. The army was loyal to Obote, someone they shared tribal loyalties with. They were hostile to Lule and to Binaisa who succeeded Lule as President. Interestingly, when the Tanzanian forces began withdrawing, the army, which was newly-enforced by exiles (i.e. soldiers who left Uganda since Amin took over) and raw recruits, and which had by now been christened as Ugandan National Liberation Army (UNLA), did not see any reason as to

⁶⁰⁸ For Prison Conditions generally see AI report June 1985 *Uganda. Six years after Amin, Torture, Killings and disappearances*. Also AI reports of 1982, 83, 84, 86. The Newspaper MUNNANSI from 1981-1983.; Horace Campbell article in the East African Social Science Review, Vol. VI No 11 1986. and “The Tragedy of Uganda” in *Mawazo*, vol. 5 No 1, June 1983; Avirgan, T., *War in Uganda: the Legacy of Amin*, Connecticut, London, 1982.

⁶⁰⁹ MRG, *Uganda and Sudan*, Minority Rights Group rep No 66, London 1984, p 7. [hereinafter MRG Report] Also see, Phares Mutibwa, *Uganda Since Independence: A Story of Unfulfilled Hopes*, Fountain Publishers: Kampala, 1992, pp 112-114.

why they should support a Muganda⁶¹⁰ as President i.e. Lule, when their own (Obote) was in Dar-es-Salaam. The UNLA commanders were quite vocal about this and hence Lule and Binaisa in turn would not trust the army. On 27 May 1980, Obote announced his return to Uganda. He flew in to Nyakisharara Aerodrome in a Tanzanian army plane, was then taken by road some 50 miles on a route lined by Tanzanian soldiers!

The political climate in Uganda was understandably precarious. It was in this backdrop that the 1980 general elections were held.⁶¹¹ Besides the UPC and the DP there was another new party, the Uganda Patriotic Movement (UPM). The elections went on to be an astonishingly bizarre farce. It was widely accepted that they were rigged.⁶¹² The UPC won the elections. The army was used extensively to intimidate the masses to maintain this farce. The army looted, murdered, raped and harassed civilians. In protest Yoweri Museveni, a young leader from the UPM, took to the bush and started a guerrilla movement called the National Resistance Movement (NRM) to dislodge Obote's government which they viewed as an illegitimate government.

The Obote government⁶¹³ in order to suppress this popular uprising resorted to drastic measures, the most notorious being in what is known as the Luwero triangle an area in Luwero district which is predominantly Buganda, covering an area of 9,199 sq. kms. It is basically a rural area. Crop farming and cattle herding⁶¹⁴ being the main activities of the locals.

⁶¹⁰ singular of Buganda.

⁶¹¹ see Nabudere, DW., *The Obote Election Fraud and the New Fascism in Uganda*, 1980.

⁶¹² The COG report quoted in the MRG's report reads "The unopposed return of as many as 17 out of the 126 constituencies...that they all belonged to one party only heightened the suspicions and doubts of the others.....days before the polls, Chief Justice Wambuzi whose job included the responsibility for making judgements on alleged election irregularities in the courts was replaced by a UPC man. There were reports of harassment, intimidation and death threats by the UPC supporters against their opponents..."

⁶¹³ MRG Report, on the UPC record p 17.

⁶¹⁴ According to the authors of the MRG report on p 15, cattle-ownership and cattle-raiding are one of the primary causes of militant activities. This view came across during the course of a series of interviews conducted in Gulu and Kitgum by myself in August-September 1997. Cattle is often the wealth of the villagers. All money goes into buying cattle instead of savings in the bank.

After the army action which included scorched earth policy much of the area was described as “a desolate waste-land”⁶¹⁵ The civilian population suffered; torture, killing, looting and rape as an everyday occurrence. The number of people killed during this time in this area remains an approximate figure. Many mass graves have been found. One boy testified that “they came upon a cattle station where in normal times cows were slaughtered and the meat sold. They saw that the grass had been cut down. They found 16 bodies - 15 men and 1 women. The male bodies had been decapitated”. Massacres in the region were common and truckloads of people were driven away and killed by the army. The situation was summed up by one aid worker as “the plight of these people is appalling. There are probably few places in the world where one would witness such a cynical and flagrant flouting of human rights”.⁶¹⁶

On the other hand, besides the Luwero triangle, The West Nile was still suffering reprisals after the 1979 liberation war. It is alleged that Tito Okello and Oyite Ojok asked Professor Lule the then President of the UNLF government, for permission to punish West Nile.⁶¹⁷ Professor Lule turned this request down. The TPDF forces were sent towards Pakwach bridge. But, later, when the Presidential convoy, was ambushed the army began their deterrent policy of reprisals. Many villages between Koboko and Aringa were targeted by the UNLA, which committed atrocities. Rape, looting and burning of houses were common and all had an ethno-political element. October 1980 saw some soldiers of Amin⁶¹⁸ coming to the aid of this population of West Nile ‘enforcements to punish the West Nile. The reprisals continued well into the late 1980s, resulting in a large number of displaced people in the entire regions.

From the time of the overthrow of Amin and the subsequent liberation, people were arrested, disappeared, raped and tortured. The instrument to achieve this was the army, largely dominated by the Northerners i.e. the Langi and the Acholi. The UNLA in the

⁶¹⁵ see Crisp, J., *Uganda Briefing*, British Refugee Council, October 1983.

⁶¹⁶ quoted by Hooper, E., in MRG Report on p 14.

⁶¹⁷ *ibid* on p 9.

⁶¹⁸ a few soldiers loyal to Amin tried to gather support, but by then Amin had distanced himself and settled into exile in Saudi Arabia.

meantime was called the “Liberation Army” or the “Looting Army” depending on the circumstances, suffered defeat at the hands of the NRA/M. While retreating to the North, they continued to commit atrocities. The NRA headed by Museveni was a politically-motivated group which won the peasants over.⁶¹⁹ After winning the war, Museveni took over Kampala to head the government of Uganda on 26 January 1986. Since 1986, the country has been democratic, though it follows a one-party system.⁶²⁰ It has been stable and seen much improvement in different spheres of life. Museveni’s Government has put human rights, democracy and children on the top of its agenda.⁶²¹ But, it is also a fact that the NRA /M initially lauded for its disciplined forces, is now suffering the ignominy of being described as a rapidly deteriorating force, indulging in killing and looting and intimidation. It is true that the country is enjoying the maximum security it has since independence, yet the wars in the North and West Nile Front leave a lot to be desired. In fact, in 1999, international aid agencies such as the World Food Program, Medecins Sans Frontieres and Action Aid were repeatedly forced to suspend their life-sustaining humanitarian activities in western Uganda due to security threats. The local population subsequently suffered from shortages of food, medicine, and shelter as well as repeated cholera outbreaks caused by poor sanitation and overcrowded living conditions in displaced persons camps. Nearly 100,000 civilians have continued to be internally displaced because of this conflict in the southwest. The UPDF has also been held responsible for serious human rights abuses, including arbitrary arrests and detentions, torture, and summary executions. UPDF soldiers who committed abuses have been held accountable for their actions. But, civilians continued to be frequently detained, abused without legal grounds at army facilities. During court proceedings relating to torture allegations published in the Monitor newspaper, army officials from northern Uganda

⁶¹⁹ Mpeirwe, A., “ The Law and Military Discipline in Uganda : The Case of the NRA Code of Conduct” , paper submitted for the award of LLB at Makerere University, 1992. (unpublished)

⁶²⁰ see Mamdani, M., and Oloka-Onyango , J., (eds.) *Uganda : Studies in Living Conditions, Popular Movements and Constitutionalism*, JEP Books : Austria , Centre for Basic Research : Uganda , 1994.

⁶²¹ The NRA/M had a clear programme. This 10 point programme remains the corner-stone of Museveni’s government.

casually admitted that civilian women are regularly "punished" at army facilities by having their heads forcibly shaven with blunt razors.⁶²²

IX. The First Child Soldiers: The Kadogos⁶²³

In the aftermath of the 1980 elections, Museveni went to the bush to fight a "just war" against an illegitimate and repressive government. He was joined by the masses. Men, women and children all joined the ranks of the National Resistance Movement/Army (NRA/M).

This army had the reputation of and proved to be a well-trained and highly motivated. They had a strong ideology and this included no smoking or drinking in the bush and breaking the code of conduct.⁶²⁴ The NRA is governed by two codes, *The Disciplinary Code* and *The Operational Code of Conduct*.

IX.A. Recruitment Policies Of The NRA

The Operational Code of Conduct provides that, "[t]here shall be recruitment of people in the NRA as and when the need arises". For women, there were no prescribed criteria to qualify/enlist. Unlike other armies in Uganda, the NRA has encouraged women to join. Many women joined. The involvement of women⁶²⁵ in the NRA/M was due to the fact that the army and the movement were two different organisations in their minds. A lot of

⁶²² see HRW, *Annual Report*, HRW: Washington DC , 2000. Country section "Uganda". available on HRW website. <http://www.hrw.org> .

⁶²³ Kadogo, a kiswahili word meaning "little one". This term was used to refer to all child soldiers in the NRM/A .

⁶²⁴ see story of two child soldiers from Fort Portal, in August 1985, reported by Dodge, CP " Today's Children - Tomorrow's Hope" in Dodge., CP. and Raundalen M (eds.) *War, Violence and Children In Uganda*, Norwegian University Press, Oslo , 1987 p 7.

⁶²⁵ for more information see, Kwarisiima B Kyerere, *Women in Military Service: Legal Challenges to an Alternative Framework for Emancipation*, 1990, Makerere Univ.Dept of Law.

Engels.F., *The Origin of the Family, Private Property and the State*, Progress Publishers, Moscow. Lenin. VI., *On the Emancipation of Women*, Progress Publishers, Moscow 1970. Smith. MB., *The Single Woman of Today*, Watts and Company: London, . de Beauvoir, S., *The Second Sex*, Harmondsworth : Penguin , London , 1972. Amii Omara Otunnu, *Politics and Military in Uganda 1890-1985*, MacMillan Press, London, 1987. Bwengye, F., *The Agony of Uganda*, Regency Press, London, Nabudere . DW., *Imperialism and Revolution in Uganda*, Onyx Press, London 1980. Mazrui.A., *Soldiers and Kinsmen in Uganda - the Making of a Military Ethnocracy*, Sage Publications, Beverly Hills, 1975; Okwalanga, R.Oboto., *The Participation of Women in the Ugandan Armed Forces*, 1990, Makerere University, Dept of Law, paper submitted for LLB.

them joined the NRA and went into the bush because they had had a bad experience with the Obote regime, a husband, brother or father was imprisoned or had died or had suffered at the hands of the regime. In 1984 there were some 56 women, by 1986 there were 973 woman soldiers and in 1988 there were 2000. Some of them were officers.

According to the NRA/M,⁶²⁶ they did not consciously recruit children into the ranks. As the NRA continued its fight against the Obote regime, the number of children increased. Some children being as young as 4-6 years old.⁶²⁷ Sometimes it was just they were caught in the middle of a conflict. Some joined because they were in the wrong place at the wrong time. School girls from Fort Portal, Luwero and Masindi joined in the hope that they could get back to their schools. Some joined for material benefit. Some were motivated by revenge. The children became what is currently termed as "camp-followers", as they had no adults or family they could turn to. But not all the children were orphans: some joined because they wanted to be part of the excitement, others due to the admiration that the soldiers received and some due to ideological reasons. In the words of one former kadogo:

"there was no enlistment drive or a formal requirement, the NRA passed by and you just walked along with them and you stayed on...You became one of them... I joined them as a fourteen-fifteen year old. I ran away from home to join them. It was the need of the moment. Every man, woman and child... it was everyone's duty to do so. You received formal training if it was possible, else you got it straight on the front-line!"⁶²⁸

But there have been one or two reports that some youngsters were shot or beaten for refusing to fight alongside the NRA. Also, a young former child soldier has told of how a

⁶²⁶ for a good first hand account of the NRA kadogo's see Dodge, CP., "Corridors of Peace Across the Lines of Civil War in Uganda and Sudan", in Dodge, CP., Raubdalen, M., *Reaching Children in War Sudan, Uganda and Mozambique*, Sigma: Forlag: Sweden, 1991. pp 72-80.

⁶²⁷ Muhumuza, R., *A Case Study on the Reintegration of Demobilized Child Soldiers in Uganda*, World Vision, Uganda, January 1995, p 1.

⁶²⁸ personal interview conducted in Kampala, September 1997.

local NRA recruiting officer had organised for him and ten other boys from his village to escape at night in a lorry and join the NRA who were then based in Kasese town.⁶²⁹

IX.B. Duties Of The Kadogos

Whatever the reason for joining the army, this relationship grew into a symbiotic one. The children stayed on with the soldiers and in return for food and security, they ran errands or chose to fight. It has been reported that children were given basic self-defence training which included weapons drills, and tactics like taking cover and moving in military formations.⁶³⁰

These child-soldiers first stayed in the background, running errands, carrying messages or working as cooks and orderlies for the adults. Later on, they were seen fighting on the front-line and were described as “good soldiers”. These children fought alongside the adult soldiers in every kind of encounter.⁶³¹ They received a lot of media attention.⁶³² On winning the war, these children were viewed as the *Liberators* and *heroes* of the masses. The Kadogos played a crucial role in the NRA battles against the UNLA.

IX.C. Reintegration And Rehabilitation Of The Kadogos⁶³³

On coming into power, the victorious NRA found it had in its ranks some 3000 kadogos, both male and female. One of the first actions of the NRA was to make arrangements for these child-soldiers. The NRA after much deliberation set up special schools for them in 1986.⁶³⁴ The children went to primary schools run by the army. The first school was started at Bambo near Kampala, these children were later moved to Mbarara about 200

⁶²⁹ Interview in *The New Vision*, of Monday 7 February 1994, on p 14. published daily in Kampala, Uganda.

⁶³⁰ *ibid*, p 3.

⁶³¹ see Goodwin-Gill, G., Cohn, I., *Child Soldiers: The Role of Children in Armed Conflicts*, Clarendon Press : Oxford, 1994. see pictures at the beginning of the study. also p 146.

⁶³² see Dodge, CP., Raundalen. M., *Reaching Children in War Sudan Uganda and Mozambique*, Sigma: Sweden, 1991. chapter 4.

⁶³³ Colletta, NJ., Kostner, M., Wiederhofer, I., *Case Studies in War-to-Peace Transition: The Demobilisation and Re-integration of Ex-Combatants in Ethiopia, Namibia and Uganda*, World Bank Discussion Paper No 331, Africa Technical Department Series. [hereinafter World Bank Report]

⁶³⁴ see NRA internal document, a paper written by Lt.Col Serwanga-Lwanga, the NRA Chief Political Commissar.

kilometres ways from the city. Once the Kadogos finished primary school, they were free to choose a secondary school of their own choice. The cost of their education was borne by the Ministry of Defence. Today, most of the primary schools have shut down as the majority of these children have graduated from primary to secondary school⁶³⁵ or are at college, university or are employed. Research indicates that most kadogos did go to school, the few that did not were either much older and /or did not feel comfortable to go back to being school children after having been the liberators. Some reportedly chose not to go to school as they had no basic education and it was difficult to begin at this stage. In 1997, I met about 20 former Kadogos who were students at Makerere University. Approximately 30 of them were at Makerere University, all sponsored by the Army. Others were at the National College of Business Studies, Nakawa and the Makerere Accountancy Centre. Some former child soldiers have chosen to go back to civilian life. Others continue in the armed forces as soldiers of the UPDF.⁶³⁶ Unfortunately, not much information is available about female kadogos. The issue of rehabilitation and re-integration will be discussed in more detail in the next chapter .

IX.D Problems Faced During Re-Integration And Rehabilitation

In Uganda, specifically for the child-soldier, re-integration has been a formidable challenge. For children, this need to re-modify their values⁶³⁷ and the urgent requirement to adopt new roles is not easy and requires time. The change of values is more difficult when the individual is not familiar with these rules and roles. "In particular, young veterans, having joined the NRA when they were children and/or their parents having being killed, struggle with this mental transition. Many simply do not know what it means to live with and provide for a spouse on a day to day basis..... To many, if not most of these child soldiers, therefore, the impact of civilian life has been almost traumatic".⁶³⁸

⁶³⁵ By 1990 most had left school i.e. they had graduated.

⁶³⁶ The information here has been reported by a number of researchers. I was able to re-confirm this information in a series of meetings with academics, officials and former child-soldiers in Kampala.

⁶³⁷ for a parents view on this re-modification of values see Andama, JWH., " The Parents Dilemma" in Dodge, CP and Raundalen M (eds.) *War, Violence and Children in Uganda*, 1987, pp 53-81.

⁶³⁸ World Bank Report, p 275.

Another very basic reason for this difficulty is the lack of marketable skills and experience which reduces their competitiveness in the labour market. This leads to anti-social behaviour as an expression of their frustration. A higher crime rate is one of the biggest worries of town officials when they are expecting back returnees from the war front.

This inability to cope with the situation in everyday-life along with unemployment and low-self esteem makes their social life very difficult. The high divorce rate found among the veterans indicates the difficulty experienced by them in re-integrating into the normal social life. The incidence of HIV has also been a major threat to re-integration. Women and girl-soldiers suffer from this stigma more than men and boys. Given the cultural set up and the sheer magnitude of the problem, assistance to women has generally been restricted hence many female veterans and soldiers have considered UCOBAC as a “bad experience”.⁶³⁹

For most Ugandans, the memory of a marauding army is not too remote and this colours their reception of an ex-combatant. Depending on which region and which forces the veteran fought for, for example, for the NRA, the veterans returning to the Central and Western regions had less hostility to face, whereas the Eastern and Northern regions faced considerable hostility. Antagonism and mistrust are a part of this reception. This often puts them on the defensive and results in antagonistic behaviour towards the civilians which in turn results in isolation and hence non-integration. But it does seem that sometimes integration has proved to be easy but this contradiction can be explained by the fact that local community conditions as well as the individual traits and personalities ultimately determine successful, social, political and economic re-integration.

In short, one can say that this model of re-integration and rehabilitation has been reasonably successful, though a formidable challenge. The key lessons to be learnt are:

⁶³⁹ World Bank Report, p 270-271.

1) Studies conducted in other countries as well, indicate that the *shorter the duration of service and the younger the ex-combatant was on demobilisation, social re-integration was easier. Female veterans had greater difficulties than their male counterparts. Also that in all case studies it is indicated that psychological⁶⁴⁰ re-integration remains a major problem. Ex-Combatants faced cold to hostile community reactions. An element of extreme importance seems to be the label that the returnee returned with and with which fraction they had fought with; the right or the wrong side!⁶⁴¹*

2) The medium to long term reintegration of combatants should not be neglected in favour of short term pacification and repatriation.

3) The needs of ex-combatants in the different phases of demobilisation, re-insertion and reintegration are different and hence all necessary support measures are required. A transitory safety net has to be provided to bridge the gap between these periods. According to the World Bank Report⁶⁴² "The particular problems of female and child soldiers as well as disabled combatants justify development of targeted interventions".

4) It is very crucial for the local communities to be involved in the implementation of this project.

⁶⁴⁰ see case studies in Lagnebro, L., *Finnish Children of War*, Institute of Migration, Turku, Finland, 1991 and Boothby, N., "Children in Emergencies" in Ressler, ME., Boothby, N., Steinbock, DJ., *Unaccompanied Children in Emergencies. Care and Placement in Wars, Natural Disasters and Refugee Movements*, New York: Oxford University Press, 1988. Also Rosenheck, R., "Impact of Post Traumatic Stress Disorders of World War II on the Next Generation," 174 (6) *Journal of Nervous and Mental Diseases*, 1986, pp 319-127. Punamaki, RL, "Childhood in the Shadow of War. A Psychological Study on Attitudes and Emotional Life of Israeli and Palestinian Children". vol. 5 *Current Research on Peace and Violence*, 1982; Raundalen, M., Dyregrov, A., Mugisha, C., Lwanga, J., "Four Investigations on Stress Among Children in Uganda", in Dodge, CP., Raundalen, M., (eds.) *War, Violence and Children in Uganda*, Oslo: Norwegian University Press, 1987. Bilu, Y., "The Other Nightmare :The Arab-Israeli Encounter as reflected in Childrens Dreams in Israel and the West Bank." vol. 10. no 3. *Political Psychology*, 1989.

⁶⁴¹ World Bank Report, p 14.

⁶⁴² *ibid.*

5) These children require more help both psychologically and physically to handle the trauma that they are suffering from.⁶⁴³

X. Current Recruitment Policies Of The UPDF :

Under the constitution of Uganda and the Statutory Instruments of 1993 No 7 The National Resistance Army (conditions of Service) (Men) Regulations, 1993 in paragraph 5(4) it reads “a recruiting officer shall not enrol a person under the apparent age of 18 years and above 30 years”.⁶⁴⁴ Given the existing infrastructure and insecurity in parts of the country and also the isolation of villages from towns and cities. It is not always possible to register births. So this use of the word “apparent” gives rise to some issues. For example, while I was in Gulu and moved around town and some army despatches, I saw some soldiers who were obviously not over 15 years of age. In a discussion with Lt Saban the PRO in Gulu, this question was raised. He defended the presence of these youngsters by saying it was not always possible to verify the ages of all enrolees. Sometimes, he said the natural build and other conditions also make a younger man look older or vice-versa. But on the whole he said they were trying to maintain this cut-off for age as the law required. Sometimes, however, there have been lapses. In the cities it seems that the age limit is adhered to.

⁶⁴³ For children separated from their families and familiar surroundings, It should be noted that in the aftermath of the second world war many Finnish children were taken from their families and moved to Sweden, studies conducted on these children have indicated that children suffered the trauma well into their adult life. There is also the example of the Greek children taken from their homes and sent to communist countries for safety and better quality of life who suffered similar trauma. see Ressler, Boothby and Steinbock, *Unaccompanied Children: Care and Protection in Wars, Natural Disasters , and Refugee Movements.*, Oxford University Press: Oxford, 1988.

⁶⁴⁴ From the perspective of international customary law, this age is in accordance with the norm of customary international accepting a legal consensus on the age of 18 as the age of legal majority. See specifically, Inter-Parliamentary Union, *Electoral Systems: A World Wide Comparative Study*, Geneva, 1993. A vast majority , i.e. 109 States opted for 18 as the minimum age limit, while most others have a slightly higher limit i.e. 19-21 and in 4 four countries alone, is 16 found to be the voting age. For the emerging norm on 18 as the minimum age of recruitment, see page 280 of this thesis. For a comparison table of both the minimum age of voting and recruitment see, Goodwin-Gill, G., Cohn, I., *Child Soldiers: The Role of Children in Armed Conflicts*, Clarendon : Oxford, 1994, pp 187-208. See also statement on an emerging consensus on the age of 18 as the minimum age of participation in hostilities by Mary Robinson, High Commissioner for Human Rights, in the GA of the UN on 9 February 1998, in E/CN.4/1998/102, para 38.

XI. The Present Day Conflict: The LRA And Child Soldiers

The National Resistance Army (NRA) came to power in January 1986. They defeated the Uganda National Liberation Army (UNLA). The UNLA soldiers mostly come from the districts of Gulu and Kitgum. After the NRA came to power, the UNLA disbanded. In late 1986, a number of anti-government movements started. By now, the NRA in an effort to have a more nationally homogenous structure had changed from the NRA to the Uganda Peoples Defence Forces (UPDF). They also made an offer to all fighting groups to join the national army. The one defect of this sudden influx of other troops into the ranks meant that there wasn't enough time for them to be trained and be given a sound ideological basis like the earlier NRA soldiers.

On 8 March 1986, the 35th Battalion of the NRA now the UPDF was sent to Kitgum/Gulu. This battalion included soldiers of the UNLA and Fedemo troops who had been integrated into the NRA/M now the UPDF. These soldiers were mainly Bugandan and used this opportunity to loot and rape, an act which was widely accepted as justified in response to the many years that they had suffered at the hands of the Acholi's.

This resulted in a number of movements and uprisings. All were in response to what the people felt to be reprisals by the UPDF on the Acholi people. The most notorious and successful of these groups was that of the Holy Spirit Movement initially called the Holy Spirit Mobile Force 1 and was led by Alice Lakwena.⁶⁴⁵ She was also addressed as the Priestess/Witch. She mobilised the former UNLA and the locals into a fighting force against the UPDF. She did not have a clear political agenda. Her goal was the installation of a leader "chosen by God and was going to come from under water". It is alleged that she prayed for stones "to turn into bombs" while fighting to gain control over Kampala. Her forces made it to Jinja approximately 60 miles from Kampala. The Holy Spirit Movement was finally defeated at Iganga in 1987. Not suprisingly her tactics had led to

⁶⁴⁵ see article by Behrend , H., "Is Alice Lakwena a Witch? The Holy Spirit Movement and its fight against evil in the North." in Behrend, H., *Alice Lakwena and the Holy Spirits : War in Northern Uganda 1985-1997*, James Curry : Oxford, Fountain Publishers : Kampala, 1999.

the death of thousands of her followers in the civil war. She fled to Kenya and sought asylum/exile.⁶⁴⁶

In mid-1987, 22 year old Joseph Kony claimed divine ordination and led a breakaway fraction to form the Holy Spirit Mobile Force 11. He claimed to have been instructed by God in a vision to declare war against the heathen NRA and “install a government that would rule using the Bible’s Ten Commandments”. He recruited former followers of Lakwena and others by force when he did not get volunteers. In 1988, Kony was declared the spiritual head of the political and military group. He was declared to be the “lao” or the sender. In 1989, his army was said to number 10, 000 and underwent many name changes before finally becoming the Lord’s Resistance Army (LRA).

The UPDF, local militia and the local defence forces all mounted a forceful effort to stop Kony. In 1992, this pressure on Kony resulted in the LRA intensifying their use of force to recruit children and young adults. The LRA invaded villages, remote townships in Gulu, Kitgum, Apac, Lira, Moyo districts. Looting, killing, rape and widespread abuse characterised this recruitment drive. Those who resisted found themselves mutilated. It was common practice to chop off ears, noses and other body parts with the panga. In 1994, the pressure intensified and the efforts to hunt for Kony and his followers increased further. This resulted in the LRA fleeing to Southern Sudan. The LRA and Kony received sanctuary, training facilities, food, weapons and other military support from the Government of Sudan.⁶⁴⁷

The Sudanese Peoples Liberation Front (SPLA) are fighting against the Sudanese Government. It is alleged that this anti-Sudan group is receiving support from the Government of Uganda. So it seems that this is a proxy war being fought between the two governments but will not be discussed here.

⁶⁴⁶ UNHCR fought her case and she has now been granted refugee status in Kenya.

⁶⁴⁷ for a more detailed account of the Sudanese involvement see the daily newspapers and AI report *Breaking God’s Commands*, AI, September 1997 and the HRW, *The Scars of Death*, HRW, September 1997.

XI.A . The Impact Of The Conflict In Northern Uganda

In Gulu district, which is the most effected district, majority of social services have ceased to exist or are operating with minimal resources and insufficient staff. Epidemics such as measles and diarrhoea continue to pose a threat to the lives of people. While I was there during the last 15 days of August 1997, 80 odd deaths were reported due to measles in one refugee camp. Health delivery and surveillance systems are seriously inadequate. In the remaining 16 units of Gulu, drugs and supplies are insufficient to meet the continuously increasing demands. Infant mortality rate had risen to 122/1000 live births, chronic malnutrition is present among 50% of the children under five. The health sector has been characterised by underfunding and low health expenditure per capita. Besides, this fact, there is also the problem that doctors and hospitals have been targeted by the LRA, as they assist the UPDF and people who are enemies of the LRA, i.e. escapees, suspected collaborators and people who have resisted the demands of the LRA.

The high level of traumatization experienced by the children have affected them permanently.⁶⁴⁸ A survey conducted in Kitgum established that: among the internally displaced people, a large number of mother's reported PTSD related symptoms; 67% of them expressed concern at unusual behaviour; 54% reported ill health; 27% heard their children shout and awake and have nightmares regularly; and 19% reported cases of sleepwalking in their children. Most children display symptoms of anxiety, depression, hallucinations and nightmares. They tend to be hopeless, desperate, angry, fearful and insecure. They have difficulty in relating to others socially and feel stigmatised by the rest of the society. Some of them express themselves in an aggressive manner and have no confidence in adults around them, in their ability to protect them. They have a poor capacity to plan ahead.⁶⁴⁹

⁶⁴⁸ Doctors Rober S Pynoos and Spencer Eth state that "the witnessing of extreme violence constitutes a unique, psychic trauma". See Pynoos, RS, Eth., S., "Witness to Violence: The Child Interview" in vol 25, *Journal of the American Academy of Child Psychiatry*, 1986, p 315.

⁶⁴⁹ Gifty Quarcoo, *Traumatized Children of War in Gulu District of Northern Uganda; A Survey Report*, World Vision , Uganda, February 1995.

As far as education is concerned, the education system has deteriorated in the 1970-80's due to civil strife and mismanagement, lack of planning, coupled by increased enrolments, inadequate infra structure, facilities and basic resources. In response to the current conflict, in 1996-September 97, 75 schools were burnt down and over 215 teachers killed. In 1997, 178 out of 179 schools were closed. These figures are from Gulu district alone.⁶⁵⁰ In general, over 60,000 school children have been displaced and moved to temporary schools. A large number have stopped school completely due to economic hardship.⁶⁵¹

In Gulu district, the number of juvenile cases appearing in court has gone up and is on the increase as the number of displaced people goes up.

XI. C Recruitment Policies Of The LRA

XI.C. i .Voluntary :

In the beginning when the movement was started by Alice Lakwena. and possibly in the early years of Kony's leadership, i.e. between the years 1987 to early 1989, individuals volunteered. Since then there have been practically no reported or confirmed enrolments. The ones that joined in the beginning continue to remain for reason such as fear of punishment and reprisals both from the state and from the rebel fraction itself. Benson an adult deserter from the LRA⁶⁵² testified that:

“very many people want to escape. But Kony said if any escaped he would kill them. After his speech, four people tried. First he took out their eyes, and then they were brought to the killing ground and ordered to be killed. Then he ordered their heads to be cast aside, and every new recruit had to sit on the body and touch the blood and smear it on their clothes. The intention was to scare you off, so you forget about returning home.”

⁶⁵⁰ Figures from UNICEF , Kampala office, Uganda .

⁶⁵¹ Figures from UNICEF , Kampala office, Uganda .

⁶⁵² There have been some incidents of desertion by adult leaders, men recently.

The few who manage to escape, live in constant fear of re-capture and the knowledge that because of their action their family and village is a risk.

XI.C. ii . Abductions:

The LRA from 1990 upto the present day have been sneaking into Gulu, Kitgum and Moyo and abducting children while looting food, killing people and planting landmines. This is the most favoured method of getting man-power for fighting, to loot, to work as slaves. The children cook, clean, and also provide sexual services to the commanders. The allocation of women depends on your performance on the field and a higher rank. The women are almost in every instance, school girls kidnapped directly or abducted from their boarding schools.⁶⁵³ All of them fight, go on raids, cook and are given as “wives” to men. Joseph Kony is reported to have 33 school girls as his “wives.”

Bosco (15),⁶⁵⁴ stated that his family had taken refuge in the bush during an attack. The rebels were chasing a girl. She happened to pass close to him and so he got captured. The rebels and their captives moved for about 3 days without sleeping. They then all fell asleep. When he awoke he found he’d been left behind. He walked back to the village. After 2 weeks the rebels returned. The neighbours were beaten-up until they identified him. He was then re-captured by the rebels. He says he was beaten a lot, questioned why he had escaped, and warned not to escape.

Kidega Tony (15),⁶⁵⁵ a student in class P5 at school, at the time he was abducted, even remembers the date that he was abducted on. On 28th March 1996, he was digging in the fields along the road to Patiko. The rebels were passing by. They asked him to carry their luggage. When he refused around 80 of them started shooting at him with their catapults.

⁶⁵³ The case of the 139 girls from St. Mary’s College, Aboke being a very prominent one. Nelson Mandela himself putting in a request to the Sudanese government to facilitate the safe return of these children. It has also come before the Commission on Human Rights, see document : Abduction of children from northern Uganda - Commission on Human Rights resolution 1999/43; E/CN.4/RES/1999/43 , 26 April 1999.

⁶⁵⁴ personal interview, Gulu.

⁶⁵⁵ personal interview, Gulu.

He carried the livestock that the rebels had taken from the village. There were many other children who had been taken captive as well. The villagers were warned against going to the soldiers in Awatch.

Pamela (13),⁶⁵⁶ who was abducted at night from her home testified, “I still get bad dreams and wake up screaming and sweating. Even when I am not asleep, I get bad dreams. I hear the rebels threatening to kill me. I see a long line of frightened children tied with ropes and hear rebels with guns and panga ordering them to kill the children. At night, I don't want to see any torch flashes. They remind me of the night I was abducted and I feel very frightened.”

XI.D . Duties And Experiences⁶⁵⁷

The initiation of all these children involves killing someone, a known person preferably from their community or area. So that it is impossible for the child to re-integrate. Sometimes they have to kill another child who has either tried to escape or who is being punished for some offence. Pamela (13),⁶⁵⁸ stated “Two young girls caught attempting to escape were brought near us and chopped into pieces by other children, who were ordered to do so”. Mandaro (12), commenting on the death of a boy who was flogged to death: “I was forced to join in the flogging. All new recruits were forced to participate in the beating and killing as a warning to us not to escape”.⁶⁵⁹

The Children that are abducted by the LRA are forced to fight on behalf of the LRA forces against the UPDF and the SPLA.⁶⁶⁰ They are sent on raids and they loot, food, clothes and ammunition. They kill, torture and maim. They kidnap other children and adults. They

⁶⁵⁶ personal interview, Gulu.

⁶⁵⁷ for detailed testimonies see, UNICEF/WORLD VISION, *Shattered Innocence* , 1996. Amnesty International, *Breaking the Lords Commandments*, 18 Sept. 1997, Human Rights Watch ,*The Scars of Death*, 18 September 1997, Muhumuza, Robby, *Girls Under Guns: A Case Study of Girls Abducted by Joseph Kony's Lord's Resistance Army (LRA) in Northern Uganda* , World Vision, Uganda, May 1996. Muhumuza, R., *The Gun Children of Uganda - The Reluctant Child Soldiers in Joseph Kony's Lord's Resistance Army (LRA) in Northern Uganda*, World Vision, Kampala, Dec 1995.

⁶⁵⁸ Personal Interview.

⁶⁵⁹ Personal Interview.

⁶⁶⁰ The Sudanese People's Liberation Army, led by John Garang. A predominantly Christian South fighting against the Moslem North Khartoum Govt of President Bashir in Sudan.

mete out the punishments they are told to, on the civilian population. Children have also been reported to be used as human shields.⁶⁶¹ Pamela (13) related to me that, when a government helicopter was spotted by the leaders they stripped and made the children put on the uniform of the rebel fraction so that the government forces would shoot at the children instead of them.⁶⁶² They lay mines,⁶⁶³ if need be they clear mines. They are taught parade skills, and how to use a gun. They cook for the commanders and their families but have to dig for their food i.e. wild fruits and leaves. Many children die of starvation and thirst. They are accepted as an easily replaceable commodity.⁶⁶⁴ It has also been reported that abducted children from Gulu i.e. 300 girls and 700 boys have been exchanged for guns in Sudan.⁶⁶⁵

“This is a real war.....many die, many are injured.” was the comment of one 15 year old after escaping.⁶⁶⁶ The experiences include captivity, torture, killing others, being tortured and wounded/mutilated themselves, persistent sexual abuse, intimidation and humiliation, walking long distances without food and drink, barefoot and half clothed over rough terrain. Besides this, the children are forced to travel long distances under excruciating conditions and many die on the way from hunger, thirst, tiredness. One boy spoke of this: “to say I am tired, is an invitation to get killed”.⁶⁶⁷ Estella, a 14 year old: “It was tough. Some children who were too weak to walk were just chopped up with pangas and left to die on the way. This scared me so much”.⁶⁶⁸ Janet a 16 year old remembered that: “the rebels were murderous and merciless. I saw a young boy with swollen feet because of walking long distances knifed to death by the rebels because he was so weak and tired he could not walk anymore. He pleaded for mercy as the blood gushed out of his neck But they just laughed. I was then forced to step on his bloody dead body. I was warned that if

⁶⁶¹ *The Crusader* of 9 September 1997, Kampala, Uganda.

⁶⁶² Personal Interview.

⁶⁶³ I was returning from a assessment visit to the homes of 3 boys in the bush, when we stumbled across a group of 3-4 children , guarded by one adult rebel, laying mines on the road.

⁶⁶⁴ see also *Children of War*, Radda Barnen no 1/00 March 2000 on p 4, and No. 2/00 July 2000 p. 7 for reports of Kenyan street boys being sold to the rebels ranks in the DRC, for 3 US dollors per child.

⁶⁶⁵ World Vision , Gulu.

⁶⁶⁶ Personal Interview.

⁶⁶⁷ Personal Interview.

⁶⁶⁸ Personal Interview.

I ever get tired or try to escape, I would be treated in the same manner.. I also witnessed another young boy being killed after he had attempted to escape”.⁶⁶⁹ Jullius a 15 year old: “I remember life in Sudan was very tough. There was a lack of food and we were forced to eat wild leaves. We were beaten a lot and girls were forcefully married of to men who were cruel”.⁶⁷⁰ Another said, “We walked long distances barefoot, became thirsty and drunk dirty water. While in Sudan we were treated like slaves. We would wake up early morning to dig in the garden, then dig latrines, build officers houses with no rest and not enough to eat. We would eat leaves, grass, *anything that would not kill you, you would eat.*”⁶⁷¹

All who attempt to escape or have succeeded live in constant fear of a reprisal. In one instance, a boy escaped with a gun. Thirty children were ordered to go to his home in Palabek, kill everyone they found there and destroy the whole homestead. They burnt the houses, killed his uncle and dogs and slashed papaw and banana trees in the compound.⁶⁷² This atmosphere of fear is constantly fuelled and children live in abject terror. “They said if I tried to escape they will kill me, and kill my parents and burn my house.”⁶⁷³

XII . Effects Of Being A Child Soldier

A survey conducted by World Vision, an international NGO suggested that 86% of abducted children were between the ages of 11-22 years of age and had been abducted for a period of 1-12 months.⁶⁷⁴ Further recruitment surveys conducted in January 1995 show that: 2% of abductees were between the ages of 5-10 years, 44% 11-16, 37% 17-22 years, 10% between 23 - 28 years, 7% between 29-51 years of age. The sex ratio was 31% female to 69% male.

⁶⁶⁹ Personal Interview.

⁶⁷⁰ Personal Interview.

⁶⁷¹ Personal Interview.

⁶⁷² testimony of one of the children who formed the group who went to render the punishment to the homestead of the escapee.

⁶⁷³ Doris, age 15 in personal interview.

⁶⁷⁴ Mrs Gifty Quarcoo - a child psychologist based in Kampala who conducted the survey for World Vision, Uganda, in Gulu district.

With little or no military training, they are made to fight battles against the national army of Uganda the UPDF and also against the SPLA in Sudan. Either way the children have no choice but to kill to survive.

Children who have been fighting or have fought have all been forced to kill. 17 year old Grace, who spend 4 years in the bush with the rebels said “they used to tell me to torture people by chopping off their ears, nose and mouth. I did it so many times that after some time it became normal to me. If you don’t do it they kill you or torture you yourself. You have to do what they tell you”.⁶⁷⁵ In fact , it is a chilling thought but a 12 year old testified that, “ I usually get nightmares. But to me killing had become normal. It is like shaking hands of greeting”.⁶⁷⁶

The brutalisation of children has become so extreme that there are reports of a some who are used to this and no longer want to come back⁶⁷⁷ and some are happy with the perks they get . Tragically some girls who have lived in the bush for a long time no longer want to come back as they fear the rejection from their communities and families. Richard a 14 year old on his experiences, “I was beaten 15 strokes the day I was abducted. So later I revenged on other children by beating them thoroughly well. I saw 5 people who were tied and burnt inside a house. I often hear them wailing and crying for mercy in my head. I sometimes dream about these terrible things I have witnessed and I wake up screaming and sweating”.⁶⁷⁸ Some are bitter for example, one girl who is the leader of the attacks on the secondary schools in Gulu told some other girls that “her life is ruined so she is going to ruin other peoples lives”.⁶⁷⁹

Janet a 16 year old related that :“I was forced to be a “wife” to a big rebel man”. After she escaped, she went back to school . But her memories kept disturbing her and often in the

⁶⁷⁵ Personal Interview.

⁶⁷⁶ Justin, in a personal interview in Gulu.

⁶⁷⁷ Psychologist say this could be also the case of children going into complete denial phase.

⁶⁷⁸ Personal interview, Gulu.

⁶⁷⁹ related by some former girl-soldiers in a personal conversation.

day time when she would shout with fear the other children would laugh at her and also tease her calling her “wife of a rebel”. On hearing that the rebels were planing to re-capture all the girls who had escaped she said: “I almost killed myself.....I thought of running way from home. I found a man who was willing to hide me in a village far away from my home where the rebels would not be able to catch me. Though I did not want to get married yet, and moreover to a man with another wife, I did not have an alternate”.⁶⁸⁰ Girls remain particularly vulnerable. The cultural and social conditions make them vulnerable to ridicule and stigmatisation. The girls with babies find it even more difficult to find acceptance. The response and the way they are treated on their return is crucial. It is without any doubt stressful for all, individuals, families and neighbours who know that this child is responsible for their suffering and loss, because the rebels use these children to come back and commit atrocities in their areas and for children because of the guilt they carry.

The ones that are alive are deeply traumatised. Almost all girls have some STD or the other, additionally, they have wounds from mines and guns, burn wounds from carrying boiling food on the heads in the event of a sudden attack. They are beaten brutally for minor reasons.⁶⁸¹ The trauma of these children is quite visible and they suffer nightmares, violent responses and distrust in adults are very common expressions.

Children often find it very difficult to go back to a normal childhood.⁶⁸² 12 year old David who spent one year with the rebels, was abducted when he was almost 10 years old said “I

⁶⁸⁰ UNICEF/WORLD VISION Report, *Shattered Innocence: Testimonies of Children Abducted in Northern Uganda*, UNICEF/WORLD VISION, Kampala, Uganda , p 5-6, 1996.

⁶⁸¹ In course of conversations with former abductees, it was quite common to hear that the children were given 100-150 lashes for minor offences like dropping food or showing a disinclination towards fighting. Sometimes the same merited being killed depending on the commander.

⁶⁸² SUMMARY OF REPORTED CASES OF CHILDREN IN 1996. (Source - Probation and Welfare Office, Gulu District.)

CATEGORY	NUMBER
Street Children	72
Child Offenders	89
Child Neglect	277
Abduction	over 1600
Defilement	38

have bad memories of the war. I witnesses continuous killing. If a child’s load was too heavy or if he was clumsy and fell with it, he would be beaten and sometimes killed. If you get out of line or have swollen feet as a result of walking long distance, you could be killed. I saw a number of children being killed with bayonets, clubs and guns. I was forced to participate once... all the children were given a big stick and were ordered to beat him till he died..... sometimes when I am sleeping, the boy we killed visits me and accuses me of killing him when he was innocent. Sometimes even during the day, I hear him crying begging for mercy to me not to kill him”.⁶⁸³ Today most of these children are unsure about their future. Their reception in their community and by the families is very unsure as well. This adds further to their trauma and shame.

The long term effects of their time spent in active combat and the torture that they have undergone is not yet known. Studies are still being carried out.⁶⁸⁴

XIII. Rehabilitation And Re-Integration:⁶⁸⁵

Former child soldiers in 1996 were handed over directly to the NGO centres in Gulu, occasionally a few were required to spend a day or two in the army barracks providing the military intelligence with information. The two NGOs working with child soldiers are the GUSCO centre and the World Vision Centre for War Children, both based in Gulu.

The children on arrival are often injured, needing medical care, exhausted, dirty and hungry, traumatised and not willing to trust anyone. On arrival, their immediate physical needs are taken care of without any pressure to talk. Slowly, the counsellors build up a relationship with the child. Slowly the children become willing to talk and share their experiences and in this way are able to overcome their trauma.

Forced Marriage	20
Others	31

⁶⁸³ personal interview, Gulu.
⁶⁸⁴ Mackoud, Jareg and others .
⁶⁸⁵ see next chapter for more details.

The children are encouraged to go back to education but also given vocational training at these centres to provide them with skills to lead constructive lives once they leave. Family reunification is the principal factor in effective social reintegration. And the centres work on tracing the family immediate or extended to reunite the children. Children return to their homes and communities after an assessment has been made by the counsellors. But this is not always possible, as parents have fears and apprehensions. This is a major hurdle in the successful rehabilitation of these children: often when no adult comes to claim them, these children suffer depression, abandonment and rejection.

XIV. Legal Protection To Children Under Uganda's National Laws:

According to Ugandan law a child is an individual upto the age of 18. Though the age of majority has been defined as "18" there is some difference in the terminology used in different statutes. For example: The Approved Schools Act defines a child as a person under 12 years of age and juvenile as a person of 7-16 years. The Reformatory Schools Act, though does not state a lower age limit uses the term "youthful offender" to indicate a male offender convicted of a imprisonable offence, who is under the age of 18. The Divorce law, uses the term minor in reference to males under the age of 15 and females under 13. Under the Affiliation Act, an order of maintenance terminates when the child is 16 years old. However, since the Children Statute of 1996 has come into force, the age of majority has now been established as 18, though the age of criminal responsibility is 12 years.⁶⁸⁶

Under the Childrens Statute and Article 24 of the Constitution, respect for human dignity and protection from inhuman and degrading treatment is upheld. This provides that no person will be subjected to any form of torture, cruel, inhuman or degrading treatment or

⁶⁸⁶ see *The Penal Code Act - Cap 106*, Law Development Centre : Kampala, Revised Edition, 31 December 1982, p 26. and Odoki, BJ., *A Guide to the Criminal Procedure in Uganda*, Law Development Centre : Kampala, 2nd edition, 1990, pp 142 - 143.

punishment. Article 25 of the same offers protection from slavery, servitude and forced labour.

Article 31(5) reads “children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law.”

Article 34 deals exclusively with children rights and states:

(1) Subject to laws enacted in their best interests, children shall have the right to know and be cared for by their parents or those entitled by law to bring them up.

(2) A child is entitled to basic education which shall be the responsibility of the state and the parents of the child.

(3) No child shall be deprived by any person of medical treatment, education or any other social or economic benefit by reasons of religious or other beliefs.

(4) Children are entitled to be protected from social or economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or to be harmful to their health or physical, mental, spiritual, moral or social development.

(5) For the purposes of clause (4) of this article, children shall be persons under the age of sixteen years.

(6) A Child offender who is kept in lawful custody or detention shall be kept separately from adult offenders.

(7) The law shall accord special protection to orphans and other vulnerable children.

Uganda ratified the CRC on 17 August 1990, which entered into force 2 September 1990; The first report by Uganda to the Committee on the Rights of the Child was submitted on 17 June 1996.⁶⁸⁷ It ratified the OAU Charter on the Rights and Welfare of the Child on 26th February 1992. Uganda participated in the World Summit for children. It has acceded

⁶⁸⁷ CRC / C/3/Add.40 *Initial reports of States parties due in 1992 : Uganda . 17/06/96.*

to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 3 November 1986. The ratification of the African Charter on Human and Peoples Rights took place on 10 May 1986. Uganda acceded to the Geneva Convention of 1949 on 18 May 1964 and to the Additional Protocols on 13 March 1991. The Additional Protocols came into force on 13 September 1991. Uganda ratified the Convention on the Elimination of all Forms of Discrimination Against Women in 1985. Under Uganda's national laws, the Geneva Conventions and their Additional Protocols all apply, as they have been incorporated into the national system as the Geneva Conventions Act (Uganda). Further, the Constitution of Uganda and the NRA code of conduct all cater to this and regulate internal conflict.⁶⁸⁸

The CRC has been incorporated into domestic law in the form of the Children's Statute of 1996 and can be enforced directly in the national courts. The Children's Statute of 1996, has been described as "a milestone in child care and protection because it makes both care and protection legally enforceable".⁶⁸⁹ However, as far as the CRC and its implementation is concerned, the implementation has been slow because of financial constraints and scarcity of other necessary resources to facilitate implementation.⁶⁹⁰ Though the age of criminal responsibility is 12,⁶⁹¹ according to the country representative of UNICEF in Uganda:

"The policies in Uganda are very good. They are probably among the best in Africa. There is for instance the children's statute which was ratified in 1996. We hope it will be implemented in the district and sub-district levels. This is one of the most progressive pieces of legislation in Africa. It is excellent. We also have many other positive policies here... The affirmative action for women and girls... universal primary education which is just coming into force defilement of young girls is a

⁶⁸⁸ *ibid.*

⁶⁸⁹ Mwesige, P., quoting the UCRNN Report in *Child -Link* p 16. Kampala : 1996

⁶⁹⁰ The government has taken many positive steps to fulfil its obligations under the CRC see pages 229 -231 of this thesis. However, the process of implementation as a whole has been slow, due to practical constraints such as finances and absence of expertise. For example, the concept of the Children's Desk (p 234) was detailed in mid-1997, but became reality only in late 1998 after funding was provided by SCF, Sweden and Denmark.

⁶⁹¹ Sec 89 of the Children Statute of 1996

very serious crime. The policies are there. I think the real challenge in Uganda is the implementation of these policies at family, community and district levels. I think that is a real problem, because in many parts of Uganda, traditional law is in conflict with the modern law and it is very hard when that happens.... I think we need to use the official law as a way of re-instating and re-informing the true tradition of Uganda. (i.e. children are treasured).”⁶⁹²

The African Charter (Banjul) stresses in Article 18 on the centrality of the family as the “natural unit and basis of society” which shall be protected by the state. Article 23 contains the right to peace and in paragraph (2)(a) it places an obligation on anyone benefiting from asylum not to indulge in or assist in subversive activities of any kind. Article 29(7) reads: “to preserve and strengthen positive African cultural values, ... in general, to contribute to the promotion of the moral well-being of society”. The African Charter too has been ratified and the appropriate national legislation exists but are such implementation procedures followed in practice? Some other questions that need to be looked at are: is the juvenile justice system ‘child-friendly’? Are children treated with dignity and respect for their human rights? Is detention used only as an option of last resort? Are children deprived of their liberty held apart from adults in all cases? Are professionals involved with the juvenile justice system trained and familiar with the CRC, Beijing Rules and the Riyadh Guidelines?

XV.NGO Responses:

There are a number of NGOs working in Uganda and many are concentrated in the North. In Gulu and Kitgum districts there are the ICRC, the Medecin du Monde, Medecin Sans Frontieres, the UNICEF, a number of church missions including the Camboni Brothers and Sisters, AVSI, WFP, World Vision International and GUSCO. The NGOs working specifically with child soldiers are World Vision Uganda, GUSCO, AVSI and UNICEF, Uganda which is based in Kampala but works closely with the various NGO organisations.

⁶⁹² Personal interview.

They are providing medical, social, economic and psycho-social support and running advocacy programs as well.

XV.A. The Gulu Save The Children Organisation (GUSCO) :

This indigenous organisation is voluntary in nature and started functioning on 4 September 1994. Its main activities are collecting children from barracks and facilitating their return to homes and families. It gives psycho-social support to all children and parents as well as providing the children with medical relief, food and basic amenities while they are staying with them. As of September 1997, 56 children were at GUSCO. All were between the ages of 11-18. GUSCO is limited in its response as it is not in a position to cater to more than 60 children at a time. The time period that a child spends at the centre is not fixed. It differs from case to case, although follow up can be from 3 weeks to 3 months to years. Another limitation in its response is that it is strict about the age limit. There are instances when a child has been abducted at the age of 14-15 or lower and has over time grown to be an adult, but knows nothing about life outside a combat zone; but the fact that he/she falls out of the 18 year age limit means that they have not been allowed to be at GUSCO. This does create problems for re-integration. This category of child-soldiers seem to be comparatively isolated. But on the whole GUSCO is coping well and it does seem practical not to overstretch themselves. GUSCO provides proper care and attention to the number they can. Accort Evelyn a 13 year old, who has been at the GUSCO centre since 26th August 1997, expressed her views about the centre saying "GUSCO is very good compared to the barracks. I feel all of us are civilians here. I can laugh. I can play here".⁶⁹³

XV.B. World Vision

World Vision International has 3 homes for children affected by war, In Gulu, Kitgum and Kiryadonga. Kiryandongo Centre was opened in March 1995, for children who have escaped rebel activity. Approximately 2,005 children have passed through this centre, of

⁶⁹³ Personal interview.

which about 1,800 of them are boys and 200 are girls. The conclusion it is submitted is not that more boys are abducted than girls but that a greater number of boys manage to escape captivity when compared to girls. 80% of these children are from Gulu and Kitgum. The World Vision centre in Gulu has been operational for slightly longer than the Kiryandongo centre.

Children spend about 10-14 days being de-briefed by the government forces. They are then handed over to World Vision Centre. Children stay at the World Vision Home for around 45 days, where they receive individual and group therapy. They are provided vocational skill training as well. During these 45 days in the centre, an effort is made to prepare communities and families of these children. The children's progress is monitored and their general welfare is followed for several months. But re-integration of these children remains a problem chiefly due to the continuing insecurity.⁶⁹⁴ The fears of re-capture and reprisals from the rebel forces keep the community and parents in a state of terror. In Gulu district for example the number of abandoned children is on the increase. This phenomenon is largely a combination of two factors: 1. the parents inability to feed them and 2. the community's fears of reprisals. Also this means that the abandonment makes the children make their way back to Konys rebels. They are reportedly being used to plant landmines in Gulu itself.⁶⁹⁵

XV.C.UNICEF, Uganda:

UNICEF is based in Kampala, the capital of the country, and works in close collaboration with Uganda National Council for Children (NCC), an umbrella organisation working for children, and others like AVSI, World Vision International, GUSCO and the Uganda Human Rights Commission. With reference to child-soldiers, the main implementing NGOs are World Vision and GUSCO. UNICEF is also working and training staff in remote areas to monitor and report abductions and returnees. It is working on programs with the community to facilitate re-integration and re-habilitation of these children.

⁶⁹⁴ I accompanied a social worker from World Vision on one trip. We were warned away in time by the boy's family as the rebels were in their home.

⁶⁹⁵ UNICEF, *The Gulu District Emergency Plan of Action*, Gulu, Uganda, 14 Feb. 1997, p 2.

A review of UNICEF policies and strategies to strengthen and implement child protection shows that much effort is being made. for example, the UNICEF plan of emergency response is very important. It looks at :

1. Peace and conflict resolution
2. Life
3. Health
4. Basic Rights
5. Family Climate
6. Psychosocial well being
8. Settlement
9. Sufficiency
- 10 Education
11. Healthy, Social and Cultural environment

XV .D. The African Network For Prevention And Protection Against Child Abuse And Neglect (ANPPCAN):

The Uganda Charter of the ANPPCAN was launched in July 1992. Its objectives are to carry out advocacy for childrens' rights with particular focus on the CRC and the African Charter on the Rights and Welfare of the Child. Its major concern is child abuse (sexual) and child labour. It is working at the grass-root level. It equips communities with the knowledge and skills to be able to protect their children.

XV.E. ICRC :

The ICRC in Uganda has been working in two major areas, assistance and protection. There are, it is estimated some 300,000 internally displaced people in Uganda. Conditions in many parts of the country therefore are conducive to poverty, illness and malnutrition. To internally displaced people who have some coping mechanisms, such as family or

rented access to land, the ICRC provides basic non-food necessities, including hoes and small agricultural packages, so as to avoid a further deterioration of their situation and to help them get back on their feet, as noted in Gulu. The organisations all seem to be in touch with each other's activities so as not to duplicate work. Newly displaced people, many of whom lose all their belongings when fleeing have also been provided with food and shelter materials as the situation requires.

An overview of ICRC operations in Uganda would be :⁶⁹⁶

Assistance - although the majority of the population is self-sufficient, there are still many affected people who need humanitarian support. The most urgent needs are in those areas of Uganda where conflict has continued to disrupt the livelihood of many thousands of civilians. Most assistance programmes aim at stimulating agricultural activities, rather than create dependency on food handouts. During the first six months of 1997, the ICRC implemented an assistance programme for over 200, 000 people in the districts of Gulu, Kitgum, West-Nile, Kasese and Bundibugyo. The assistance given was in the form of blankets, soap, kitchen sets, tarpaulins and jerry-cans. For example in April 1997, the URCS - in co-operation with the ICRC - distributed hoes and soap to 10,000 people affected by the fighting in Kitgum district. More recently, the ICRC and URCS embarked on a comprehensive programme by distributing emergency help in the Gulu district, sub-counties of Nwoya, Aswa and Kilak - providing over 110, 000 persons with hoes, seeds, vegetable seeds, soap, cooking pots and blankets. In some cases, this non-food relief is not sufficient and food assistance has to be provided to the most needy population affected by the conflict situation.

In the case of *protection of detainees*, the ICRC has supplied medicines for specific treatments. In Uganda, the detaining authorities have granted access to military barracks and prisons, as well as to civilian prisons and detention facilities. More than 1,500

⁶⁹⁶ all information on the ICRC and its operations has been assimilated from various publications. When I visited Uganda, I was not able to get any access to any information from the office of the ICRC, but made some observations while in Gulu, Kitgum and Kampala.

detainees have now been registered by the ICRC delegates. They will continue to be assessed until their release. The ICRC has also registered 114 Sudanese soldiers captured by the Ugandan army in mid-April 1998. Most child-soldiers that I met between August-October 1997, indicated that they had received fair treatment at the hands of the Army.

Promoting the laws of war - Both ICRC and URCS work to heighten awareness and understanding of the rules applicable during armed conflict. Since the beginning of 1997, more than 850 army officers and NCOs were familiarised with the Laws of War, which aims at minimising the suffering of civilians and soldiers during military operations. In order to be efficient, the law of war should be integrated at all levels of military instruction in Uganda. Another aspect of ICRC dissemination activities involves promoting the work and activities of the Red Cross in order to ensure access to the victims and guaranteeing basic security conditions for its workers. A number of specially adapted publications have been created to reach specific target audiences. As part of its global campaign against landmines, the ICRC organised an art exhibition in Kampala which depicted the effects of these weapons on the civilian population. While I was in Gulu, posters by the ICRC in local languages were very visible, drafted in a simple language stating the laws of war, and creating awareness.⁶⁹⁷

The ICRC continues to work as a *tracing agency* in Uganda. This could be useful in the process of tracing abducted and found children and being able to understand the magnitude of the problem.

Working together with the URCS - with the aim of having sustainable humanitarian activities in the country, the ICRC supports some key programmes of the Uganda Red Cross Society (URCS). The URCS has full responsibility for implementing tracing activities as well as important parts of the dissemination and information work in Uganda. Because of its extensive branch network and its volunteers, the national Red

⁶⁹⁷ The essence of Common Article 3 and fundamental guarantees and principles of humanitarian law were the most common posters that I saw around the town of Gulu.

Cross Society has become increasingly involved in assistance programmes in Acholiland, West Nile, Kasese and Bundibugyo.

However, one sector of the population that must be helped above all is that of the children. "Humanitarian agencies may be impartial, but their duty is first and foremost to these most vulnerable of victims. Children must be given a chance to survive and to play their part in society. They hold the future of the human race in their hands. Those who see the daily reality of war - ICRC delegates, Red Cross and Red Crescent volunteers, those working for other humanitarian agencies - are sure of one thing: something must be done to reverse the trend of today's merciless power struggles in which children are no longer the chance victims but are actually singled out as targets, this is the very least that we adults can do for our children".⁶⁹⁸ The ICRC's strategy of providing assistance in difficult situations and at the same time mobilising support for humanitarian law and its underlying ethical values, and disseminating the laws of war widely are commendable. The ICRC continues to seek to contribute to developing the law further, raise awareness of problems related to weapons and strengthen the operational capacity of National Red Cross and Red Crescent Societies, thus working to protect children both at a national and international level.⁶⁹⁹

XVI. Govt. Response To The Child Soldiers:

It has been one of the aims of Museveni's Government to shift the burden of public expenditure from defence and security to the promotion of social and economic development. A major part in this has been the demobilisation and subsequent re-integration of approximately 90,000 soldiers of the NRA, which included 3000 child-soldiers. According to a World Bank report⁷⁰⁰ a crucial step of this entire operation was the three studies undertaken i.e. :

⁶⁹⁸ *Children and War: A brochure*, ICRC : Geneva. 1994.

⁶⁹⁹ ICRC special report , *Stemming the Violence*.

⁷⁰⁰ World Bank Report, *supra* fn 80.

- i) a socio-economic profile of soldiers to identify the capabilities, needs and expectations of the target group,
- ii) an analysis of the opportunities for veterans in product and factor markets to design the settling-in kit and long term integration program and
- iii) the examination of institutional requirements to determine the program implementation structure.

At the time of discharge, over one third of the veterans were under the age of 30. An estimated 30 percent of phase II veterans had been under 18 when they enlisted. Only few of these veterans possess any marketable skills, the basic education level is below primary. The female veterans reported some discrimination. Female children are reported to have been discriminated against in phase I of the program in terms of education and health facilities but phase II and III seem to have countered these allegations.

In the present day conflict,⁷⁰¹ the government has declared a pardon for all those surrendering. The children are as a rule benefiting from this pardon. The government is treating these children as “abductees” and hence immediately allowing them to re-integrate with their communities. The treatment meted out to these child-soldiers is reported to be fair. But there are some discrepancies that need further investigation. There are reports of some children being tried for treason in Kampala High Court. The Ugandan Human Rights Commission is following these cases. It stated that “during the commission’s visit to the remands homes, the commission came across children charged with treason. These children have been captured at the war front. The commission wishes to recommend that they be given general amnesty. Indeed measures should be taken for their moral and physical rehabilitation”.⁷⁰²

⁷⁰¹ The government efforts can be appreciated by the fact that the budget of the child care and protection sector has been increased from Ushs. 986 million in 1993/4 to 1.976 billion Ushs in 1995/6.

⁷⁰² “The Human Rights of Suspects and Prisoners as Assessed by the Uganda Human Rights Commission: Observations and Recommendations” presented at the Consultative Workshop on Human Rights and the

The UPDF does not recruit persons under the age of 18, though historically the NRA did use *kadagos* between 1981-85. The Local Defence Force in Gulu has recruited some children between the ages of 13-15. There have been reports but are as yet unsubstantiated that some child-soldiers are given the option to join and fight for the UPDF. There is also the problem of what attitude is being taken towards children who may have been abducted and forced to fight from a much younger age than 18 but are now adults. The government seems vague on this aspect though the PRO in Gulu stressed that all abductees will be handed over to the NGOs for counselling and other support and are free to go, but the slighter older age group seems to be at risk of being viewed as rebels on the other hand there is this statement from Col Kazini, officer in charge of operation in the North, "any returning child who is not registered as abducted will be considered as collaborator and charged". The Government passed an Amnesty Statute in June 1987. In its preamble it reads: "Amnesty for all persons involved in acts of warlike nature in various parts of the country." It continues in section 1(a) "to all persons within and outside Uganda, now waging war against the government. The amnesty extends to former armies, fighting groups, police, prisons and security agencies". This amnesty had not proved to be very successful. There are instances of children being tried for treason for waging a war against the government and also for collaborating.⁷⁰³

The government seems to have concentrated more efforts in the re-integration and demobilisation of its Kadogos than it seems to do with the children on the front-line in the present conflict. Though legally it had taken many positive steps to improve the situation of children generally. It has, for example, It has inaugurated on 10 November 1993, the National Council for Children (NCC). Its main objective to co-ordinate the implementation of the National Plan of Action for Children (NPA). The entire spectrum

Administration for Justice in Uganda 23rd & 24th July 1997, at the International Conference Centre, Kampala, Uganda , p 11.

⁷⁰³ personal interviews with ANCPPAN, Uganda Human Rights Commissioner and J Oruut (Child Welfare and Probation Officer, Gulu).

of these activities are planned within a government framework along with the informal sector i.e. with the NGO's.

The Secretary-General of the NCC is Kampala based. The secretariat comprises of a small technical and support staff. Its other aims along with co-ordination and liaison are advocacy, resource mobilisation and supporting structures at the district (DPAC) and sub-county (SPAC) plan of action for children and to monitor the implementation of the goals of the UNPAC.

The government also organised the National Program of Action for Children (UNPAC). The NCC is a special partner in the implementation and monitoring of the UNPAC. Officially it is linked to the Ministry of Labour and Social Affairs, it includes representatives from a range of ministries and other organisations and groups. It has since its creation become the "most dynamic, comprehensive "voice" for children in Uganda".⁷⁰⁴

In the preface to the 1989 Situation Analysis of Woman and Children in Uganda, Dr SBM Kisekka, the Prime Minister of the Republic of Uganda stated that the NRM government "sees the increasing of childrens chances of survival and promotion of the development of their fullest potential as a central element of the ten point programme as such accords high priority."⁷⁰⁵

Further academic and professional institutions like the Child Health Development Centre (CHDC) of Makerere University, Institute of Social Research and the Institute of Public Health also within Makerere University continue to receive Government support.

⁷⁰⁴Government of Uganda and UNICEF Country programme 1995-2000, *Co-ordination, Communication and Advocacy Programme Plan of Operations with Master Plan of Operations*, April 1995, Government of Uganda-UNICEF Publication, on p 32.

⁷⁰⁵ UNICEF, *Children and Women in Uganda : A Situation Analysis*, 1989, UNICEF: Kampala, 1990, preface.

The Constitution is the supreme law in Uganda and supersedes all traditional practices which are in conflict with the rights of the child. Chapter 4 of the Constitution guarantees human rights and freedoms and Article 34 of the same specifies children's rights. It has shown its commitment to the well-being of the Children of Uganda and their rights by incorporating the CRC into national law in 1996. The government has taken legal and general measures to improve the situation, one of these has been the steps taken to enhance implementation of the CRC. For example, Article 4 of the Children's Statute Act 1996 refers to Legislative, Administrative and Other Measures.

The Children's Statute of 1996 addresses specific issue of children's rights. It has been referred to as a milestone in the protection of children. The Children's act makes both care and protection legally enforceable. This Act brings together the majority of the principles of the CRC and the OAU charter and has received Presidential assent. A task force has been established to develop a *national implementation strategy*.

The post of Secretary for Children Affairs has been created in the Local Council (LC) structure, juvenile justice reforms have been proposed and children and family courts are to be established, at district levels. Yet, practical difficulties remain. For example : the Department of Probation and Child Development (DCCP) has been granted a specific mandate, but it is grossly underfunded and under-resourced, and heavily dependent on donor funding.

Another positive step is the Ugandan National Human Rights Commission (UNHRC): Its role in armed conflict situations as stated under Article 52 of the Constitution is :

1. Investigating at its own initiative or on a complaint by any person or group of persons against the violation of any human rights.

2. Visiting jails, prisons and places of detention or related facilities with a view to assessing and inspecting conditions of inmates and make recommendations.⁷⁰⁶

The UNHRC faces practical difficulties. People are unaware of the commission and its mandate as it is a new body. Not everyone trusts them. Another problem that is undermining its performance is that it finds it difficult to access war zones. Under Article 52(1)(h) an important function of this commission is to “monitor the government’s compliance with international treaty and convention obligations on human rights”. Further, in its functions it has the right “to observe the rules of natural justice”.⁷⁰⁷

The Government of President Museveni has introduced the office of the Inspector General for Government (IGG) as a watch dog over possible human rights abuses in Uganda. This is akin to the concept of an ombudsman institute. It is a general norm that the rule of law is to be upheld in a civilised and democratic governance. “A government is the collective power of the people. Government exists as a service institution in order to ensure that the life of each individual in society is safe and that there is no unauthorised interference with his personal liberty, property or other rights. Consequently, it is the function of every constitution to strike a balance between the power of the state and the rights of the individual”.⁷⁰⁸

In Uganda, there is a human rights department with a human rights committee and a human rights desk to monitor human rights in the army and the civilian-army relationship.⁷⁰⁹ In Africa, children have responsibilities as well as rights. The President has in a speech at the *Seminar on Internal Conflict* on 21 September 1987 said:

⁷⁰⁶ Article 52(1) of the Constitution of Uganda.

⁷⁰⁷ Article 52 (3a.)

⁷⁰⁸ Kiapi, A., “The Constitution as a Mediator in Internal Conflict” in *Conflict Resolution in Uganda*, Villier Publications, London, 1986.

⁷⁰⁹ Col. Fred Tolit, Director of Military Intelligence, UPDF, at the Regional Conference on the Conflict in the North, 6-7 July 1997, FHRI Report, p 26.

“We in Uganda are determined to use the law as the method of redressing wrongs in our society.....we are of the view that if the law is deficient, then it must be reinforced with legislation.”⁷¹⁰

According to Jimmy Oruut,⁷¹¹ children have not benefited significantly from this commitment. The status of children has deteriorated in recent years “war and civil strife” being one of the main elements contributing to this deterioration, as the capacity of the community to protect its children has been eroded. Approximately 56 % (on the lower side) are said to be children in the LRA ranks.⁷¹² The physical, sexual and emotional abuse of these children has been reported to be a common experience.

Additionally the government of Uganda has identified the health sector as one of its priorities. Though still inadequate, the National Rehabilitation and Development Plan (1990/91-1993/94) has included primary health care, control and prevention of disease, strengthening the education system, programs on food security etc. A very positive step has been the increase in the government expenditure on health in the last 5 years.⁷¹³

There are plans under the Domestic Relations Project on Traditional and Cultural practices in the Uganda Law Reform Commission to identify positive cultural and traditional practices to be codified or criminalised.

Since my field visit to Uganda there has been another positive development. “The Childrens Desk” a structure that was being set up in 1997, which came into effect in 1998. It consists of 1 officer of the UPDF who is the Child Protection Unit Officer, 2 trained nurses (military), 1 social worker (from an NGO in this case trained by SCF, Sweden), 4 additional staff members. In 2000, soldiers are being trained to work as

⁷¹⁰ P 9, The Monitor, 19/09/97

⁷¹¹ in an unpublished paper during workshop entitled “Leadership, Paralegal Training as a Foundation For Empowerment” a paper presentation on Children’s Rights 21-2 February 1997, from the Dept of Probation and Social Welfare, Gulu. on p 5

⁷¹² Livinstone, S., Director , Human Rights Initiative, Kampala, Uganda in a situation report briefing.

⁷¹³ see UN Doc. CRC/C/3/Add.40, p 26.

counsellors who work with the social worker. This unit is funded by SCF, Sweden and Denmark. The UPDF officials and the NGOs work in close collaboration.⁷¹⁴ The main activities of this unit are: assessment of needs, providing treatment, evacuation from conflict areas, re-orientation of both the children and UPDF soldiers who they may interact with on contact, counselling, working with NGOs in the re-integration and follow-up programs. Additionally, there are now special local radio programmes which disseminate information on Children Rights and International Humanitarian Law.⁷¹⁵ But there is on the other hand, the presence of child soldiers in 2 units sent to Congo to fight alongside the UPDF.⁷¹⁶

XVII. Conclusions

War today is a greater threat to mankind than famine or disease. The understanding of war and the possible ways of abolishing it are on the agenda. "War usually has differed from simple murder in that it has been large scale, highly organised, long prepared in advance and carried out with more costly and effective equipment, and in that it has killed more widely and with less foresight and discrimination".⁷¹⁷ War has through the ages been accepted as a legitimate response to unjust situations, in the least it has seen acceptance as a "normal, acceptable part of human life, recurrent in the past and unavoidable in the future."

In the world of today, man's instruments of death have become incomparably quicker and more powerful than the instruments of life. The impact of military expenditure on the survival, protection and development of children makes for dismal reading. In 1988, sub-Saharan Africa imported 7.2 percent of the total Third World Arms import and 4.6 percent

⁷¹⁴ I met the Current Child Protection Unit officer, Capt. A. Opio at a Regional Training Program on Children's Rights before, during and after a Conflict, in Cote d'Ivoire for Military Officers from 15 West African Countries. (12-24 June 2000). Capt A Opio and Capt Ronald presented the Ugandan experience of dealing with Child soldiers.

⁷¹⁵ I spent an afternoon at the radio station in Gulu and talked with the journalists there in 1997. This was re-iterated by the officers of the Child Protection Unit, in 2000.

⁷¹⁶ Personal conversation source name withheld. 100 children from Kassese district are reported to have been included in the two units (31 Bn and 55 Bn) sent to Congo.

⁷¹⁷ Duetsch, KW., "Quincy Wright's Contribution to the Study of War" in Wright, Q., *A Study of War*, The University of Chicago: London, 1965. p xi.

in terms of the world's total.⁷¹⁸ Military expenditure plus external public debt service as a proportion of current government revenue ratio of Uganda in 1987 was 58.0.⁷¹⁹ "Government priorities and structural changes determine levels and shares of military expenditure as well as those of other socio-economic expenditures particularly relevant to child development." The ratio of education vs. military expenditure for 1983-86 show a decline in education as military expense goes up!⁷²⁰ Also it should be noted that "[p]olitics and economics intermingle ! Maybe it would be worthwhile to remember that weapons technology has forced the great powers to test each other's influence through involvement in the internal wars of small neutral nations. Thus internal wars always pose the potential danger of breeding larger conflicts."⁷²¹

At independence, Uganda had one of the most promising economies in sub-Saharan Africa. Between 1962 -70 a growth rate of 5.8% per annum was sustained. However from 1971 all this changed. In 1986 when the present government came into power the economy was completely ruined. GDP had dropped to 18.8% from that of the 1970's and inflation was as high as 260%. The rate today is reported to be about 7%. GDP has been growing at an average of 5.5% per annum. Social indicators however remain among the worst in the world.⁷²²

Uganda's population is 19.8 million with children comprising 10.6 million of the total. Children are vulnerable, susceptible to disease, malnutrition and physical injury. They are dependent, they need the support of adults, not only for physical survival, particularly in the early years of childhood but also for their psychological and social well-being.

⁷¹⁸ Deger, S and Sen, S., *Arms and the Child: A SIPRI Report for UNICEF on the Impact of Military Expenditure in Sub-Saharan Africa on the Survival, Protection and Development of Children*, Staff Working Paper No 9, UNICEF and SIPRI, New York, May 1991. p 17.

⁷¹⁹ figure in percentage from the SIPRI database.

⁷²⁰ 1983-4 0.70 percent

1984-5 0.82 percent

1985-86 0.57 percent

⁷²¹ Rosenau, JN., (ed.) *International Aspects of Civil Strife*, Princeton University Press : Princeton, 1964.p 6.

⁷²² Olaka-Onyango, J., "Poverty, Human Rights and the Quest for Sustainable Human Development in Structurally -Adjusted Uganda" in *NQHR*, vol.18, No.1 , 2000, p 34. Onyango quotes the UNDP Development Index: 160th standing out of 174 in 1998. In 1999 the position improved to 158th.

Children are developing, they grow in developmental sequences, like a tower for bricks, each layer depending on the one below it. Serious delays interrupting these sequences can severely disrupt development. Refugee children face far greater danger to their safety and well-being than the average child.⁷²³ Displacement for children puts at risk almost the entire range of rights guaranteed to them by the CRC.⁷²⁴

According to the *Monitor*, 30,000 were displaced and 100 killed between 16 June - 30 June 1997. The *New Vision* of 15 March 97 reported that 80,000 people fled their villages in Uganda's Western Bundibugyo district. It also reported that 133 schools out of 180 had been displaced from the original sites. In January 1996, 74,000 children were enrolled in primary school i.e. 55,000 in the district and 19,000 in the municipality. By February 1996, student and teachers had begun to be abducted and or killed. The number of functional schools dropped from 199 to 64. The district lost 215 primary school teachers and 2 secondary teachers. Education is vital to the development of children. It has been recognised as a universal human right. Article 28 of the CRC binds signatories to the CRC to fulfil their obligation in providing it. Whether a child has been displaced internally or if a child is a refugee in another country, a child's right to education remains an imperative.⁷²⁵ Education remains one of the most stabilising factors in the lives of children; it provides them with a sense of continuity and stability. It therefore assists them in coping with the stresses of conflict and associated trauma.⁷²⁶

Among the East African tribes, warfare is a reality but traditionally only a certain age group fights and this does not include children.⁷²⁷ Moving more specifically to protection of children from abductions and direct participation in armed conflict, the First lady of

⁷²³ *Refugee Children: Guidelines on Protection and Care*, UNHCR, Geneva 1994. An example, during the month of July 1994, over 1 million refugees have crossed from Rwanda into Zaire. Women and Children making up 65% or more. Of these over 27,000 children and adolescents were separated. Children specially adolescent girls remain more vulnerable to violence and sexual assault.

⁷²⁴ TDP Paper, UNICEF, p 5

⁷²⁵ *Refugee Children: Guidelines on Protection and Care*, UNHCR, Geneva 1994, p 109.

⁷²⁶ *ibid*, see Machel Report and *Medicine, Conflict and Survival*, Vol.15, No: 4, October- December 1999. Special Issue "Children and Conflict: Rights and Realities. pp 313- 415.

⁷²⁷ Wright, Q, *A Study of War*, University of Chicago Press : London, 1965, p 85.

Uganda, Janet Museveni has been quoted: “[a] child is like a small dot in the centre of two circles. To reach the child one must penetrate the outer circle which is the community and then there is the inner circle, which is the family. If these two circles are strong, then the child is safe; if they are weak then the child is vulnerable.” Carol Bellamy of UNICEF speaking of these abductions said: “[t]he children abducted in Northern Uganda highlight a ‘moral vacuum’ ... they are victims not only of war but of the unconscionable failure of adults to protect the lives and welfare of their children”.⁷²⁸ Abductions it is submitted, violate the right to life; right to health; right to education; an adequate standard of living; protection from abuse. Halting these abductions it is submitted should be one of the main priorities of the Ugandan government. It is the duty of the Government to provide security to these children.

In Uganda, it seems that the first batch of child soldiers i.e. the kadogos, joined and fought along side the NRA/M a highly motivated army. The children seem to have been well looked after; not suffering the kind of abuse they do with the LRA. At the end of hostilities the former kadogos were looked after. Although, since no records were kept, the study of the long term effects of their participation seem to be improbable. Children today, however, are being “forced “ to fight by the rebel groups, and a small minority only, seems to be enlisting.⁷²⁹

In an overview of the situation one can say that some of the effects of the present conflict are:

1. destruction of the existing infrastructure (schools and health centres being the more specific targets, followed by community centres.)
2. abduction on a massive scale;
3. loss of life;
4. torture and maiming;
5. domestic violence due to loss of social fibre;

⁷²⁸ Carol Bellamy, Executive Director UNICEF in press release Nov. 1996.

⁷²⁹ see Coalition to Stop the Use of Child Soldiers, *The Use of Children As Soldiers in Africa*, Geneva, 1999, pp 113-116.

6. increased crime rate;
7. highest rate ever of child abuse;
8. rape;
9. separation of family members;
10. food shortage;
11. lack of medical facilities;
12. the inability to protect their children.

These are some of the reasons that children who have enlisted to fight give. Children often get convinced that this is the only way to bring about change. The specific effects of consequences in a short time have been that children are not only physically effected: wounds, amputations, STD's but also deeply effected psychologically. They are more prone to using force and violence and are often unable to reintegrate back into society. Unresolved , this problem is often what leads to further conflict.

In Uganda, due to the continued insurgency the effects of the present psycho-social support is greatly reduced. There are inadequate counselling services; a lack of follow -up services; widespread economic deprivation almost to the point of complete breakdown; lack of proper communication between the districts and the NGOs; there exists no database⁷³⁰ or source to keep a record of abductions and kidnappings and escapees. There is a lack of sufficient support facilities including transport. Both the Government and NGO sector are well-meaning but overstretched in Northern Uganda. Another priority for the government given the enormity of the problem, should be the training of personnel to deal with the trauma and torture that children and their families have undergone.

According to the statement of Miss Rebecca Kadegga, Minister of State for Foreign Affairs in report to the 53rd session of the Commission on Human Rights, Geneva 12 March 1997: 'Uganda believes it is crucial to focus on preventive measures by putting in place appropriate (measures) institutions and mechanisms for the purpose. The Government of

⁷³⁰ UNICEF started the procedure in September 1997.

Uganda has not proved very satisfactory on the count as it is true that “[d]eliberately children are being targeted for killings, for injuries, mainly to separate them from their families, to destroy communities, their schools, the social institutions which give meaning to the life for the child.”⁷³¹ It is true that it should be kept in mind that there are practical difficulties and limitations that the government is working under, but the “International standards determine what exactly is the minimum level of social protection and welfare, the attainment of which must be sought by all states.”⁷³² And if a State is unable it must ask for assistance from regional and international institutions that may be in a position to provide assistance.

The involvement of children in this conflict as we can see is mostly forced.⁷³³ The identification of coercive factors is easy. Material and social factors can be found in the reason for the conflict, and in turn caused by the conflict itself. It is when children have no alternative as in the case of the Kadogos: many of who joined as they had no family and needed basic necessities and the support of adults. In 2000, there have been some reports of “mercenary” recruitment, as rebel recruiters from the ADF were offering cash reward to volunteers and support to their families.⁷³⁴

In terms of humanitarian relief and laws, centuries before the Second World War, there were writers and scholars that insisted that customary norms regulating the conduct of warfare applied to all parties to a civil war.⁷³⁵ Richard Baxter states that: “in all cases of armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the adversaries shall be bound to

⁷³¹ Graca Machel in *CHILD LINK*, ANPPCAN Chapter, vol. 12, No 3, December 1996, p 3

⁷³² Veermen, P., *The Rights of the Child and the Changing Image of Childhood*, Martinus Nijhoff : Dordrecht, 1992, p 21.

⁷³³ the LRA , the WBNF and the ADF being classic examples.

⁷³⁴ see Coalition to Stop the Use of Child Soldiers, *The Use of Children As Soldiers in Africa*, Geneva, 1999, p 115.

⁷³⁵ Taubenfeld, HJ., “The Laws of War in Civil War” in Moore, JN., (ed.) *Law and Civil War in the Modern World*, John Hopkins Press, Baltimore, 1974, p 502.

implement the provisions of the present convention".⁷³⁶ But since this was too broad for most states, the world community came to a conclusion that Common Article 3 was applicable to internal conflicts. Yet, can Article 3 be an adequate guide to the conduct of belligerents in civil strife? In Gulu and surrounding areas, the number of ICRC posters were numerous, and although most people talked about what was right and acceptable or wrong in the conflict, the fact is that the rebels ignored even this very basic guideline. In the course of meeting with people in the war-torn area they expressed the view that the international community had not paid attention to what was happening in Uganda. In response to that, it is submitted, that intervention is or may be an appropriate or justifiable act when the conflict is externally initiated. The current level of crisis is extremely high. It involves an extensive and immediate threat to the fundamental human rights, specially that to the right to life.⁷³⁷

In Article II, section 1 paragraph e, one of the objectives of the OAU is "to promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights." Article 4 of the Charter reiterates a fundamental principle, i.e. "[h]uman beings are inviolable" and that "[e]very human shall be entitled to respect for his life and the integrity of his person." Additionally, in paragraph 1(b), it states that one of its purposes shall be "to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa."

The OAU, no doubt promotes "sovereignty and territorial integrity", maintains conditions for peace and security and continues the fight against any form of neo-colonialism. Although it seems to adhere to the principle of non-interference, it has shown, during the Congo Crisis and the Nigerian internal war, legitimate concern through insisting on national reconciliation within a member state. The OAU has also been proactive in the case of the cessation of hostilities agreement which helped halt the two-year war between

⁷³⁶ Baxter, R., "Jus in Bello Interno: The Present and Future Law" in *Law and Civil War in the Modern World*, John Hopkins Press, Baltimore, 1974, p 519 quoting Article 2, para 3 from the *Final Record of the Diplomatic Conference of Geneva of 1949*, p 47.

⁷³⁷ Ellen Frey-Wouters, "Internal Conflicts in the Developing World", in Moore, JN., (ed.) *Law and Civil War in the Modern World*, John Hopkins University Press, Baltimore, 1974, p 488.

Ethiopia and Eritrea. The cease-fire, which was a product of OAU intervention, consisted of detailed plans to disengage the two armies and to allow a U.N. peacekeeping force to patrol parts of the established buffer zone. As part of its efforts to oversee the agreement's implementation, the OAU also sent military observers to monitor the cessation of hostilities.⁷³⁸ A similar role in keeping with the requirements of Uganda would no doubt be of great use.

The OAU Charter establishes some norms of permissible involvement in the case of internal conflicts.⁷³⁹ Article 23(1) which refers to national peace and security along with articles 45, 46, 52, 60 and 61 indicate that the OAU can play an important mediatory and conciliatory role in Uganda. If this is unsuccessful, it could explore the possibilities of stronger action in the form of intervention on humanitarian grounds.⁷⁴⁰ The OAU it is true has, limited material resources and perhaps a limited leadership to respond to crisis.⁷⁴¹ But has the OAU commission for mediation, conciliation and arbitration been utilised in resolving this conflict?⁷⁴²

In Uganda, we have seen that children are being forced to fight by rebel factions. The government offered an amnesty deal which still stands and yet, more and more children are being charged with treason. The penalty for this charge is death. January 2000 saw 5

⁷³⁸ *Human Rights Watch World Report 2001*, website: <http://www.hrw.org/wr2k1/africa/africa2.html>.

⁷³⁹ Omozurike, *AJIL*, vol 77, 1983, p 911. He refers to the right to national and international peace and security.

⁷⁴⁰ *The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security*. Adopted at Lome, Togo, on 10 December 1999 by the member states of the Economic Community of West African States (ECOWAS). This mechanism has been realised in the aftermath of ECOWAS interventions in Liberia and Sierra Leone. See Abass, A., "The New Collective Security Mechanism of ECOWAS: Innovations and Problems" in *Journal of Conflict and Security Law*, 2000, vol. 5, no. 2, 2000, p 211. This mechanism is an example of intervention at a regional or sub-regional level in Africa, the OAU could also develop a similar legal framework. See for further details on ECOMOG actions, Weller (ed.) *Regional Peacekeeping and International Enforcement: The Liberian Crisis*, 1994, and *Report of the Secretary-General pursuant to Security Council Resolution 1233 (1999) relative to the Situation in Guinea-Bissau*, Doc S/ 1999/741. "Regional Peacekeeping and Enforcement Action" in Gray, C., *International Law and the Use of Force*, Oxford University Press, 2000.

⁷⁴¹ Olonisakin, F., *Reinventing Peacekeeping in Africa: Conceptual and Legal Issues in ECOMOG Operations*, Kluwer : Hague, 2000, p 60.

⁷⁴² the issue has been discussed by the Committee on the Rights of the Child while evaluating the report of the Government of Uganda. see for example: CRC/C/15/Add.80 of 21 October 1997. To date the OAU has not been formally involved.

teenagers being executed.⁷⁴³ The Ugandan Government is in breach of both its national and international law obligations. The change in the stand of the military in their dealings with children should now be clarified and efforts made by the International Community to help provide these children with physical protection and also to provide them with rehabilitation and reintegration facilities.

Chapter Seven

A CHILD'S RIGHT TO REHABILITATION⁷⁴⁴

I. Introduction:

The effects of war and trauma are long-lasting and the international community, it is submitted, has an obligation to help. Most studies and research have concluded that though children are able to live through difficult situations without breaking down, i.e. they show great resilience, there is no reason to believe that children can escape the harmful effects of traumatic situations. It has been submitted that "repeated exposure to such situations will probably cause more permanent damage to their personality formation than single events".⁷⁴⁵ Data collected as part of initial needs assessment of Mozambican refugee children shows that witnessing or knowing of a traumatic effect has

⁷⁴³ Email communication from World Vision, Uganda.

⁷⁴⁴ During the drafting of Article 39 of the CRC, the first proposal used the term "physical, psychological and social rehabilitation" (E/CN.4/1998/28, pp 17-18). There was much discussion over the use of the word rehabilitation, as some speakers clarified that this particular word, in their respective languages was "linked to very precise and restrictive idea" and yet many were of the opinion that the word "rehabilitation" was most appropriate. The English speakers in particular felt this was an appropriate choice. The Canadian delegate in fact requested that their preference for this term be noted formally. (see Detrick, S., *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"*, Martinus Nijhoff: Dordrecht, 1992, p 455). The use of the term "recovery and reintegration" was eventually adopted. The title of this chapter is a matter of personal preference. For meaning and synonyms see generally *The Oxford Concise Dictionary*, 9th edition, Oxford University Press, 1995 and *The Concise Oxford Thesaurus in clear A-Z form*, Oxford University Press, 1995. Medical experts seem to use the two terms interchangeably, see for example: *Medicine, Conflict and Survival*, Vol. 15, No.4, Oct-Dec 1999. This is a special issue dealing with children in armed conflict situations. For the purposes of this Chapter, rehabilitation is used to indicate the entire process of recovery and reintegration for mental, physical, emotional and social well-being of the individual. Further the OP to the CRC (A/54/L.84 of 16 May 2000) uses in its pp no. 17 and Article 7 the terms "rehabilitation and social reintegration".

⁷⁴⁵ Dodge C, Raundalen, M, *Reaching Children in War: Sudan, Uganda and Mozambique*, Sigma forlag: Uppsala, Sweden, 1991, p 30.

a strong measurable impact and effect on both young children and adolescents. Being a direct victim had a “devastating effect”. Such children it has been submitted lack confidence, making it difficult to trust and hence build healthy relationships. Anxiety, helplessness, fear and hopelessness were characteristic of the vast majority of these children.⁷⁴⁶ Separation from family and the loss of family life is a major cause in creating a “more vulnerable” child.⁷⁴⁷ Children suffer strong anxiety because of frequent attacks. According to Dodge and Raundalen, a child’s right to health, education and leisure are all fundamental to the child’s normal development.

Rehabilitation means to restore to original condition, to a state that existed before a specific instance, for example in case of injuries it means to gain a specific degree of independence, if complete recovery is not possible. In the case of a punishable act it means to equate the person with the rest of society, i.e. which is not punishable, or has a non-criminal or a non-violator status, in the instance of child-soldiers today it seems to be childhood, that one must restore; but is it possible to restore childhood?

“The evolving capacities of the child stem from the acknowledgement of the fact that childhood is not a single, fixed, universal experience. Children are not smaller adults. At different stages in their lives, they require different degrees of protection, provision, prevention and participation”.⁷⁴⁸ If International Law is to be effective it must respond to these developments.

Interestingly, Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides for “as full rehabilitation as possible” but is applicable only to torture victims.

⁷⁴⁶ see McCallin , M., “The Convention on the Rights of the Child as an Instrument to Address the Psychosocial Needs of Refugee Children” in *The International Journal of Refugee Law*. Vol. 3, Number 1, 1991, p 90.

⁷⁴⁷ See, Martz, F., *Open Your Hearts: The Story of the Jewish War Orphans in Canada*, Ve'hicule Press : Baltimore, 1997.

⁷⁴⁸ Van Beuren, G., *The International law on the Rights of the Child*, Save the Children , UK and Martinus Nijhoff Dordrecht, 1995, p 50.

Article 39 of the CRC states that parties shall take all appropriate measures to promote the physical and psychological recovery and social re-integration of a child victim of *any form of neglect, exploitation or abuse; torture or any form of cruel, inhuman or degrading treatment or punishment; or armed conflict*. At this juncture it is to be noted that what may merely be viewed in an adult perception as nasty or not nice may to a child be an extremely traumatising experience. So this broad inclusion of different forms of neglect i.e. "any form of cruel armed conflict" is very crucial to a child's well being. Article 39 clearly goes beyond a generic protection against torture, as it recognises that the needs of children are distinct. Also, it is important to note that this very article indicates the environment in which such action should take place and that the aims of this rehabilitation are specified. This article therefore becomes of paramount importance to the child. But does it create a positive obligation? and how strong is its implementation ability or capacity?

Further, Article 6 of the CRC and Article 24 along with other articles⁷⁴⁹ all together within the structure of the CRC lay a strong foundation for care, protection and hence well being of the child. From the preamble⁷⁵⁰ and the text⁷⁵¹ of the CRC it can be interpreted that the object and purpose of the CRC is to promote a child's sense of dignity and worth.⁷⁵² Likewise, the aim of juvenile justice is that a child must be shown how to re-integrate and assume a constructive role in society. True, the CRC today is the most important legally binding instrument for children encompassing a wide variety of rights dealing with various aspects of a child's life. However, does the CRC actually make real its promises?

⁷⁴⁹ See section below on CRC.

⁷⁵⁰ specifically preambulatory paragraphs 1 and 2.

⁷⁵¹ For example articles such as: 6, 24, 29(1)(c), 37(c), 40 etc.

⁷⁵² Article 31 of the Vienna Convention on the Law of Treaties, which provides the general rule of interpretation states in "(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: ...".

This chapter is a continuation of the case study discussed in the previous chapter, and looks at the rehabilitation of child soldiers, with emphasis on the rehabilitation of child-soldiers in Uganda. First, it generally discusses the role of international law in placing obligations on the adults of the world as the decision-makers and implementers of these decisions. It looks at the reality of rehabilitation and reintegration today in the light of the above statement. It then looks at the child-soldiers of Uganda. The main foundation of this chapter is Article 39 of the CRC.

II. Rehabilitation And Reintegration - Existing Law:

It seems that until the CRC of 1989 finally became a reality after a gestation period of 10 long years, there was no positive obligation to rehabilitate. However, it is submitted that an obligation existed, in the form of a moral one if not a clear legal obligation. This has much to do with the fact that a general opinion was that children always received protection from adults in dire situations. However as we are all aware today such is not the case, in many instances children need protection from the very adults who are responsible for them, numerous instances of children being removed from their families or carers for their well-being by the state exist.

To trace this obligation one must go through the chronological history of the rights of the child under international human rights law and international humanitarian law. They all together with the CRC place a positive obligation on the states parties to make rehabilitation and reintegration of former child-soldiers a priority.

II.i. The Declaration Of The Rights Of The Child 1959:

In Principle 2 this Declaration states that “the child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration”. In Principle

4 it stresses the child's right to not only the basics of life i.e. of food, health and shelter but also recreation, which is just as vital for a child's normal development. It reads: "[t]he child shall have the right to adequate nutrition, housing, recreation and medical services. By virtue of principle 5 and 8 which read: Principle 5: "The child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition" and Principle 8: "The child shall in all circumstances be among the first to receive the protection and relief". It clearly states that a child should be the beneficiary of special treatment and care. Further, Principle 10 states that: "[t]he child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood and in full consciousness that his energy and talents should be devoted to the service of his fellowmen" this indicates the urgency and importance of childhood as they are future adults of tomorrow.

The Declaration of the Rights of the Child 1959 does not relate specifically to the right to rehabilitation but places a general responsibility for the well-being of the child. It emphasises clearly the Child's *right* to "special protection" and stresses that not only legal means but *all possible means available* at ones disposal are to be used to ensure that children develop in a normal healthy fashion. The theme of special protection and assistance as and when required by the child, keeping the best interests of the child as a central issue, is also to be found consistently in the articles of the CRC too.

II. ii. The International Covenant On Civil And Political Rights, 1966:

The International Covenant on Civil and Political rights or the ICCPR does not deal specifically with children but is applicable as it applies to all members of the human family. However in some articles it speaks very specifically of children. Other than Article 23 and 24 these provisions relate to juvenile justice.

The provisions regulating the administration of child justice, were for the first time placed in a global treaty in 1966 in the form of the ICCPR. It is true they focus on separation of

adults and juveniles, trial procedures etc. but they take into account the importance of age and hence emotional maturity and the desirability of promoting rehabilitation.

Article 10 of the ICCPR deals with the deprivation of liberty: in Article 10(2)(b) it speaks of separation from adults and speedy adjudication for the trials. In Article 10 (3) it reads:

“The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”

It clearly places an obligation on States Parties that the aim of detaining children is not merely to penalise but to rehabilitate them. Article 14, 4 and 6(5) all deal with different aspects of justice relevant to the child. When a child is in conflict with the law, the aim is to educate the child to be a *constructive element in society*.

II.iii. The International Covenant On Economic, Social And Cultural Rights, 1966

Article 10 speaks of the importance of the family and it is by virtue of Article 10(3) that it provides “special measures of protection and assistance” to children and emphasises that children and young persons should be protected from economic and social exploitation but it does not specify the right to rehabilitation.

Art 10 (3) reads:

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be

punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Special measures of protection that a child needs may be extended to provide all relevant assistance to a child to be rehabilitated.

II. iv. The UNHCR Guidelines On Refugee Children, 1988

The UNHCR Guidelines on Refugee Children 1988 addresses in its introduction that children have special needs. Paragraphs 66, 67 and 70 speak of a community-based concept of rehabilitation but deals specifically with physical disability, paragraphs 72-91 deal with emotional and mental rehabilitation of children. Though the theme is present throughout, paragraph 130 refers specifically of the needs of unaccompanied children for protection as they are more vulnerable.⁷⁵³

It operates in conjunction with Article 22 of the CRC which places an obligation on State Parties to take :

“appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties”.

II.v. The CRC 1989:

There are a number of articles in the CRC which lay the foundation for care and protection to be provided to children. For example in Article 36 the CRC instructs States

⁷⁵³see chapter four of this thesis on *Recruitment*, also Ressler, Boothby and Steinbock, *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements*, Oxford University Press, 1988.

Parties to “protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare”. The debates during drafting indicate that “all other forms of exploitation” were included to specify any form of exploitation that was harmful to children, not just sexual exploitation or abuse. Likewise, Article 32(1) of the CRC stresses that child labour is exploitative when it threatens the physical, mental, emotional or social development of the child. Work or employment also amounts to exploitation when it is undertaken at too young an age and has detrimental effects to the health and general well-being of the child. Article 23 of the CRC which deals with the rights of the disabled child in para 3 and 4 reads:

“3. Recognising the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child’s achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

4. States parties shall promote, in the spirit of international co-operation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, educational and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard particular account shall be taken of developing countries”.

This is a an interesting development as not only is the right to rehabilitation of a disabled child to attain the fullest possible social integration and individual development specified strongly but it also makes this a collective responsibility of all State Parties.

Article 24 (1) of the CRC :

States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right to access to such health care services.

and Article 27

1. State Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child both within the State Party and from abroad. In particular, when the person having financial responsibility for the child lives in a State different from that of the child, State Parties shall promote the accession to international agreements or the conclusions of such agreements, as well as the making of other appropriate arrangements.

These provisions underscore the right of all children to special protection and care which clearly emphasises health and additional needs. Articles 5, 9, 10, 11 of the CRC all deal with family life and a child's right not to be separated from his/her family. The right to family life and the right not to be separated from the family are crucial to both the child's well-being, normal development and in the instance of trauma and injury of any kind, in the process of rehabilitation and reintegration. In the instance that parents and extended family is absent, Article 5 of the CRC places an obligation that it is the State that is

responsible for appropriate care for the child, keeping in mind the evolving capacities of the child. In situations of emergency, it therefore becomes paramount for the state to provide stronger protection than they have been providing so far. In most instances, it is often the case that relief and care is provided to infants and young children but the equally important and perhaps more vulnerable (i.e. prone to get motivated by ideology) age group of adolescents tends to get overlooked.⁷⁵⁴ Article 9 of the CRC deals with parental care and the principle of non-separation of the child from the parents. Article 10 deals with family reunification, though dealing with re-unification from the point of parental abductions, the concept of family-reunification is crucial for the child's well being and normal healthy development.

Some of the other documents that deal with protection of children from the effects of armed conflict⁷⁵⁵ are the Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples 1965; Declaration on the Protection of Women and Children in Emergency and Armed Conflict 1974; Recommendation No R (87) 8 of the Committee of Ministers to Member States Regarding Conscientious Objection to Compulsory Military Service 1987. Others are, the European Social Charter of 1961 (Articles 7 and 16), the Declaration of Alma-Ata 1978, and Article 5 of the African Charter on the Rights and Welfare of the Child 1990, which deals with survival and development. Article 16 of the same deals with protection against child abuse and torture and Article 17 with the administration of juvenile justice.

These instruments mentioned above are all however, mostly preventive in nature and do not deal with the principle of rehabilitation specifically or with the situation of child-soldiers too. Yet, they build a basis for the right to rehabilitation and reintegration as the right of every child, as they substantiate clearly the fact as a right in the first instance of a child to health and normal development. Therefore no child should be facing violations as suffered by child soldiers. In the case that the right to health and harmonious development

⁷⁵⁴ Discussion with Nigel Cantwell, Head of Humanitarian Assistance, UNICEF-ICDC, Firenze, in Jan 1999.

⁷⁵⁵ see chapter 3 for details.

has been violated one can say, that a strong moral obligation is present, even if accepted that a certain amount of legal incertitude is possible. A legal obligation of sorts however, to rehabilitate a child, can be traced from the very first legal instrument drawn outlining the rights of the child. But it is without any doubt that it is in the form of the CRC, in 1989 that this right to rehabilitation was clearly stated as an obligation on the part of state parties.

III. Article 39 Of The CRC - A Positive Obligation On States?

The origins of Article 39, lie in a proposal by the informal NGO *Ad Hoc* group, supported by Venezuela and submitted by the Norwegian delegation.⁷⁵⁶ It is quite clear that when treaties are negotiated, imaginative drafting is a necessary requirement to meet all competing interests.⁷⁵⁷ This occasionally gives rise to some problems of interpretation. The International Law Commission has clarified that for the purposes of interpretation equal weightage must be given to all factors⁷⁵⁸ such as text, supposed intentions, object and purpose of the treaty. To place greater reliance on one factor to the impairment or detriment of another is “contrary to the jurisprudence of the International Court of Justice”.⁷⁵⁹ For a satisfactory outcome it has been proposed that the correct approach to interpretation would be to emphasize the overriding aims and intentions of the High Contracting Parties (HCP), rather than one that takes a narrow, formalistic view of the text.⁷⁶⁰ Article 31 of the Vienna Convention on the Law of Treaties (VCLT) lays down the general rules of interpretation; that a treaty be interpreted in good faith in accordance with both the “ordinary meaning” given to the terms in their context and in the light of the “object and purpose” of the treaty.⁷⁶¹ It indicates in 31(4) that a special meaning shall be

⁷⁵⁶ E/CN.4/1988/WG.1/WP.29 . For the Ngo proposal see E/CN.4/1988/WG.1/WG.2. Chap IV.

⁷⁵⁷ Aust, A, *Modern Treaty Law and Practice*, Cambridge University Press: Cambridge, 2000, p 184.

⁷⁵⁸ see O’Connell, D., *International Law*, Stevens: London, 1970. p 263, where he addresses issues such as - authenticity, completeness and availability of the travaux with regard to their significance and value.

⁷⁵⁹ Thirlway, H., “The Law and Procedure of the International Court of Justice 1960-1989” in *BYIL*, 1991, pp 16-17.

⁷⁶⁰ O’Connell, DP., *International Law*, 1970 and McNair, A., *Law of Treaties*, Clarendon Press: Oxford, 1961, pp 364-473.

⁷⁶¹ See Bernhardt, R., “Thoughts on the interpretation of human-rights treaties” in Matscher and Petzold (eds.) *Protecting Human Rights: The European Dimension: Studies in Honour of Gérard J Wiarda*, Heymanns: Köln, 1988, p 65-71. He states that compared with other international treaties, human-rights

given if it is established that that was the intention of the parties.⁷⁶² To clarify the intention of the parties one may look also at supplementary means of interpretation. According to Article 32 of the VCLT, for the purpose of clarity and determination of meaning, recourse may be had to preparatory work of the treaty and circumstances of its conclusion.⁷⁶³ The travaux préparatoires are an important means of confirming the meaning arrived at,⁷⁶⁴ as indicated by an application of the general rule set out in Article 31 of the VCLT. In the instance that the ordinary meaning appears to be clear, but if it is evident from the travaux préparatoires that the ordinary meaning does not represent the intention of the parties, the primary duty in Article 31(i) to interpret in good faith requires a correction of the ordinary meaning.⁷⁶⁵ The travaux préparatoires are therefore significant, in their importance as authoritative interpretation of what was intended by the drafters and to what extent an obligation was legally acceptable to them.

During the drafting of the CRC, and more specifically during the drafting of Article 39, the debates make one consider it dubious whether all states actually wanted this right to rehabilitation to be a strong one. Changes made during the drafting process include on one hand the adopting of the term “armed conflict”, thereby covering more conflicts and strengthening protection and yet on the other hand exchanging the word “ensure” for the word “enable” because as the travaux seem to indicate the group felt that States *could not be made to guarantee the recovery and reintegration of children*. The word “enable” was then changed to the word “promote” as it implied “more of an ongoing obligation”.⁷⁶⁶ However it is interesting to note that this same delegate suggested

treaties have a unique character, therefore the object and purpose of these treaties are of considerable importance and even decisive.

⁷⁶² Aust on p 198-199 states that the Travaux explain why a particular word was chosen over others.

⁷⁶³ For full text see Brownlie, I., *Basic Documents in International Law*, Clarendon Press: Oxford, 1995. See page 402 for text of Article 32.

⁷⁶⁴ Aust, p 198. Sinclair, I., *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd ed., 1984, p 115.

⁷⁶⁵ Aust, A, *Modern Treaty Law and Practice*, Cambridge University Press: Cambridge, 2000, p 197.

⁷⁶⁶ Detrick, S., *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”*, Martinus Nijhoff : Dordrecht, 1992, p 457, para 531.

inserting the word “appropriate” in-between “all measures” because “without the qualifying word, the obligation placed on States would be unduly strong”.⁷⁶⁷

A second positive point seems to be when a speaker did bring up the question as to the need of the second sentence: “Such recovery and re-integration shall take place....of the child”. The response was that if this sentence were to be eliminated it could be interpreted as “any kind of medical treatment or mechanisms for social adjustment would be acceptable in the context of the convention and such was not the idea”.⁷⁶⁸

Article 39 of the CRC as finally adopted and known today reads :

“State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any form of cruel, inhuman or degrading treatment or punishment; or armed conflict. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”

This article, to reiterate, and as submitted above is of paramount importance, given that rehabilitation of the child in any instance is important.⁷⁶⁹ When children have been forced to fight, are brutalised to commit crimes and incredibly devastating violations of all accepted norms, the need for any child to have access to the process of rehabilitation and reintegration is paramount. It places a positive obligation on States to take “all appropriate measures” not just feasible measures. Further, the use of to “promote” indicates a proactive obligation. This is a step forward. It is also important to note that this article specifies that such rehabilitation should take place in an “environment that fosters health, self-respect and dignity of the child”.⁷⁷⁰

⁷⁶⁷ *ibid.*

⁷⁶⁸ *ibid.*, p 455 para 69.

⁷⁶⁹ the effects and impact of being child-combatants has been discussed in detail. See Machel Report generally and also chapter 4 and 6 of this thesis .

⁷⁷⁰ van Beuren, G., *The International Law on the Rights of the Child*, Martinus Nijhoff & Save the Children : Dordrecht : 1995 , p 89-90.

Until the adoption of the CRC, provision for rehabilitation was severely limited if one analyses the scope of possibility but if one looks at it otherwise as submitted earlier it did exist, though it was limited and could do with more power. According to Van Beuren, Article 39 “represents significant progress in raising existing standards of duty on states to provide rehabilitation”.⁷⁷¹ Compared to Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is perhaps one such article that speaks explicitly of the right to rehabilitation. It provides for “as full rehabilitation as possible” but the duty on the state party is only to provide such rehabilitation *only* for victims of torture. Under the CRC, as pointed out earlier, the level of suffering for which children will become eligible is importantly lower, as it includes all forms of abuse, neglect and exploitation, but this given that children are not adults and do not suffer in a similar manner as adults this article indeed represents progress. Further, the Committee on the Rights of the Child when referring to what is “appropriate” refers to policies, programmes at family and community levels that would address both the physical, psychological recovery and social reintegration of the child. Further, it refers to ensuring demobilisation of child soldiers, preparing them for an active and responsible role in society, which would include education and vocational training and further research and studies to improve.⁷⁷² It has in its reports criticised State Parties for not taking sufficient measures for providing physical and psychological recovery and reintegration for child victims of war.⁷⁷³

Here international law has made an important contribution in accepting that children are different from adults and that their needs are different too. But, in not guaranteeing outright this right to children yet, it can in the future go much further in providing stronger protection to children than it does today.

⁷⁷¹ *ibid.*

⁷⁷² UN Doc CRC/C/58 p 38 paragraph 130. Also Detrick, S., *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff: Hague, 1999 pp 411-47.

⁷⁷³ see CRC Doc A/53/41 of 07/07/98 para 218 for Guatemala, para 507 for Ethiopia, paras 583 for child soldiers in Burma and 586 for insufficient measures taken with regard to Article 39 by Burma.

IV. Ugandan Child Soldiers: A Successful Case Of Rehabilitation And Reintegration ? :

IV. A. Rehabilitation And Reintegration Of The Kadogo's

When the NRA came to power, it had in its ranks some 3000 kadogos, both male and female. The media attention that the NRA and its Kadogos had received meant that the NRA received criticism of its policy to have children in its ranks. "Uganda received considerable attention in the international media from the time of the July coup until mid-1986. Commentary on the child soldiers started soon after the country was divided in 1985. Feature articles glorifying the young soldiers appeared in the Nairobi press in late 1985. Eventually, as Kampala fell and reporters had access to the child soldiers, feature-length articles appeared in major newspapers in the western world. Most of the western press reports carried some critical comment about the child soldiers while the Kenya press recognised the *positive role* the NRA had played in initially protecting the youngsters and gave credit to their role in the liberation of the country".⁷⁷⁴

UNICEF started a dialogue with the NRA leadership regarding child-soldiers on 24th October 1985, the time when the first corridors of peace flights had become operational. Initially, no agreement was reached but the mounting international pressure seems to have had some effect and the new government announced that all child soldiers were to be removed from front-line battalions and children would not be deployed in front line action. The NRA claimed that they had never forced any of these children into fighting and the ICRC medical teams confirmed this claim. This dialogue for the future and potential rehabilitation of the child soldiers was pursued by UNICEF until July 1986. Most returned to their homes, by June of 1986 about 3000 remained in the army. One of the first actions of the NRA on coming into power was to make arrangements for these child-soldiers.

⁷⁷⁴ Dodge CP, Raundalen, M, *Reaching Children in War: Sudan, Uganda and Mozambique* . Sigma Forlag : Uppsala Sweden, 1991, p 54.

After a lot of deliberations,⁷⁷⁵ which included looking at what was in the best interest of these children, the NRA took into account that these children had no parents and in many cases no relatives. Some had relatives who were also part of the NRA. Living with relatives who had difficulty in maintaining themselves and their families meant the possibility that these children would be deprived of many facilities which they could make use of within the NRA. There was also the problem of acceptance, as many schools refused to accept these children as they represented a potential disciplinary problem. The NRA therefore set up special schools for them in 1986. The army sent its qualified professional teachers for refresher courses and the first school was started at Bambo near Kampala. These children were later moved to Mbarara about 200 kilometres away from the city. The first Kadogo Primary school, started under the Ministry of Education but run by the Army, was established in 1987 at Mbarara. There were some 300 students of which 40 were girls. Once the Kadogos finished primary school, they were free to choose a secondary school of their own choice. The cost of their education was borne by the Ministry of Defence. In 1989, a total of 45 students were admitted to various schools around Mbarara. Most of them faced problems in getting admission. The army therefore had to convince the schools to accept these children. The kadogos' attending day-school, went to school and came back to the barracks in the evening. The curriculum for all these schools was decided by the Ministry of Education. During the holidays the kadogos who had no living family, would return to the barracks during holidays. Other activities were made available for them: these activities included, military science, agriculture, carpentry, political education, drama, kiswahili etc. In 1989 the NRA had introduced salaries, which was extended to these kadogos as well. This formed their pocket money for the month as well as contributed to some savings. They were provided by the army with school fees, uniform, books and stationary. Today, most of the primary schools have shut down as the majority have graduated from primary to secondary⁷⁷⁶ or are at college, university or are employed.

⁷⁷⁵ see NRA internal document, a paper written by Lt.Col Serwanga-Lwanga, the NRA Chief Political Commissar. (unpublished)

⁷⁷⁶ By 1990 most had left school i.e. they had graduated.

A problem group was 15-17 year old's who found it difficult to cope with⁷⁷⁷ school, kept running away. For these children counselling was provided, including problems such as smoking, drugs, alcoholism, and sexual abuse. Over a period of time the problems were reduced. However, many older boys were sent back to the army for military training and were re-deployed. Research indicates that most kadogos did go to school, the few that did not were either much older and /or did not feel comfortable to go back to being school children after having been the liberators. Some reportedly chose not to go to school as they had no basic education and it was difficult to begin at this stage. In all, 1989 saw 45 of them in secondary school, January 1994 saw 201 kadogos in various secondary schools and 193 in Mbarara Kadogo School, 1995 saw the first of them sitting for university entrance exams. In 1996, about 20 former Kadogos were students at Makerere University. In 1997, approximately 30 were at Makerere University of which a majority is studying law. Others have joined the National College of Business Studies, Nakawa and the Makerere Accountancy Centre. Some choose to go back to civilian life and others to continue in the armed forces as soldiers of the UPDF.⁷⁷⁸

Not much information is available about female kadogos. I tried to get information about female soldiers and get to meet some of them but was unsuccessful. The current policy is to avoid the recruitment of women as one soldier stated "they get pregnant."

IV. A.i. Problems Faced During Re-Integration And Rehabilitation

As submitted in the previous chapter, re-integration has been a formidable challenge.⁷⁷⁹ Children have had to re-modify urgently their values.⁷⁸⁰ This adaptation has been hard and needs time. Children have found it more difficult as they are often not even familiar with these rules and roles. As many join when they are so young and impressionable, that the

⁷⁷⁷ Mahumuza, R., *A Case Study on Reintegration of Demobilized Child soldiers in Uganda*, January 1995, p 6. (unpublished, but available as a World Vision Office Document.)

⁷⁷⁸ The information here has been reported by a number of researchers. I was able to re-confirm this information in a series of meetings with academics, officials and former child-soldiers in Kampala.

⁷⁷⁹ Chapter 6 of this thesis.

⁷⁸⁰ for a parents view on this re-modification of values see Andama, JWH., "The Parents Dilemma" in Dodge, CP and Raundalen M (eds.) *War, Violence and Children in Uganda*, 1987, pp 53-81.

impact of this new life, rules and roles is almost traumatic".⁷⁸¹ Besides this, they lack employable skills. Because of the resulting frustration often children get sucked back into leading violent lives as criminals or re-joining fighting .

Given the cultural set-up, women and girl-soldiers have had greater problems reintegrating than men and boys. Though even boys and returning combatants have had to face hostility as a lot depends on which side they were fighting on .

Some of the other problems identified have been that children need greater amount of psycho-social counselling and help. Such expertise is not always available. Besides this, they need forgiveness, love and understanding from their families and communities and this is not always forthcoming. The involvement of the community is crucial, if the children have to reintegrate back into the social fabric of society.⁷⁸²

IV.B. Rehabilitation And Re-Integration Of The Child -Soldiers Of The LRA:

The children who either manage to escape or are captured after a battle spend a day or two on an average in the army barracks providing the military intelligence with information. On the whole, from various children, counsellors and individuals it seems an established fact that children are given fair treatment by the UPDF soldiers. As soon as it is possible, they are handed over to the two NGOs working for the rehabilitation and re-integration of these children into society. The two NGOs are the GUSCO centre and the World Vision Centre for War Children, both based in Gulu. World Vision has two more homes, one in Kitgum and another in Kiryadongo. The work of other NGOs will be discussed in NGOs responses.

When they first arrive at the centre, the children are simply given the required medical treatment for physical wounds. They are given food and time to recover. The counsellors

⁷⁸¹ World Bank Report, 1997, p 275.

⁷⁸² Summerfield, D., "Children and Conflict" in *Medicine, Conflict and Survival*, vol. 15, No. 4, October-December 1999, para 2 on p 415.

are there as soon as the child arrives. The child's psycho-social⁷⁸³ support begins when the child is willing to talk about his/her experiences.

The children are also given vocational training at the centres. Families are informed as soon as possible about the whereabouts of the children. Family reunification is the principal factor in effective social reintegration. Sometimes it is difficult to trace the families.⁷⁸⁴ The centres also had to train counsellors to handle parental trauma as well, because the adults too find it difficult to accept the fact that their children have killed, raped and tortured.⁷⁸⁵ This has been one of the problems in re-uniting these children with their families, as besides the community, occasionally the parents have refused to take these children back. Some would like to but are fearful of the response of the community. There have been cases where the parents have opted to send their children away to the homes of relatives to ensure safety. There is also the constant fear of reprisal from the LRA as well. The LRA is known to go back to pick up and punish escapees and their families.

These children go back to their homes, when the counsellor feels they are ready and also when counsellors are satisfied with the atmosphere in the child's home.⁷⁸⁶ The follow-up is anything from 3 months to 3 years depending on the requirement and feasibility. Re-

⁷⁸³ The term "psycho-social" underlines the close relationship between the psychological and social effects of armed conflict, the one type of effect continually influencing the other. By "psycho-social effects" is meant the those experiences which effect emotions, behaviour, thoughts, memory and learning ability and how a situation may be perceived and understood. By "social effects" is meant how the diverse experiences of war alter peoples relationship with one another/ each other, in that such experience changes people, but also through death, separation, estrangement and other losses. "Social" may be extended to include an economic dimension, many individuals and families become destitute through the material and economic devastation for war, thus losing their social status and place in the familiar social network.

⁷⁸⁴ in a few cases the children had been abducted when they were infants so had no idea where they were from, unless an older child could re-collect and let this child know that he/she had been picked from which village or area. One boy now 14 years old was 3 when he was abducted. Currently his home is in the Kiryandogo centre as all efforts to trace his family have failed so far.

⁷⁸⁵ I attended a one day counselling session for families and community in Gulu. Many adults expressed their fears and many put forward arguments why children should not be allowed to come back.

⁷⁸⁶ the counsellors visits the area and the home of the child and assess the situation carefully before this decision is finally taken. The aim is to achieve this as soon as possible but it is not always in the best interests of the child to do so. I went to assess the situation in 3 cases , and we had to bring the children back with us in 2 of them. In one case the rebels were actually in the same settlement in the bush and we were warned away by the mother of the boy.

integration is becoming increasingly difficult according to UNICEF: “some communities are reluctant to take their children back fearing that the rebels will return to recapture these children; that the children have contacted HIV/AIDS during captivity; or that these adolescents will be rebellious after their experience in the military camps”. Occasionally this has meant that such circumstances lead to the children being forced to go back to their rebel associates, as that is the only alternative before them.⁷⁸⁷

Children are encouraged to go back to school, but are also given vocational training, as they find it difficult to go back to a normal childhood as the essence of childhood is gone. Children in general have the benefit of the presidential pardon declared in 1987, yet there are reports of children being tried for treason.⁷⁸⁸ In January 1999, five boys between 14-17 were executed by the UPDF.⁷⁸⁹ Under Uganda’s national laws, treason, which includes trying to overthrow the government, is punishable by death. An interesting issue that has appeared is the fact that the children from other conflict zones i.e. the West Nile and other fraction groups seem to be more prone to be charged under this law than the ones from the north. This needs to be investigated further.

Children who fought alongside the NRA, often chose to do so, and their circumstances were much different from those of the children in northern Uganda, who are kidnapped, then terrorised and brutalised into fighting for the LRA. The difference in the reality of the two groups of child-soldiers explains the difficulty of re-adapting or in some circumstances learning for the first instance the difference between “right and wrong”,⁷⁹⁰ these children fighting for the LRA need a greater degree of help and understanding. The

⁷⁸⁷ rarely reported.

⁷⁸⁸ reported in *ChildLink*. Also repeated in conversation with J Orut, Probation officer, Gulu. Livingstone Sewayana, Director Initiative for Human Rights, Kampala and By the Commissioner of Human Rights Commission of Uganda. Most of the children reported to be awaiting trial in Kampala are from the West Nile Front and almost without exception are Muslim. Information from UNICEF (internal) report and Memo to the Human Rights Commission of Uganda. 1997.

⁷⁸⁹ Coalition to Stop the Use of Child Soldiers, *The Use of Children As Soldiers in Uganda*. March 1999, p 115.

⁷⁹⁰ An anecdote - while I was in Uganda, there was a talk given by the head of the World Vision camp, and he spoke to the children of how things were getting a bit difficult as there was more demand and less facilities available including food, a little boy who had only seen the life of a rebel, offered to help by saying he was really good at looting food.

re-adapting of values and learning to live a normal life for these children, who are haunted by the deeds they have done is an extremely difficult task.

V. Has Enough Been Done?

In Phase II of the Demobilisation process conducted for veterans by the UVAP program, the Phase II orientation program was considered to be the “strongest element of phase II for successful reintegration”.⁷⁹¹ The Harare Conference conducted by the ILO between 11-14 July 1995 agreed that successful re-integration and rehabilitation is primarily dependent on the involvement of the children’s family and communities. The Mozambican experience also substantiates the fact that the family plays a crucial role in re-integration of ex-combatants.⁷⁹² Another factor is that vocational training is crucial too.⁷⁹³ The ability to feed themselves/grow food plays an important role in contributing to easier and quicker reintegration.⁷⁹⁴

Vukoni Lupa-Lasaga a reporter for *The Monitor*,⁷⁹⁵ stated that very little financial resources and expertise were being directed towards the rehabilitation of these child - soldiers of the NRA. In the Mozambican experience AMODEG too felt that too little was being done to help to reintegrate former child-combatants. Vocational training programs were not aimed at these children, and that they were ineligible for pension, these factors contributed to a festering resentment.⁷⁹⁶ This created understandable problems in the reintegration of former child-combatants. According to Brett and Mccallin, the case studies used for the Machel report establish that only limited instances of efforts to

⁷⁹¹ World Bank Report, 1997, p 240.

⁷⁹² Maslen, S, *ILO Action Programme on Skills and Entrepreneurship Training For Countries Emerging from Armed Conflict: The Reintegration of War-Affected Youth . The Experience of Mozambique. .* ILO, Geneva 1997. p 13

⁷⁹³ *ibid* , p3

⁷⁹⁴ *ibid*, p4

⁷⁹⁵ See *The Monitor*, 21-23 August 1995, “Special Report - Turning Kadogo Heroes into Children again”.

⁷⁹⁶ Maslen S, *ILO Action Programme on Skills and Entrepreneurship Training For Countries Emerging from Armed Conflict: The Reintegration of War-Affected Youth . The Experience of Mozambique. .* ILO, Geneva 1997, p 14.

demobilise and assist rehabilitation and reintegration of former child soldiers has been made.⁷⁹⁷

Interestingly, the formal demobilisation, reintegration and rehabilitation program conducted under the auspices of the Ministry of Defence (MOD) the Government and the World Bank, was formally handled by the Uganda Veterans Assistance Program (UVAP). It handled specifically “normal soldier” demobilisation. According to the report,⁷⁹⁸ there was some criticism as it states that child-soldiers were not given “explicit attention”⁷⁹⁹ Although it says “specific reintegration programs had been identified” this program did not cater to these child-soldiers.⁸⁰⁰ It seems to be possible that the NRA took a strong paternalistic view regarding the rehabilitation of the child soldier but it seems to me given my personal interaction with former child soldiers in Uganda that the program was reasonably successful, and further it has been even been considered by the RPA for their child-soldiers.

To answer the question whether enough has been done to rehabilitate and reintegrate the child-soldiers of the LRA, the answer is more difficult to find. Given the sheer magnitude and the scarcity of resources, based on personal experience, it is submitted that much effort is being made, but compared to what is required, it is not enough, specially with reference to psychological counselling. But it is a beginning. Another positive action has been the setting up of the Child Protection Unit under “The Children’s Desk” and plans are underway to expand this unit to 8 other districts in the North of Uganda. The worrying issue however is the change in 1999 in the attitude of the Ugandan authorities to try the 25 children for treason in the north and executing five from the south west district of Kasese.

⁷⁹⁷ Brett, R., McCallin, M., Shea, R., *Children: The Invisible Soldiers*, Radda Barnen: Stockholm, April 1996, p 61.

⁷⁹⁸ World Bank Report, 1997, p 230.

⁷⁹⁹ *ibid.*

⁸⁰⁰ *ibid.*

In Africa, little data exists despite the unprecedented number of children exposed to war.⁸⁰¹ According to Dodge and Raundalen, educational facilities will help in the situation. More and more children can be reached through their teachers and schools. Besides the importance of cultural methods, cartoons and story-telling are a very helpful method to help children. PTSD which normally is an after-effect accompanying war and insecurity has a very serious effect on children and society, the need for all the above becomes of greater importance in the absence of trained counsellors.⁸⁰² Both short-term and long-term issues can be resolved by using positive examples and providing a positive future for children, in this way one should “encourage more help for children in war based on observation and research, as well as by sharing new insights”.⁸⁰³

Rwanda is an example where the need of successfully re-integrating child-soldiers back into society is of the utmost importance given that 53% percent of the population comprises of children. As in the case of the NRA/M in Uganda, the children some 5,000 under the age of 18 years in October 1994, with the Rwandan Peoples Army (RPA) were never formally recruited. They simply become a part of the RPA as they moved through the country. Interestingly, the use of the term “demobilization” is questioned, as there is no hard data evident, but there are estimates that perhaps 80 percent of the children cannot be described as soldiers even if they carried out tasks or played an indirect role in the conflict. However, they could not be just send home, as firstly they had no homes or families to return to. In addition, the fear that their experiences and attitudes might create social problems for their communities. Ultimately, after much debate, a Kadogo School opened on 5 June 1995 with 41 teachers and 15 social workers and a small administrative core staff. The school began functioning with 2, 400 children from among the 5000. The aim of the authorities was: “the social re-integration of the former child soldiers back into the community, in a manner that will allow these children to grow and develop into

⁸⁰¹ see Dodge, CP and Raundalen, M. (eds.) *War, Violence and Children in Uganda*, Norwegian University Press: Oslo, 1987, p 108

⁸⁰² Summerfield, D., “Children and Conflict: Commentary” in *Medicine, Conflict and Survival*, vol. 15, No. 4., October-December 1999, p 415.

⁸⁰³ *ibid.* see also Innstrand, AG., Haaseth., *Street Children In Khartoum*, Thesis , University of Bergen, Norway, 1991. Raundalen, M., Raundalen, TS., Pereira, E., Vogt. N., *Street Children in Maputo*, Report to NORAD, Maputo, 1991,

responsible members of their communities.” MINADEF asserts that out of 2,992 Kadogos that were demobilized, there are none left in the army, although this claim is contested. Of these numbers, 400 have been re-united with their families; 1,702 are at the Kadogo primary school and 820 in secondary schools. However, some have been refused the opportunity of secondary education as the ability to pay fees was not present. There have been a number of problems at the Kadogo school. Funding for the social workers expired and by mid-1996 they had left. The facilities in the school are not as expected but offer only the basic necessary material such as food, clothing and shelter. “A full-fledged reintegration programme, from provision of life skills to preparation of the community for the boys return, is said to be cruelly lacking”.⁸⁰⁴

VI. Conclusions:

As stated in chapter one, the Machel study has “demonstrated the centrality of children and their human rights to the peace and security agenda. It posed a fundamental challenge to the way the United Nations system and especially the humanitarian community responded to violations of children’s rights in armed conflict”.⁸⁰⁵ As submitted earlier, as child soldiers these children lose out on almost all of their rights, their right to be nurtured, to care and protection, to a family, not to be tortured and they receive limited or no education, but in a majority of instances the conflict destroys educational institutions and hence it is difficult for children to return to normalcy. It has been established that most children “see education as their way out of poverty and are thus motivated to learn. the activity of going to school is clearly having a major organising effect on the children’s behaviour and self-esteem...it is important”.⁸⁰⁶ Armed conflict destroys this very crucial factor which helps them to retain some sense of

⁸⁰⁴ Cantwell, N., *Starting From Zero: The Promotion and Protection of Children’s Rights in Post-Genocide Rwanda, July 1994- December 1996*, UNICEF ICDC, Florence, p 52, 1997.

⁸⁰⁵ GA/SHC/3382, 30th Meeting (PM) 8 November 1996.

⁸⁰⁶ Jareg, E., McCallin, M., *The Rehabilitation of Former Child-Soldiers*, Report of a Training Workshop for Caregivers of Demobilised Child Soldiers. Freetown, Sierra Leone, ICCB: Geneva, 1993.

normalcy in their lives. By attacking and abducting children from schools, the LRA have caused great damage.

International law has extended protection to children in the guise of the CRC and in the form of Article 39, has indeed for the first time created a strong obligation upon states in theory to ensure the right to rehabilitation. It is true that until Article 39 of the CRC such a strong and specific obligation did not exist in positive international law. It clearly states that a child should be the beneficiary of special treatment and care. Further, as established above, the international community has accepted that children should be protected from practices which may foster racial, religious or any other forms of discrimination. Children should be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood and in full consciousness that their energy and talents should be devoted to the service of their fellowmen, thus indicating the urgency and importance of childhood as they are future adults of tomorrow.

For children, the family is the centre of their existence. The importance of the family in their lives has tended to be overlooked specially in times of emergency. By allowing states to derogate from their duties towards the family - as a central unit in the lives of a child, they have succeeded in indirectly weakening the protection extended to children.⁸⁰⁷ Further, by playing with words, the travaux préparatoires seems to indicate that states did not want to make this a very strong positive obligation but more of an ongoing obligation: to do what was possible. The Machel report in paragraph 190 stresses the role that education plays in the rehabilitation and conducive to normalcy for these children or any children effected by armed conflict or displacement. If we can provide children with access to education, a great deal could be achieved in terms of their rehabilitation. The case studies of not only Uganda, but Mozambique, Sudan and Ethiopia establish that the family and community play a great role in the reintegration and rehabilitation of these children.

⁸⁰⁷Van Beuren , G, *International law on the Rights of the Child*, Martinus Nijhoff & Save the Children : Dordrecht, 1995. p 86.

However, looking at the specific case study of Uganda, since no records of the children released were made on discharge, it is difficult to conduct any follow-up research. Most of these children faded into the fabric of society, credit perhaps to the NRA, but the fact is that the corridors of peace were a successful attempt in establishing relief in the conflict zones, and though most returned to civilian life, a small number opted to stay back in the army. These as we have seen have been provided with education and other facilities. The program conducted for these kadogos was reasonably successful. However the fact that no follow-up was conducted means that an opportunity was lost to evaluate the impact of war and violence on their lives, which may have proved of some assistance in dealing with the current child-soldiers though the situations are very different. Further, it seems that the international community is very strong in its emphasis on primary health care and such implementation but when dealing with the age group of 15-18 and of children who may have committed atrocities as combatants, protection and care is more ambiguous. This age group needs to be protected to a greater extent. As we have seen, this age group is more prone to recruitment and other factors and it is they that need to be targeted by NGOs and relief bodies, with more education, vocational skills and positive role models, to keep them safe from the “glamour” of being men on the front-line while they are children.

As the Machel report indicates, and has been stated above⁸⁰⁸ not enough is being done with regard to rehabilitation and reintegration of child-soldiers. Further, it is submitted that given the magnitude of the problem, “most nations simply do not have the resources to provide such treatment or facilities for children. It is therefore incumbent upon the international community to help secure the rights embodied in article 39”.⁸⁰⁹

⁸⁰⁸ on p 261 of this thesis.

⁸⁰⁹ Kent, G., *Implementing the Rights of the Child in Armed Conflict*, University of Hawai, Honolulu, 1991. Cohn, I., “The Convention on the Rights of the Child: What it Means for Children in War” in *International Journal of Refugee Law*, vol. 3, no. 1, 1991.

These violations and abuses today that children suffer as child-combatants, reflect a “political, moral and legal vacuum” throughout the world. They occur not because of the absence of legal protection, but because of lack of governmental will to implement the protection. As long as the presence and participation of children in armed conflict is accepted as inevitable, the situation will remain the same. In para 205 of her report, Machel states: “States parties have also recognised that the protection of the children is not just a national issue, but a legitimate concern of the international community.” This will be the focus of the next chapter.

Chapter Eight

INTERNATIONAL RESPONSE TO THE ISSUE OF CHILD SOLDIERS

I. Introduction:

It has been submitted earlier that the way “a society treats its children reflects not only its qualities of compassion and protective caring, but also its sense of justice, its commitment to the future and its urge to enhance the human condition for coming generations. This is indisputably true of the community of nations as it is of nations individually”.⁸¹⁰

Though a lot of effort seems to have gone into the issue of child soldiers, the Machel report feels, quite rightly it is submitted, that the humanitarian responses have been largely inadequate.⁸¹¹ For example in Somalia, the abandonment of the UN operation in February 1995 meant that relief agencies also withdrew, and in this situation child soldiers continue a dangerous existence. On the other hand in Sudan the zones of tranquillity and corridors of peace negotiated between the warring sides by UNICEF, World Vision, the Sudan Council of Churches, Oxfam and other NGOs helped. The transformation of these corridors of peace into Operation Lifeline Sudan have been described as “a landmark of humanitarian progress”⁸¹² yet, the example of Sudan⁸¹³ in the years 1986-1989 (Operation Lifeline Sudan began in 1989, a much more complex and spectacular operation than the Ugandan Corridors of Peace), made Dodge and Raundalen, question the reactions of the international community; the NGOs and the UN in their

⁸¹⁰ Perez de Cuellar, quoted in Flekkoy, MG., *A voice for Children: Speaking Out as Their Ombudsman*, 1991, London: Jessica Langley.

⁸¹¹ Machel Report, para 109.

⁸¹² Vittacchi, VT, *Between the Guns : Children as a Zone of Peace*, Hodder and Stoghton : London, 1993, p 67.

⁸¹³ See Chapter One on background to the conflict.

failure to provide assistance.⁸¹⁴ Today, coming specifically to child soldiers, there is a more positive change, for example, thanks to the offices of the SRSG, the Colombian armed groups have agreed not to recruit under 15s to fight for them,⁸¹⁵ but the phenomenon of child soldiers continues in increasing numbers.

This chapter looks at the international response to the issue of child soldiers. Its aim is to understand if the international community as a whole has really tried to halt the practice. By international response it is both the state and non-state entities that will be studied. It consists of two main sections. The first deals with the response of “the international community” in the traditional concept of the phrase and will therefore be studied through the debates in the UN, and other regional and state organisations and state practice. It looks at the state responses and state practice leading to the formation of law, regarding the use of children in armed conflict, dealing both with under 15 and the unprotected age group of 15-18 years of age. It also looks briefly at some UN organs and organisations working on the issue of child soldiers.

The second section deals with the role of voluntary organisations. It accepts the role organisations play as lobbyists and from this point proceeds to study briefly the role played by non-governmental organisations and bodies, both international and national, as an international response to the problem and possible interventions, with respect to the recruitment and participation of children in armed conflict. It also looks at the influence of the arms trade and the possibility of curbing it with respect to children. This chapter analyses the role of NGOs and other bodies in Uganda, a descriptive account of which is to be found in Chapter Six, the core case study of this thesis.

⁸¹⁴ Dodge CP, Raundalen, M, *Reaching Children in War : Sudan, Uganda and Mozambique* , Sigma Forlag : Uppsala Sweden, 1991, pp 80- 88. and chapter one of the same.

⁸¹⁵ UN Doc A/55/442 , 3 October 2000, “Protection of Children Affected By Armed Conflict”, pp 21-22.

II. The International Community

II.A. Presenting The Issue - A Joint Effort And Some Responses To It

The ICRC, International Union for Child Welfare, Defence for Children International, Radda Barnen, World Vision International, Save the Children, Quakers, UNHCR, UNICEF etc. have been crucial in the act of putting the issue before the world. The ICRC in fact made its first ever proposal for the protection of children in armed conflict as early as 1939, yet nothing ever came of it ironically because of the outbreak of war. Protection to be extended to children has since been discussed at various stages, the most prominent before the advent of the CRC is that during the drafting of the APs of 1977.⁸¹⁶ The ICRC has been officially working on the specific issue of child soldiers i.e. children participating in armed hostilities since 1972.⁸¹⁷ Since 1979 the Quaker UN Office (QUNO), Geneva along with some other organisations has been working to put the issue of child soldiers on the international agenda, and to establish the minimum age for recruitment i.e. for the purposes of participating in hostilities or enlisting into the armed forces, to that of 18.⁸¹⁸ An important report produced was that by Dorothea Woods in 1984 named "Children bearing Military Arms"⁸¹⁹ leading to a presentation in the UN⁸²⁰ by the UNICEF. It is important to note that this was not the only report to be presented, the issue came up in the form of other reports both in the media⁸²¹ and before the UN.⁸²²

⁸¹⁶ See Mann, H., "International Law and the Child Soldier" in vol. 36 *ICLQ*, 1987, pp 32- 57.

⁸¹⁷ *ibid*, p 33.

⁸¹⁸ See *Action Alert*, Quaker United Nations Office, Geneva, October - December 1998, vol. 17, No 4. on p 1.

⁸¹⁹ Woods, D., "Children Bearing Military Arms" in *General Information*, May 1984.

⁸²⁰ See Doc E/ICEF/1986/CRP.2 of 10 March 1986. Paragraphs 62-64. Titled "Children in Situations of Armed Conflict".

⁸²¹ For e.g. see Baxter, RR., "So-Called 'unprivileged' Belligerency: Spies, Guerillas and Saboteurs" 1951, 28 *BYBIL*, P323, Commentary of the International Union of Child Welfare in 1972. Lewis, F., "No Outcry for the Children of War", *International Herald Tribune* 27 April 1984. Moorehead, Caroline, "The Boys of War", *The Times*, London, 9 May 1984, Smith, Terrance., "Iran - Five Years of Fanaticism", *New York Times Magazine*, 12 February 1984. Granada Television Productions for ITV, England, "World in Action" on 25 November 1985.

⁸²² Doc E/CN.4/1985/18 on 1 February 1985, and E/CN.4/1986/22 of 3 February 1986. Commission on Human Rights "Final Report on the Situation of Human Rights in El Salvador" Submitted by Prof. Jose' Antonio Pastor Ridruejo.

QUNO, Geneva has been the focal point for the NGO coalition, working for the adoption of 18 as the minimum age of participation and recruitment in hostilities. In June 1998, the NGOs set up the “Coalition to Stop The Use of Child Soldiers”, based in Geneva.

II A (i) CRC Negotiations

Looking back at how the legal protection for children has taken shape, it is the drafting process of the CRC that proves to be crucially indicative of the how and why of the existing framework. The CRC clarifies not only the position of states and in some instances explains their support or opposition to issues but also exemplifies their conduct. During the drafting of the CRC as a whole much debate took place. However, there is criticism of the Inter-Governmental organisations because of their noted absence. Cantwell⁸²³ writes: “if the active participation of most individual governments generally left much to be desired, the presence and impact of inter-governmental organisations can only be qualified as scandalously weak”.⁸²⁴ On the other hand to summarise the NGO group effort: “[t]he extent of the overall NGO contribution is understandably, by no means always clear from the préparatoires. The success of the NGO activities to promote support for the convention was, for example, undoubtedly instrumental in getting governments to take the drafting process more seriously, and in giving the working group a renewed sense of purpose”.⁸²⁵ As far as the CRC is concerned, specifically with reference to child soldiers, it is the NGOs which are responsible for the inclusion of Articles 38 (4), 37, 39, 32, 33 and 40.⁸²⁶ The NGO group and a number of governments tried in vain to raise the age of recruitment and participation in hostilities to a minimum of 18. However, they had to concede this point. They then tried to ensure that at the very least the age group of 15 -18 would be prohibited from direct participation. There was however no consensus. Article 38 remains the most debated and controversial article in the CRC.⁸²⁷ During the drafting of the CRC,⁸²⁸ the question of the minimum age of

⁸²³ Director of Defence for Children International, who played a lead role during the drafting of the CRC.

⁸²⁴ for further details see, Cantwell, N., “The Origins, Development and Significance of the United Nations Convention on The Rights of the Child” in Detrick, S (ed. and comp.) *The United Nations Convention on The Rights of the Child : A Guide to the “Travaux Préparatoires”*, Martinus Nijhoff: Dordrecht, 1992, p 23.

⁸²⁵ *ibid*, pp 24-25.

⁸²⁶ *ibid*, p 25.

⁸²⁷ *ibid*, pp 26-29.

recruitment and participation in hostilities was the cause of much debate. Many governments and concerned organisations wished to see this age raised from 15 to 18 years. In fact seven countries, namely Argentina, Austria, Columbia, Germany, the Netherlands, Spain and Uruguay expressed their disapproval by declarations at the time of signature or ratification of the CRC. It is submitted that the CRC offers protection to children under 18 generally, except in the cases where children attain majority earlier than 18 under national legislation, but the CRC does extend special protection and makes all under 18 the beneficiary of special protection except - in the case of Article 38. It is because of Article 38(3) that States are expected to “*endeavour* to give priority to the oldest” while recruiting between the ages of 15 -18.

Interestingly the debates during the drafting of the CRC are “very telling” of the reactions of many governments. During the discussion on Article 38 (then draft Article 20) in the considerations of the 1988 Working Group,⁸²⁹ there are some interesting viewpoints to be noted. The Swedish delegation proposed bringing the then draft article *at least upto the existing standards* as established by the GCs of 1949 and the APs of 1977. Subsequently a number of members commented on the issue. For example, one participant stated that “[t]he group should not limit itself to revision of the concept of recruitment and recruitment age, because the real problem was with the militarization of children in official, private and informal armies”. Another pointed out that it was “premature” to take a decision on age of recruitment when Article 1 was not a satisfactory definition of a child in the first place. There were also some objections from participants who stated that their national legislation prevented them from supporting this proposed text. The result of this entire debate was the compromise that lead to establishing 15 as the minimum age of recruitment. The most vocal resistance to raising the age to 18 came from the UK, USA and France, with the USA alone refusing to change its position on the issue in November / December 1988.

⁸²⁸ this section relies on Detrick, S (ed. And comp.) *The United Nations Convention on the Rights of the Child : A Guide to the “Travaux Préparatoires”*, Martinus Nijhoff : Dordrecht, 1992.

⁸²⁹ E/CN.4/1988/28, pp 19-20.

In further deliberations,⁸³⁰ which took place in 1989, while incorporating some of the revisions as suggested by UNICEF,⁸³¹ the Working Group also had before them a proposal⁸³² by Angola, Austria, France, India, Italy, Mozambique, Norway, Sweden⁸³³, USA, UNHCR, ICRC, Quakers and the Radda Barnen. A summary of the main point of this proposal is that it suggested that no child under 18 should take a direct part in hostilities and those under 15 do not take any part in hostilities. The delegate from Sweden suggested, rightly,⁸³⁴ that the working group should not allow the proposed text to fall below already existing standards: a proposal that a number of participants were in total agreement with. It was also expressed that though the proposed text made it clear that children from the age of 15 years could be recruited into armed forces and therefore could not be realistically protected from participation, therefore the State Parties should at least endeavour to prevent this age group of 15-18 from “active” participation. The US delegation, which has been to date a strong opponent in this debate, stated that that the US had no desire to see children involved in armed conflict. However the US delegate stated that he believed that the word “child” should be replaced by the words “person who have not attained the age of 15 years”. He explained that this 15 year age limit represented international law, whereas the proposal to change this age was an attempt to “alter the Law of War as established in Protocol I in ways that the Diplomatic Conference concluded were unreasonable”.⁸³⁵ The US delegate further expressed “strong opposition” with regard to paragraph 4 of the proposal⁸³⁶ i.e. to replacing of the word “feasible” with “necessary” because, the use of the latter word in the view of the US, represented a standard that would be impossible to implement. He stated that the government of USA felt that it was more important to enforce and implement existing standards rather than create new standards that would be impossible to observe and enforce.⁸³⁷ A majority of the participants of the Working Group however rightly felt that they should not feel

⁸³⁰ Considerations of 1989 working group, E/CN.4/1989/48. pp 110-116.

⁸³¹ E/CN.4/1989/WG.1/WP.2

⁸³² For text see E/CN.4/1989/WG.1/WP.65

⁸³³ The proposal contained in E/CN.4/1989/WG.1/WP.65 was presented by the observer for Sweden.

⁸³⁴ Article 4 (3) of APII represents a higher level of protection than Article 38 of the CRC .

⁸³⁵ Detrick, S., (Ed. and Comp.) *The United Nations Convention on the Rights of the Child : A Guide to the “Travaux Pre’paratoires”*, Martinus Nijhoff : Dordrecht, 1992.on p 513.

⁸³⁶ see E/CN.4/1989/WG.1/WP.65.

constrained by existing international law standards,⁸³⁸ if it helped maximise the protection that could be offered to children. The response to this from the US and USSR representatives⁸³⁹ was that the Working group mandate did not include reviewing international law standards and nor was the forum an appropriate one! In fact, the representatives of the Federal Republic of Germany and the US opined that if no consensus text was arrived at, it would be a better idea to *delete* the whole article.⁸⁴⁰ Numerous other delegations however spoke in favour of this article. In fact, representatives of Algeria, Angola, Argentina, Australia, Austria, Canada, China, Columbia, Finland, France, the German Democratic Republic, the Holy See, India, Italy, Mexico, Mozambique, the Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, the Union of Soviet Socialist Republics, the United Kingdom, Venezuela, and the ICRC all voted in favour of the first version which protects children upto the age of 18.⁸⁴¹ The representatives of both Netherlands and New Zealand submitted that they would have preferred to extend a complete ban upto the age of 16 years regarding recruitment but were willing to agree on the compromise of 15 in the spirit of consensus.⁸⁴²

Columbia raised a query that is extremely interesting. The representative desired to know *why, if the Working Group was willing to recognise rights for children as understood to be persons upto 18 years of age, was the very same working group not willing to extend the same protection to children upto the age of 18 in situations of armed conflict.*⁸⁴³ Two States, India and UK, who had expressed difficulty in enforcing the 18 year limit, responded expressing some hesitation but both parties however, stated that they would *support* it with reservations,⁸⁴⁴ thus enabling their respective governments to be in a position to observe it. The UK, additionally, expressed the difficulty that as

⁸³⁷ *ibid.* para 603.

⁸³⁸ *ibid.* para 604.

⁸³⁹ *ibid.*

⁸⁴⁰ *ibid.* para 605.

⁸⁴¹ *ibid.* para 607.

⁸⁴² *ibid.* para 607.

⁸⁴³ *ibid.* para 607.

⁸⁴⁴ *ibid.*

children below 18 were part of the regular forces, it would be difficult to enforce this in times of hostilities.⁸⁴⁵

Since the drafting of the treaty was operating on the basis of consensus, the chairman, concluding that there was consensus on the age of 15 and that reaching an agreement on the age of 18 seemed difficult, closed the debate at the age of 15.⁸⁴⁶

It is interesting to note that though the debates in favour of 18 as the minimum age of recruitment and participation in hostilities lost in the drafting process of the CRC, the issue is as much in the forefront as it was then. This is due to the fact that certain organisations like the Radda Barnen, Quakers, the Swedish Red Cross persisted and were joined by agencies like the UNICEF and the UNHCR and the media which brought the issue home to people. After the CRC became reality, the issue of child soldiers continued to be topical, controversial and subject to debate.

In 1991, the Swedish Red Cross, the Radda Barnen and the Raoul Wallenberg Institute of Human Rights organised a conference on *Children Of War*,⁸⁴⁷ which resulted in the Study on behalf of the Henry Dunant Institute, Geneva entitled *Child Soldiers: The Role of Children in Armed Conflict*.⁸⁴⁸ This too emphasised the need for raising the minimum age of recruitment to 18 years.

The 1990s found the UN to be active on this front. The Committee on the Rights of the Child took up the issue of “children in armed conflicts” as their subject on the first day of

⁸⁴⁵ *ibid.*

⁸⁴⁶ Cantwell, N., “The Origins, Development and Significance of the United Nations Convention on the Rights of the Child”, in Detrick, S., (Ed. and Comp.) *The United Nations Convention on the Rights of the Child : A Guide to the “Travaux Préparatoires”*, Martinus Nijhoff : Dordrecht, 1992, p 27.

⁸⁴⁷ *Children in War*, report from the conference on Children of War, Stockholm, Sweden, 31st May - 2 June 1991, Raoul Wallenberg Institute, report No. 10, Lund, 1991.

⁸⁴⁸ Goodwin-Gill, G and Cohn, I., *Child Soldiers: The Role of Children in Armed Conflicts*, Clarendon Press: Oxford , 1994.

discussion on 9 October 1992.⁸⁴⁹ At the end of it the committee made two recommendations. First, the adoption of an Optional Protocol to the CRC to raise the minimum age of recruitment to 18 years, and second, recommended to the General Assembly (GA) that a request be made to the Secretary-General to undertake a study on children affected by armed conflict.⁸⁵⁰

II A (ii) General Assembly Responses

At its 48th session, the GA adopted resolution 48/157 which was “Protection of children affected by armed conflict” in which grave concern was expressed at the tragic situation of children in various conflicts occurring in various regions of the world. This resolution urged all member states to “continue seeking comprehensive improvement of the situation with appropriate and concrete measures to alleviate the situation and requested bodies and organisations, within the scope of their respective mandates, to co-operate in order to ensure more effective action in addressing the problem of children affected by armed conflicts”. Further, this same resolution asked for the appointment of an expert to undertake a comprehensive study on the issue on behalf of the UN.

The World Conference on Human Rights⁸⁵¹ also responded positively to the Committee on the Rights of the Child’s recommendation on having an Optional Protocol raising the age of recruitment and participation in hostilities to 18. The Committee then submitted a preliminary draft to the UN Commission on Human Rights. By virtue of resolution 1994/91, adopted without a vote, the Commission started the process of establishing an open-ended inter-sessional working group to elaborate, as a matter of priority a draft Optional Protocol (OP) to the CRC.⁸⁵²

⁸⁴⁹ UN Doc. CRC/C/10 of 13 October 1992. see also “Background Paper on United Nations Mechanisms on Childrens Rights” in *Rights of the Child : Report of a Training Program in Asia*. ICJ, Geneva , 1994 , p 294.

⁸⁵⁰ UN Doc CRC/C/16 of 5 March 1993 pp 36-37.

⁸⁵¹ Vienna, June 1993.

⁸⁵² for more details see “Report on the Working Group to Draft an Optional Protocol to the Convention on the Rights of the Child on Participation of Children in Armed Conflict (31st October - 11 November 1994)” Quaker United Nations Office , Geneva.

On 5 October 1994, Vitit Muntharborn's report in his capacity as the Special rapporteur on "Sale of children, Child Prostitution and Child Pornography" was presented to the GA.⁸⁵³ In this very innovative report of 1993, the special rapporteur in section D of his report entitled "Sale of Children" refers to the problem of children in armed conflicts and child soldiers. In paragraphs 99 and 113, 114 a specific mention is made of children in armed conflict situations. In paragraphs 115-116 a very crucial issue for child soldiers is raised i.e. the need for rehabilitation of these children.⁸⁵⁴ He emphasises a community and family based rehabilitation process instead of a state institute based rehabilitation.⁸⁵⁵ Further, in his recommendations he stresses that the age of recruitment should be raised to 18 and for those children fleeing recruitment he states: "If they have escaped recruitment, they should be awarded refugee status and accorded international protection. Dialogue with the military of both governmental and non-governmental forces is needed to curb the use of child soldiers".⁸⁵⁶ Regarding children who have fought in the conflict and have been captured he asserts strongly that their POW status be respected.⁸⁵⁷ This is important as children often get treated as ordinary criminals on capture and / or are not given the privileges associated with the status of POW. These issues are even today being stressed upon by both NGOs on the ground and researchers.

After this, the NGOs and the UN machinery seem to have worked together getting the issue increasingly as a crucial topic within the UN. The discussion on the issue of child soldiers in the United Nations, reached its apex, marking an important landmark in the appointment of Graca Machel as the expert on behalf of the Secretary-General on 8 June 1994, pursuant to the GA resolution 48/157 of 20 December 1993. She presented a report after a study of 2 years on 26 August 1996. It is after this report that the magnitude of the problem and the dire urgency for action was accepted. This report also indicated clearly that there was a need for a special rapporteur or representative who would focus all his/her attention to the issue. Pursuant to GA Resolution 51/77 Mr Olara Otunnu was

⁸⁵³ UN Doc A/49/478 49th session, Agenda item 101.

⁸⁵⁴ Also emphasised in UN Doc E/CN.4/1994/84 of 14 January 1994 in paras 130-131.

⁸⁵⁵ refer back to Chapters Six and Seven of this thesis.

⁸⁵⁶ UN Doc A/49/478 49th session, Agenda item 101, para 35 of section VI B.

⁸⁵⁷ *ibid.*

appointed as the Special Representative for the Secretary General for Children and Armed Conflict (SRSG) for a period of 3 years.

II. B. A Response to the Opposition to Raising the Age of Recruitment to 18

It is clear that there has been since the adoption of the CRC a shift in the stand taken by various states and a consensus on the age of 18 seems to have emerged. Yet an agreement on raising the age of recruitment to 18 remains unresolved. The OP to the CRC has been under discussion from 1994 to date. Though a text of the draft OP has been agreed upon in January 2000 the issue of a straight 18 ban on all kinds of participation and forces remains unresolved still.

As clarified in chapter three, Article 38(2) of the CRC allows indirect participation and so does Article 77(2) of API but Article 4(3)(c) of APII prohibits any participation. It must be noted at the very outset that the OP deals with a *single* issue, that with the age of recruitment and participation in armed conflicts. Initially it was felt that it would be a simple manoeuvre of changing the age from 15 to 18 in Article 38 of the CRC, however, research conducted has clarified the issue and it is now clear that the problem is not as simple as that. Some key points that the research conducted so far has highlighted are that:⁸⁵⁸

- 1.The majority of child soldiers are not part of regular government armed forces, though no doubt a large number of them are.
- 2.That though it varies from country to country and situation to situation, the “volunteers” even if only “notional volunteers” do exist, in a large number .
- 3.That irrespective of the complete ban on use of children below the age of 15, they continue to be deployed and used in armed conflicts.

⁸⁵⁸ see Rachel Brett “Child Soldiers: law, practice and politics” in *The International Journal of Childrens Rights*, vol. 4 no.2, 1996, p 123.

It is also important to understand that ground experience of NGOs⁸⁵⁹ indicates that it is virtually impossible to ascertain if a child has truly volunteered, as they may join under threats direct or indirect and be told to say that they have volunteered, or may have enlisted for the advantage of food, shelter and other basic necessities.⁸⁶⁰ This makes the need for a complete ban on recruitment or conscription below the age of 18 a necessary safeguard for children today. Further, if volunteers between the ages of 15-18 is allowed, the chances of it being misused by armed forces is possible. The physical development of children tends to vary, for example a 14 year may pass as a 17 year old, but it would be very difficult to pass a 13 year old as an 18 year old. In the instance that there existed a straight ban on under 18s for all kinds of participation, children would benefit greatly, as most armed conflicts today are internal and in countries where birth registration regulations are not adhered to or is not always possible. In the absence of such documentation, this straight ban would be of greater service.

It is submitted that *if* the OP has to make a significant impact and progress, it has to ban all participation as, most children graduate from indirect to direct participation on the front-line rapidly, and the state of art re: weapons technology has yet to advance to the level that it can differentiate and deviate from its path if it is about to hit an individual who is in an auxiliary, i.e. in a supporting role of an indirect participant for example, children on the front-line present as cooks or messengers are just as prone to the effects of a stray bullet or other weapons as are direct participants.

But it also seems that however important it is to raise the age from 15 to 18 as a legal standard this alone might not solve the problem. Because even though it seems that a consensus on the age of 18 has emerged, and there are reports and news that some countries are changing their national laws in a favour of a positive change i.e. 18 or above; there are, however, some which are digressing from a higher to a lower age

⁸⁵⁹ Radda Barnen, No 2/99, June 1999, p 1. also my personal viewpoint after interviews and discussions with refugees, and NGOs and others in Uganda, Burma and Thailand.

⁸⁶⁰ see also para 28 of UN Doc. E/CN.4/1998/102 Report of the Working Group on a draft optional protocol to the CRC, in its 4th session.

group.⁸⁶¹ This digression seems to indicate, it is submitted that legal protection for children has to be enforced by stronger methods than those currently in use. This behaviour seems to indicate that children are an expendable commodity and if the need arises they can be used as shown by the examples of Burundi, Congo, Mozambique, Angola, Sierra Leone, Sudan and Uganda in recent situations.⁸⁶²

The UK today represents an interesting conundrum: it is in favour of raising the age to 18 yet its domestic policy for recruitment is aimed at 16 year old school-leavers. The United Kingdom actually encourages youth to start the recruitment process while still at school, leaving only the formal enlistment for later. In a bid to swell the ranks of its armed forces, the UK recently embarked on a recruitment drive of under-18s. They routinely employ under-18's as a part of their regular forces. "If a 16-year-old is enrolled normally for 22 years of service, he or she has the right to 'buy out' after three years. The three year period, however, only begins to elapse upon the recruit's 18th birthday this is known as the 'five-year trap'. Five British soldiers under the age of 18 fought and died in both the Falklands conflict and the Gulf War."⁸⁶³ According to the Ministry of Defence (MOD),⁸⁶⁴ they have to target under 18s, otherwise they would not have the required number of recruits to make up the ranks. The UK's under-18 years old soldiers have also been part of it's peacekeeping operations.⁸⁶⁵ It is, however, interesting to note that in the UK the minimum age for police recruits is 18.⁸⁶⁶ The question of enforcement and implementation therefore clearly does arise. It brings up the question of how and why the

⁸⁶¹ for example - Columbia has raised the age of recruitment to 18, even its armed opposition group FARC has agreed not to recruit under 15's into their ranks. South Africa no longer has under 18's in their armed forces, Germany, Norway, Burundi, Canada are in the process of raising the age to 18 as well, but Angola has lowered the age.

⁸⁶² for details see Mermet, J., *The Use of Child Soldiers in Africa*, Coalition to Stop the Use of Child Soldiers Report, April 1999.

⁸⁶³ http://www.child-soldiers.org/Growing_phenomenon.htm

⁸⁶⁴ see also Hetherington, B., "Memorandum on the UK Government Policy on the Recruitment of Young Persons to the Armed Forces and on The Engagement of Young Persons in Armed Conflict", *Peace Pledge Union*, UK, April 1998.

⁸⁶⁵ see generally, AI report, *United Kingdom, U-18s: Child Soldiers at Risk*, London, November 2000. and *United Kingdom: U-18s: Report on the Recruitment and Deployment of Child Soldiers*, November 2000, AI Index EUR/45/57/00.

⁸⁶⁶ Information supplied by the Metropolitan Police Force to the Coalition to Stop the Use of Child Soldiers, quoted on p 8 in *Stop Using Child Soldiers*, Brochure prepared by the Coalition to Stop the Use of Child Soldiers and International Save the Children Alliance, 1998.

UK can support this position and yet their current practice is contradictory to their position internationally on the issue.

Is the UK therefore admitting that it is open to change and waiting for things to be legally tightened or is it merely mouthing the rhetoric of the need to protect under 18s and thinks that the wordings of the text are sufficiently vague enough to continue being in contradiction with their obligations or that the situation does not require a change in their current practice? This does bring up the question of what the Committee on the Rights of the Child and the international community sees as an appropriate response to this “breach” of obligation.

Going further towards the OP the government of the UK should expect further pressure to change domestic policy, as among the regional organisations, the EU Council of Ministers⁸⁶⁷ has also declared their strong support that the minimum age of recruitment should be 18 years and that once a text is agreed upon,⁸⁶⁸ the EU will encourage all states to adhere to the Optional Protocol.⁸⁶⁹ Besides this the EU also have welcomed the fact that the ICC⁸⁷⁰ makes the conscription and recruitment of under 15s a war-crime falling under the jurisdiction of the ICC.

The ILO Convention Number 182 or the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour adopted by the conference at its eighty-seventh session, Geneva , 17 June 1999 also known as the *Worst Forms of Child Labour Convention, 1999*, is another response to the problem of child soldiering which it describes as practice similar to slavery. This Convention which is intended to end the exploitation of children under the age of 18 does in its Article 2 specify clearly that the child is every individual below 18 years of age, and in Article 3 defines forced or compulsory recruitment of children for use in armed conflict as one of

⁸⁶⁷ see Radda Barnen “Children of War” Newsletter no 2/99, June 1999.

⁸⁶⁸ text agreed upon on 22 January 2000.

⁸⁶⁹ European Parliament , Resolution B4-1078, passed 17 December 1998.

⁸⁷⁰ see section on ICC, Chapter three.

the *worst forms of labour*. The CRC as is clear by its Article 1, fails children as it allows the setting of limits regarding age to be lower than 18 under national legislation and by the compromise achieved in Article 38.⁸⁷¹ This ILO Convention no 182 is a landmark, as it is for the *first time that an international convention has recognised the age of 18 as the minimum age limit for soldiers*. However, ILO Convention no 182 fails to establish a prohibition on the voluntary recruitment for under-18's. This weakens the document and the debates that took place show that trade unions, the African and most Latin American Countries, Canada, Norway and Denmark were in favour of "tougher provisions including a complete ban on the use of child soldiers under 18" and yet the narrower provision was adopted after "heavy insistence by the United States, supported by Sweden, Austria, Belgium, Finland, Germany, Hungary, Ireland, Luxembourg, New Zealand, Portugal, San Marino and Turkey".⁸⁷² Interestingly the ages of recruitment under domestic legislation⁸⁷³ for these countries are:

COUNTRY	AGE OF RECRUITMENT	CONSCRIPTION
USA	18 (Compulsory) 17 (Volunteer)	NO
Sweden	18 (Compulsory)	YES
Austria	18 (Compulsory) 17 (Volunteer)	YES
Belgium	18 (Compulsory abolished in 1994) 17 (Volunteer)	
Finland	18 (Compulsory) 17 (Volunteer)	YES
Germany	18 (Compulsory)	YES

⁸⁷¹ It can be argued that this flexibility allows the age to be higher than 18. However, it is the lowering of age which is a matter of concern.

⁸⁷² Radda Barnen, " ILO Congress Fails to Stop the Use of Child Soldiers" in *Children of War* , No 2/99, June 1999. on p 1.

⁸⁷³ from Goodwin-Gill , G., and Cohn ,I., *Child Soldiers: The Role of Children in Armed Conflicts*, Clarendon Press : Oxford, 1994, pp 187 -208.

	17 (Volunteer)	
Turkey	20 (Compulsory)	YES
Hungary	18 (Compulsory)	YES
Ireland	18 (Volunteer)	NO
Luxembourg	17 (Volunteer)	NO
New Zealand ⁸⁷⁴	16 (Volunteer only)	
Portugal	21 (Compulsory)	YES
San Marino	18 (Compulsory)	YES

It is interesting to note that even the vast majority of opposing states in this case have the age of 18 as a recruitment age, and allow 17 year-olds to volunteer except in the case of New Zealand. In the instance of this convention it is in all probability the case of the USA influencing the others⁸⁷⁵ (which makes for an interesting study as the USA has a strong stand against the use of child-labour.)⁸⁷⁶ Indeed, it a harsh reality that often States influence other States by methods which may include granting or denying aid, which may be financial, military or other. One such example would be that of China voting in favour of Guatemala in the Security Council in 1998 on the human rights situation in Guatemala, on the condition that it accept Chinese sovereignty over Taiwan. Another immediate example that springs to the mind is that of US influencing the UK and also France and Germany to supply arms to Iraq during the Iraq-Iran war.

It is submitted that "State practice suggests that a minimum age of 18 may already be an emerging norm of customary international law",⁸⁷⁷ a belief that is being reiterated in most resolutions and documents currently. The study conducted by the Henry Dunant Institute also establishes that a state practice seems to exist in favour of the total prohibition on

⁸⁷⁴ under 18s may join with parental consent or if married. Liability to active service overseas are 18 for army and airforce and 16 and 1/2 years for the navy.

⁸⁷⁵ similar to the ICC proceedings in Roma, Italy, in June-July 1998.

⁸⁷⁶ The Harkins Bill is an example.

⁸⁷⁷ Commission on Human Rights, Fifty-Second session., item 20 of the agenda, "Rights of the Child - Impact of Armed Conflict on Children :Report of the Secretary -General". UN Doc E/CN.4/1996/110. See paragraph 38.

compulsory recruitment (conscription) of under 18s into governmental armed forces, as out of the 99 countries which have a law setting the minimum age, 70 of them specify 18 years or above. According to a recent report by the Coalition, countries that allow under-18s to enlist in governmental forces, the age for participation in hostilities except for the UK is 18 years.⁸⁷⁸ The OP was adopted unanimously on 25 May 2000 by the UN GA and has been signed by Canada and San Marino, Sweden, Argentina, Norway and Cambodia. As of 6 January 2001⁸⁷⁹ it has 70 signatories and 3 State Parties,⁸⁸⁰ The fact is, that though a text has been agreed upon a consensus on a complete ban of the recruitment on children upto the age of 18 has not been arrived at so far, because of the mainly strong opposition of the USA, supported by the UK and Australia.⁸⁸¹

During the drafting history of the CRC as can be seen from above and the section on the ICRC below, some of the US opposition to the age of 18 has been that they believed that this was re-writing international humanitarian law in an “inappropriate forum” this as clarified earlier was countered by the ICRC delegates. But it is submitted that if one follows the debates during the drafting of the CRC, it is fairly evident that many states stressed on the need for updating and making changes to deal with new and current situations. If states could insist in the same spirit to modify, change or simply introduce rights for the first time in an international instrument extending legal protection to children, why is it not possible to do the same in the case of armed conflict, further more when it would result in raising the existing standards, in favour of the best interests of the child.

⁸⁷⁸ See page 13 of “Stop Using Child Soldiers”.

⁸⁷⁹ source International Coalition Against Child Soldiers, website - <http://www.child-soldiers.org>. Bangladesh (6 September 2000), Sri Lanka (8 September 2000) and Canada (7 July 2000) are the states which have ratified the OP.

⁸⁸⁰ The ICRC stated that they preferred a delay in the OP, instead of a compromise solution which in their opinion would weaken the protection offered to all children below the age of 18, and would therefore lower the levels of international humanitarian law. see E/CN.4/1998/WG.13/2 paragraphs 53 - 105 And Statement by the ICRC, on 16 April 1998, in Geneva to the Commission on Human rights, 54th Session. item 20 of the Agenda.

⁸⁸¹ “CRC Optional Protocol Finally Agreed” in *Children of War*, No1/00, March 2000 Radda Barnen : Sweden, p 1 para 3.

Another objection is that the US insists it is more appropriate to enforce existing standards rather than create new ones which cannot be observed. Law as submitted earlier is a evolving process,⁸⁸² often following events, but it is a law whose nature allows it to follow needs and hence to be changed as the current needs develop. This particular objection of the US, if it were to be accepted, suggests that we may have to digress from many an existing standard that the world has been working hard to achieve, simply for the reason that they have not been enforced satisfactorily yet globally, or that there are problems of implementation or enforcement, and so the need to have a law that provides stronger protection is irrelevant! There is also the fact that every single study conducted on the issue of child soldiers to date has strongly and urgently recommended that the age of recruitment and of participation of any kind be allowed only for 18 and above.⁸⁸³ These various studies, though not a strict source of international law can be equated to the writings of the most qualified publicists,⁸⁸⁴ and are indicative of an emerging custom. They therefore carry legal weight. In fact, Bellamy while addressing the UN SC stated that “[w]e would be derelict if we did not reiterate in the strongest possible terms, that until the minimum age of recruitment is universally set at 18, the ruthless exploitation of children as soldiers will continue.”⁸⁸⁵

Nils Thedin, president of the Swedish Committee of UNICEF in 1984 stated, “[i]n the present situation with the threat of armed conflict of indiscriminate destruction... it is imperative to strengthen the UN and other instruments of international law”.⁸⁸⁶ Today, this threat is a strong reality with figures of children under 18 fighting as soldiers touching 300, 000. In the case of children, if we can establish stronger protection in their favour than that currently exists, that protection is preferable in a legally binding form, so that in the instance that children could be abused, the existing law would be in the position to come to their aid. Children as submitted and re-iterated earlier cannot wait, the

⁸⁸² See Chapter Two of this thesis.

⁸⁸³ For example, the Machel report, the Henry Dunant Report (by Goodwin-Gill and Cohn), reports mentioned in para 111 of Section D of UN Doc A/49/478, AI report , HRW report.

⁸⁸⁴ Article 38 of the ICJ Statute.

⁸⁸⁵ Carol Bellamy, Executive Director UNICEF, in a statement to the UN SC on 12 February 1999.

⁸⁸⁶ *Report on Child Victims of Armed Conflicts*, NGO Forum, Rome, 28 April 1984, Radda Barnen International, 1984.

protection and aid provided to them has to be in the “present” not “tomorrow”, as a child is today. The US army accepts 17 year old volunteer recruits so is unwilling to change its position as it means they would have to change their domestic policy. The minimum age of recruitment in the USA into the police forces is generally 18 though in many states of the US it is 21.⁸⁸⁷ The current position of the Government of the United States, is that they vigorously oppose the OP setting eighteen as the minimum age for either recruitment or participation in armed conflict. According to Human Rights Watch,⁸⁸⁸ the US officials have stated that recruitment of “seventeen-year-olds represented an ‘edge’ that the Defence Department was not willing to give up, and argued that given the lack of compliance with existing standards prohibiting the use of under-fifteen’s, emphasis should be placed on enforcing current prohibitions rather than raising the relevant age”. And yet, there are a very small number of under-eighteen’s in the U.S. armed forces, according to the HRW paper, they comprise less than one-half of 1 percent of the US army. According to the Department of Defence Statistics, “less than 7000 minors are in the US armed forces, making up less than half of one percent of the total 1.5 million active duty forces and four percent of new active duty recruits each year”.⁸⁸⁹ The HRW response is that the United States is sacrificing strong international protection for children in order to protect its own military recruitment policies. Becker, the Director of the Children’s Rights Program of HRW has said that “[r]ecruits under the age of eighteen are a negligible part of the U.S. armed forces, There’s no reason that thousands of children around the world should be at risk, just so the Pentagon won’t be inconvenienced.”⁸⁹⁰

It seems that the US is opposing with vigour the text of the OP to the CRC as they fear that ratification of the OP along similar lines to the CRC. This would, they fear, indicate or establish further an emerging norm of customary international law regarding the

⁸⁸⁷ *ibid* above fn 32.

⁸⁸⁸ <http://www.hrw.org> also <http://www.child-soldiers.org/> ; <http://www.us-childsoldiers.org/> .

⁸⁸⁹ <http://www.hrw.org/hrw/press/1999/jun/labor699.htm>.

⁸⁹⁰ U.S. Blocks Efforts to Ban the Use of Child Soldiers - Clinton Urged to Back Stronger Measures in Geneva see website : <http://www.hrw.org/hrw/press/1999/jun/labor699.htm>.

minimum age of recruitment and participation in armed conflict and the US will therefore face pressure to change its domestic policy.⁸⁹¹

This section indicates that the opposition to raising of age of recruitment to 18 is not justifiable: it demonstrates that the opposition is based on narrow military interests.⁸⁹² Given that the US has been the strongest opponent to the establishment of 18 as the minimum age of recruitment, it does seem a shame that the only state that has yet to date become a party to the CRC, is calling the shots and is in a position to influence the voting of other states.⁸⁹³ It does bring up the point that if the CRC has attained the status of customary international law by virtue of being “universally ratified” and other research conducted has shown that most states are in favour of the establishment of 18 year old as a minimum age for all kinds of participation, that a *sole* even if a *persistent objector* should be allowed to influence the situation versus the universal acceptance? Is the norm of customary international law stronger than the persistent objector or vice-versa? The question before the international community therefore is that given its acceptance of the moral and legal need to protect children from the effects and impact of soldiering, is how and what they will do to provide their children with protection that they believe their children need ?

III. The Response Of Some UN Organs And Some Inter - Governmental Bodies :

III.A. The Committee On The Rights Of The Child⁸⁹⁴

Looking at the performance of the Committee on the Rights of the Child tackling of the issue of child soldiers, it is the Committee that *chose* to have the topic of children in

⁸⁹¹ <http://www.hrw.org/hrw/campaigns/crp/q&a.htm>.

⁸⁹² see also letter from retired army personnel to President Clinton on HRW website <http://www.hrw.org/hrw/campaigns/crp/mil2.htm> . See also “U.S. Congress Condemns The Use Of Child Soldiers” in Appropriations for the Department of Defense for Fiscal Year 1999 Section 8128 (a) of the Conference Report Accompanying H.R. 4103. also available on HRW website.

⁸⁹³ see AI News Release - IOR 42/06/99 of 10 June 1999

⁸⁹⁴ see Chapter Three for more information on the Committee.

armed conflict as its theme on the first day of meeting on 5 October 1992. The Committee endorsed the idea and recommendations of the day regarding child participation in armed conflict leading to the Machel Study. During its second session, the Committee devoted its 38th and 39th meetings⁸⁹⁵ to a general discussion on "Children in Armed Conflicts". The relevance and adequacy of existing standards was examined. It was pointed out that there were some situations in which children did not benefit from the protection of existing standards. There was therefore a strong need to consider a set of minimum humanitarian standards to be applicable in all situations to all children, without discrimination, in a period of armed conflict, which would thus fill any existing gaps. The Committee also stressed that the international community should apply more conducive standards than those directly deriving from the Convention, namely by not recruiting children under 18 years of age into the armed forces. Preventive measures too were discussed. It was recalled that, apart from Article 38, the overall framework of the realisation of the rights of the child set forth by the Convention should be ensured. The emphasis was that the age should be raised to 18.⁸⁹⁶ Post-Vienna (Conference on Human Rights in 1993), the Committee drafted a preliminary draft Optional Protocol to the CRC raising the minimum age of recruitment into armed forces. After which the Commission on Human Rights by virtue of resolution 1994/91 adopted by consensus to establish an open-ended working group to work on the draft optional protocol to the CRC regarding the involvement of children in armed conflict. The Working group met from 31 October to 11 November 1994. They included between 20-50 member and observer states of the Commission on Human Rights, UNICEF, UNHCR, ICRC and NGOs. The Committee however was absent during this session. This absence was strongly felt as there were many queries and suggestions that they could clarify. Given that the Committee is in the position to question states and place checks on them, and accepted that there are limitations on their abilities due to lack of resources, it is still disappointing.

⁸⁹⁵ 5 October 1992

⁸⁹⁶ see para 549(e).

The Committee adopted a recommendation on behalf of children in Armed Conflict on 21 September-9 October 1998.⁸⁹⁷ They discussed the relevance and adequacy of existing standards. It expressed its alarm at the deeply tragic consequences of the involvement of children in armed conflict which were brought home in the State Party reports. It stressed its belief that a new legal instrument i.e. an Optional Protocol was urgently needed in order to strengthen the levels of protection ensured by the Convention; and stressed the special responsibility of States parties to the search for the most protective solutions, guided by the best interests of the child. It also recalled its recommendation on the fundamental importance of raising the age of all forms of recruitment of children into the armed forces to eighteen years and the prohibition of their involvement in hostilities.

It has in its reports to the GA expressed deep concern on the use of child soldiers. In its response to the State Report submitted by Uganda, it expressed deep concern at the violation of the rules of international humanitarian law in the north of Uganda. The Committee stated that Uganda was in violation of Article 38 of the CRC.⁸⁹⁸ Looking more specifically at the committee performance, the Committee in fact did inquire of the Government of Uganda what it could do to secure the lives of such children in the north and what action could be expected from the OAU, the international community generally and the office of the SRSG.⁸⁹⁹ It further questioned the delegation of Uganda regarding the strategies in place for the implementation of the Children's Statute,⁹⁰⁰ the portion of the budget allocation identified for children,⁹⁰¹ and also regarding the responsibility of the State in applying the APs, international humanitarian law and Article 22 of the African Charter.⁹⁰² The Committee asked the Government of Uganda to explain its needs regarding assistance to child victims of the conflict in the north,⁹⁰³ to explain its juvenile

⁸⁹⁷ see website <http://www.unhchr.ch/html/menu2/6/crcrecom#22nd>

⁸⁹⁸ Concluding Observations of the Committee on the Rights of the Child: Uganda, 21/100/97. CRC/C/15/Add.80. see paras 19 -20.

⁸⁹⁹ see Summery Record of the 409th Meeting: Uganda 02/10/97 CRC/C/SR.409 . para 15.

⁹⁰⁰ *ibid*, para 21.

⁹⁰¹ *ibid*, para 26.

⁹⁰² *ibid*, para 59.

⁹⁰³ Summary Record of 410th Meeting, 12/12/97 CRC/C/SR.410 para 2.

justice system, detention procedures and rehabilitation abilities.⁹⁰⁴ One of the very interesting questions that the Committee put forward was the explanation desired regarding the governments position regarding the possibility of recruiting of children from the age of 13 into its armed forces. The Committee inquired “how far the provision was compatible with the convention”.⁹⁰⁵ It has further expressed its concern regarding action taken for care of traumatised children as insufficient,⁹⁰⁶ and has expressed its concern over the gaps in law which it referred to as “unclear” and actual practice.⁹⁰⁷ In some cases it has appreciated the stand adopted by the Government, for example that of Uruguay regarding the age of recruitment,⁹⁰⁸ for Myanmar⁹⁰⁹ or Burma, it expressed grave concern regarding the reports of forced and under-age recruitment of children and insufficient measures taken with regard to its obligations under Article 39. In the deliberations that took place between the Committee and the government delegations, it inquired very specifically as to “what means were available to children under the age of 12 to refuse enlistment in armed forces and how the rights of the child obliged to work as a ‘porter’ in the armed forces were protected and safeguarded”.⁹¹⁰ Further the Committee inquired, referring to the fact that children below 14 were serving in the government armed forces as well as opposition,⁹¹¹ “what was being done to verify the real age of children recruited into the armed forces or compelled to perform forced labour. Was a program of specific treatment planned for children traumatised by the conflict or after-effects of the conflict in Myanmar”.⁹¹² The response of the government delegate was interesting. He stated that “the allegations that the army recruited young people under the age of 18 were groundless. However, it did happen that, in order to be enlisted, young men pretended they were older than they really were, for example by falsifying their

⁹⁰⁴ Summary Record of 410th Meeting, 12/12/97 CRC/C/SR.410 para 9.

⁹⁰⁵ *ibid*, para 14.

⁹⁰⁶ *ibid*, para 38.

⁹⁰⁷ *ibid*, para 47.

⁹⁰⁸ Report of the Committee on the Rights of the Child 07/07/98 Doc: A/53/41 (Sessional/Annual report) see para 330.

⁹⁰⁹ Report of the Committee on the Rights of the Child - 07/07/98 Doc A/53/41 (Sessional/Annual report) para 582.

⁹¹⁰ Summary Record of the 359th Meeting : Myanmar 21/003/97 CRC/C/SR.359. para 16.

⁹¹¹ *ibid*, para 24.

⁹¹² *ibid*, para 29.

identity papers. The military authorities therefore had to check the age of new recruits very carefully. As to youths under the age of 18 who had fought with the insurgents, the Government had to exercise great indulgence towards them because they were not aware of the consequences of their actions. For that reason, the State was facilitating their reintegration and taking care to ensure that their special needs, and in particular psychological needs, were met. In that connection, his delegation had taken due note of the Committee's suggestion concerning the establishment of a special unit for minors who had been traumatised by the war".⁹¹³ The Committee response has been strong: "there were real problems in Myanmar and the State could not evade them by saying they merely amounted to allegations".⁹¹⁴ One can see that in the case of Myanmar the Committee has taken a strong line of questioning regarding under-age recruitment,⁹¹⁵ social re-integration and rehabilitation,⁹¹⁶ and asked the State to take appropriate measures regarding combating the problems of child labour including under-age recruitment and comprehensive reforms regarding juvenile justice.⁹¹⁷ Looking at the two country reports above, it seems that the committee is looking at reports other than state reports and has a strong stand regarding the use of children in armed conflict, and is concerned deeply about the impact and effect it has on them and is in favour of much more to be done regarding rehabilitation and reintegration of these children.

III.B. The Special Representative For Children In Armed Conflict (SRSG)

In October 1997, Mr Olara Otunnu accepted the post of the Special Representative for Children in Armed Conflict. His mandate as the SRSG is to serve as an "advocate for children in conflict situations, promoting measures for their protection in times of conflict and for their healing and reintegration in conflict's aftermath: by taking concrete initiatives in particular cases; by informing and mobilising international public opinion; by ensuring that the welfare of children affected by armed conflict is a priority on the

⁹¹³ *ibid*, para 35.

⁹¹⁴ *ibid*, para 33.

⁹¹⁵ Concluding Observations of the Committee on the Rights of the Child, 24 Jan 1997, CRC/C/15/Add .69 para 22.

⁹¹⁶ *ibid*, para 45.

⁹¹⁷ *ibid*, paras 43, 46.

international agenda; and by acting as a catalyst among United Nations agencies and humanitarian non-governmental organisations to develop a concerted and focused approach to meet the needs of children affected by violent conflict”.⁹¹⁸ Since his appointment, he has made an effort to visit effected countries, making special efforts to seek improvements in the situation of children. The list of such countries is large, numbering approximately 50, comprising of those in the midst of conflict as well as in post-conflict recovery. He has personally visited the Federal Republic of Yugoslavia (Kosovo), Liberia, Sierra Leone, Sri Lanka, Sudan and Columbia. His office has also conducted two assessment missions to Afghanistan. The SRSG in his discussions with relevant parties has emerged with a number of important commitments concerning, for example, assurance of access to humanitarian aid for affected populations, cessation of the recruitment and participation of children in hostilities, use of landmines and targeting of civilian populations.⁹¹⁹ The SRSG has been very vocal in his support for the raising of the age limit from 15 to 18 and a ban on all kinds of participation. Further, he has expressed his complete support for an OP towards achieving this aim. He has urged the Security Council of the UN to take immediate action.⁹²⁰ The Security Council (SC) dedicated an entire day to discussions on the issue of child soldiers and expressed their “grave concern” of the impact of armed conflict on children and “strongly condemned” the suffering forced on the children. The SC for the first time has condemned explicitly the practice of recruitment of children in hostilities, and called for an immediate halt to this practice. In fact on 26 August 1999 after listening to 48 speakers on the issue, they adopted resolution 1261 (1999). The SC in fact asked the Secretary-General to submit by 31 July 2000 a report on the implementation of the Resolution, consulting all relevant parts of the UN system and taking into account other relevant work.⁹²¹ The Security Council has adopted Resolution 1279 (30 November 1999) and 1314 (11 August 2000).⁹²² The SC further has urged States and the entire machinery of the UN to

⁹¹⁸ The mandate of the SRSG as on the homepage of the office of the SRSG in 1999. see website <http://www.un.org/special-rep/children-armed-conflict/fstate.htm>

⁹¹⁹ For more details on the office of the SRSG and follow up on activities conducted see: <http://www.un.org/special-rep/children-armed-conflict/ffield.htm>.

⁹²⁰ 29 June 1999, IPS.

⁹²¹ see report , available on <http://www.un.org/special-rep/children-armed-conflict/freports.htm>.

⁹²² website - <http://www.un.org/special-rep/children-armed-conflict/fUnDocs.htm>.

“facilitate disarmament, demobilisation, rehabilitation and reintegration of children used as soldiers” and also requested an intensification of effort by all to achieve this. A more recent achievement of the office of the SRSG is the deployment of Child Protection Advisers as an integral part of the enhanced peacekeeping missions in Sierra Leone⁹²³ and the Democratic Republic of the Congo (DRC)⁹²⁴ and the addition of civilian specialists in child protection and human rights to the “blue helmets” of the UN Mission in Sierra Leone (UNAMSIL) and in the DRC (MONUC).

III.C. United Nations Fund For Children (UNICEF)⁹²⁵

This is a special organ of the UN created to provide the children of the world with all the aid, assistance required to ensure the care and protection they need. It has special concern for child victims of armed conflict, a concern that was highlighted in the 1996 *State of the World's Children Report*. UNICEF also played a pertinent role in the Machel study, particularly in their contribution in the form of the recommendations made by the Machel study to the UN. An important point to be noted is that right from the time of creation, UNICEF started work on the basis that “children are above the political divide”. And it is noteworthy that the UNICEF to-date has a current track record of working often with both sides of the fighting forces, as they needed to provide aid to children on both sides, two classic examples being the Vietnam War and the conflict in El Salvador.⁹²⁶ Today UNICEF has a special program entitled; Children in Difficult Circumstances (CEDC), which includes the category “children in situations of armed conflict”. Concrete examples of how the CEDC intervention can be used can be seen in the instances of child soldiers in Rwanda in ensuring their demobilisation and reintegration and in protecting the rights of children charged with genocide in prison in Rwanda. Besides the traditional UNICEF programmes of basic health, nutrition and education, most of UNICEF efforts today seem

⁹²³ pursuant to Security Council Resolution 1260

⁹²⁴ following the adoption of Security Council Resolution 1279

⁹²⁵ For more details see Black., Maggie, *The Story of UNICEF, Past and Present*, Oxford University Press, 1996 – specially chapter 9 - “Children at the Frontline” and Chapter 10 – “Towards 2000 and Beyond.”

⁹²⁶ *ibid*, pp 247-249.

to concentrate on the rehabilitation and re-integration of child soldiers and other child victims in armed conflicts. The IDP Program of the UNICEF⁹²⁷ is a case in point.

To further this goal, that of protecting children under 18 from the effects of involvement in armed conflicts, UNICEF has proposed that the ICC should act against recruitment irrespective of whether it involves direct or indirect participation.⁹²⁸

III.D United Nations High Commission For Refugees (UNHCR)

The UNHCR has been involved on the ground working with refugees and unaccompanied children. They have been in many instances the first to see the recruitment policies and drives of many groups, both governmental and non-governmental. In the UNHCR Information note of 22 July 1991, the Office of the High Commissioner stated fears of the forced recruitment for direct and indirect participation of women and girls living in refugee camps into armed forces.⁹²⁹ The UNHCR is involved with providing assistance to refugee children - and have been implementing programme priorities in various countries which deal with women, children and the environment.⁹³⁰ The UNHCR was also involved in the reintegration of demobilised soldiers with partner NGOs in countries like Mozambique, Angola and so on.⁹³¹ They have been supporting strongly the raising of the minimum age of recruitment from 15 to 18 years. Mrs Sadaka Ogata, in her statement to the 52nd Session of the UN Commission on Human Rights spoke of the active participation of her office in the preparation of the *Study on the Impact of Armed Conflict Children* and that the UNHCR was strongly in favour of the draft OP banning the "recruitment of all children under the age of 18 in military recruitment".⁹³² The office of

⁹²⁷ Kunder, James., *The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations*, Office of Emergency Programmes Working Paper Series, UNICEF, New York September 1998, p 11.

⁹²⁸ 29 June 1999 IPS. UN.

⁹²⁹ see Doc EC/SCP/67, Executive Committee of the High Commissioners Program, 42nd Session, Sub-Committee of the whole on international protection, paragraph 37 (d) .

⁹³⁰ EC/46/CRP.35, of 31st May 1996, "Update on Regional Developments in Africa".

⁹³¹ EXCOM report - Summary record of the 503rd Meeting, October 1995, paragraph - 105.

⁹³² see document E/CN.4/1996/WG.13/2 Add.1. for comments on the OP to the CRC.

the UNHCR has contributed funds to the office of the SRSG. The High Commissioner has emphasised the need to stop the recruitment of child soldiers. She has also spoken of the need to protest against the detention of children in prison. She stressed that it is a must to "prevent the victimisation of children".⁹³³

IV. The Role Of Some International, National and Non - Governmental Organisations

State actors no doubt play the lead role in the transformation of "a legal and often moral need" into international law, yet, it is the non-state actors such as non-governmental organisations at national, regional and international levels along with various other agencies and inter-governmental organisations that lay the foundation to the formulation of international law. Yet, it is only in recent years that attitudes have changed and acceptance of these non-state actors as a driving force with expert expertise has been accepted. The acclaim has indeed taken a long time to arrive because it is also quite true that until recent years international agencies have been renowned for being by the very nature of their mandates and by their size, to be cumbrous. They are bound by the sovereignty principle, which is deeply entrenched in the UN Charter, and hence have to respect national borders and the autonomy of national states. It is indeed a welcome development that recently in international relations the notion has become increasingly predominant that sovereign nations have not only rights but obligations towards people within their borders.⁹³⁴ The latest is the NATO action in Kosovar,⁹³⁵ controversial⁹³⁶ it

⁹³³ Speaking at the Nansen Medal Award Ceremony, Geneva, 20 October 1995, see web site : <http://www.unhcr.ch/refworld/unhcr/hcspeech/20o1995b.htm>

⁹³⁴ see Wheeler, NJ., *Saving Strangers: Humanitarian Intervention in International Society*, Oxford University Press, 2000.

⁹³⁵ for NATO's role in relation to the conflict in Kosovo see report on website: <http://www.nato.int/kosovo/history.htm>

⁹³⁶ See White, ND, "The Legality of Bombing in the Name of Humanity" in *Journal of Conflict and Security Law*, vol. 5, No. 1, 2000. Nye, JS., "Redefining National Interest", *Foreign Affairs*, vol. 78, 1999, Lutwakk, EN., "Give War a Chance" *Foreign Affairs*, vol. 78, 1999. Rodman, P., "The Fallout from Kosovo", *Foreign Affairs*, vol. 78, 1999; Hagen, WW, "The Lethal Nationalism" *Foreign Affairs*, vol. 78, 1999, Franck, T., "Sidelined in Kosovo? The United Nations Demise Has Been Exaggerated", *Foreign Affairs*, vol. 78, 1999; Luck, EC, "A Road to Nowhere", *Foreign Affairs*, vol. 78, 1999; Rockler, WJ., "America First?", *Foreign Affairs*, vol. 78, 1999; Glennon, M., "The New Interventionism, The Search for a Just International Law", *Foreign Affairs*, vol. 78, 1999; Hedges, C., "Kosovo's Next masters?" *Foreign Affairs*, vol. 78, 1999; Simma, B., "NATO, The UN and the Use of Force: Legal Aspects" in *EJIL*, vol 10,

certainly is, but this *concept* of humanitarian intervention i.e. that the human suffering and repression had to end, peace had to be maintained and that the international community had a duty to respond, is the very justification offered by the NATO leaders.⁹³⁷ More importantly is the consensual view that governments cannot abuse with impunity the ethos of universal human rights, which most states and governments have agreed to in a multitude of Declarations and Conventions.⁹³⁸

National organisations on the other hand face other pressures and restrictions, yet they are the first port of call in emergencies and humanitarian situations and importantly often the “lone ranger” fighting the battle in favour of human rights. But mostly they are closer to the reality of the world of children’s rights than most government delegations.

The legal position of these organisations can be traced from the UN Charter. An initial mention of the role of such organisations is found in Article 71 of Chapter 10 which states:

“The Economic and Social Council may make suitable arrangements for consultation with non-governmental organisations which are concerned with matters within its competence. Such arrangements may be made with international organisations, and where appropriate, with national organisations after consultation with Members of the United Nations.”

1999; Cassese, A., “Ex Injuria ius Oritur. Are we moving towards Legitimation of Forcible Humanitarian Countermeasures in the World Community?” *EJIL*, vol. 10, 1999; See also Lynne Duke “Africans see Bitter Irony in NATO Kosovo Mission : For War Torn Continent, West Shows Prejudice”, *International Herald Tribune*, 10 May 1999, London, p1; Gordon, MR., “Imitating NATO: A Script is Adapted for Chechnya” 28 September 1999, on website <http://www.nytimes.com/library/world/europe>. “Nato bombing of Kosovo was illegal, say MPs” by Patrick Wintour in *The Guardian Weekly*, 15-21 June 2000 on p 7. “Nato’s Kosovo Intervention” in Comments & Analysis - Letters, *The Guardian Weekly* of 22-28 June 2000, a response to Isabel Hilton (Nato’s Shame, June 8, 2000) by Lord Robertson, Secretary-General, NATO.

⁹³⁷ “Kosovo One Year On : Achievement and Challenge” by Lord Robertson of Port Ellen, Secretary General of NATO, 21 March 2000 on website - <http://www.nato.int/kosovo/repo2000/intro.htm>

⁹³⁸ Vittachi, VT, *Between the Guns, Children as a Zone of Peace*, 1993, Hodder and Stoughton: London, p76.

This is the first mention that the UN Charter makes of the expertise available to the international community in the guise of organisations. Article 45 (relevant sections below) of the CRC of 1989 reads:

“In Order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialised agencies, UNICEF and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialised agencies, UNICEF and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialised agencies, UNICEF and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

(b) The Committee shall transmit, as it may consider appropriate, to the specialised agencies, UNICEF and other Competent bodies, any reports from State Parties that contain a request, or indicate a need, for technical advice or assistance along with the Committee’s observations and suggestions, if any, on these request or indications.

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child.”

It is by virtue of Article 45 of the CRC, that the role of the NGO’s, which is an ambition waiting to be realised in Article 71 of chapter 10 of the UN, reaches fruition.

This mention in Article 45, it is submitted, may not seem so powerful a mention unless one looks at the travaux préparatoires which makes the competence of the NGOs in the monitoring of the CRC, a valuable safeguard for all children of the world. The drafting process of the CRC is interesting given the participation of the NGOs in this process.

The actions of the NGO world, the specialised UN bodies have all created the expectation of the CRC as a tool for improving the situation of all children. The NGOs made a "significant impact on the convention as well as on its conceptual framework".⁹³⁹ They have, it is said "injected an element of creativity and progress".⁹⁴⁰ It should be noted that this is the first human rights instrument that NGOs are specifically mentioned and assigned a role in the implementation of the convention. NGOs after all are involved at the grassroots level deeply in issues that concern the CRC, they are the driving force calling the attention of governments and states to the reality of children's rights and how to make the theoretical exercise that governments and academics indulge in into reality. The CRC requires international co-operation, world-wide dissemination of its contents and powers, and it is the NGOs who play a pivotal role here. This role is important to the Committee of the CRC which may invite the NGOs as they are as submitted earlier "often uniquely capable of providing data reflecting the impact of government child care policies and programmes. Their staff are intimately familiar with the living conditions, needs, priorities, and struggles of families and children, and their observations and information, collected independently in the performance of their work will provide important insights to the committee".⁹⁴¹

The objective of NGO work can be viewed as having two main components: first, Policy Advice and Advocacy regarding the making and enforcement of relevant international standards and, second, that of Humanitarian Assistance.

IV.A International Committee Of The Red Cross (ICRC)

Among the international organisations of the world, the ICRC has a unique position. With regard to children in armed conflict, and the provision of protection, the ICRC is crucial. The ICRC has played an understandably important role as they provide the link between

⁹³⁹ Miljeteig-Olssen, P., "Advocacy of Children's Rights - The Convention as More than a Legal Document" in 12 *HRQ*, 1990, p 151.

⁹⁴⁰ *ibid.*

⁹⁴¹ Cohn, I., "The Convention on the Rights of The Child: What it Means for Children in War", in *The International Journal of Refugee Law*, vol. 3, No: 1, 1991, p 109. Oxford University Press: Oxford.

human rights law with the international humanitarian law component. As the “guardians” of humanitarian law,⁹⁴² their role cannot be otherwise.

On 6 December 1978, in their comment on the draft of the CRC, the ICRC stated that the scope of the material was very broad and that the draft applied in times of war as well as in times of peace. Further, the delegation pointed out that the texts of the Geneva Conventions, the Additional Protocols of 1977 and the CRC were compatible.⁹⁴³ It is submitted that the aspiration of all the above was and continues to be the provision of protection. The aims are clear and although it true that the APs were a step forward, the fact is that the API provide children below 15 with protection yet weakens that protection by allowing indirect participation. APII provides stronger protection by making complete the ban upto the age of 15, but leaves children above 15-18 in a vulnerable position. It is also clear that the CRC has failed in providing children with relevant protection in times of armed conflict by the weakness in both Articles 1 and 38.

The Henry Dunant Institute, which undertook the study *Child Soldiers*, followed this up by developing a “Plan of Action concerning Children in Armed Conflict” for the Red Cross and Red Crescent Movements. The Plan of Action is committed to promoting the principle of non-recruitment and non-participation in armed conflict of children under the age of 18 years. This commitment itself has three components:

1. Promote national and international standards such as an Optional Protocol to the Convention on the Rights of the Child prohibiting the military recruitment and use of hostilities of persons younger than 18 years of age, and also the recognition and enforcement of such standards by all armed groups (governmental and non-governmental).

⁹⁴² According to the Statutes of the ICRC in article 4 the ICRC has a role in the perfecting of humanitarian law and the promotion, diffusion and development of the Geneva Conventions. This is further confirmed by the 1952 statute in Article 6, para 7.

⁹⁴³ See ICRC Statement at the UN GA, 52nd Session, Third Committee, Agenda item 108, New York, 29 October 1997 on “promotion and protection of the rights of the child”. available on website <http://www.icrc.org/icrceng.nsf/>.

2. Prevent children from joining armed forces or groups by offering them alternatives to enlistment.
3. Raise awareness in society of the need not to allow children to join armed forces or groups.

To reiterate, the involvement of the ICRC from the beginning has been crucial as they not only provide the link between human rights and humanitarian law, but were in a qualified position to counter arguments as put forward by the US delegation.⁹⁴⁴ The importance of this ICRC involvement is crucial also because they are involved on the ground and hence have an impact on the situation. National societies are in a position to discuss with and press the local governments for improvements in respecting human rights and humanitarian rules. They are, therefore, a crucial link. An example of their impact on the field can be understood by the ICRC Annual Report of 1991-1995: they provided protection to some 14, 000 unaccompanied refugee children, they protected them from being kidnapped and press-ganged into military service, they provided medical aid and counselling to the refugees, until conditions in 1994 led to suspension of work in Sudan. But there has also been the suggestion of some criticism of the ICRC policy of confidentiality or secrecy.⁹⁴⁵ A classic example of this kind of criticism would be Mann quoting a senior journalist as saying “[t]he Red Cross is afraid of being accused of partisanship and having its work placed in jeopardy”. However it is submitted that the ICRC has been successful in getting access to all parties, importantly, victims often held in detention in extreme conditions when other efforts have failed; in exchange for this “confidentiality” or “neutrality” but the debate if silence over and about violations is an acceptable exchange continues. The widespread and growing nature of the problem may help them to decide in favour of greater openness in the future.⁹⁴⁶

⁹⁴⁴ page of this thesis.

⁹⁴⁵ See generally, Minear, L., “The theory and practise of neutrality: Some thoughts on the tensions” in *IRRC*, no. 833 of 31 March 1999. Plattner, D., “ICRC neutrality and neutrality in humanitarian assistance” in *IRRC*, No. 311 of 30 April 1996 and Haug, H., “Neutrality as a Fundamental Principle of the Red Cross” in *IRRC*, No. 315 of 31 December 1996.

⁹⁴⁶ see “Open Forum” in *Humanitarian Affairs Review*, Autumn 2000, No. 11, especially pp 4 -10.

Further the Red Cross / Red Crescent Conference held in Geneva 3-7 December 1995, not only noted the adoption of plan of action concerning children in Armed Conflict, but also made very clear its position by stating in its resolution that it:

“c) *also strongly condemns* recruitment and conscription of children under the age of 15 years in the armed forces or armed groups, which constitute a violation of international humanitarian law, and *demand*s that those responsible for such acts are brought to justice and punished.

d) *recommends* that parties to conflict refrain from arming children under the age of 18 years and take every feasible step to ensure that children under the age of 18 years do not take part in hostilities;

e) *supports* the work being done by the United Nations Commission on Human Rights on the involvement of children in armed conflicts with a view to adopting an Optional Protocol to the 1989 Convention on the Rights of the Child, the purpose of which is to increase the protection of children involved in armed conflicts.”

The ICRC made another important contribution when the issue of non-governmental groups came up, they raised the point during the drafting of the OP by expressing their concern about “equality of arms” and how realistic it was to expect that armed groups would abide by higher standards while governments declined to accept the same standards for themselves. The solution to this problem no doubt would be a common standard that was the same for all parties to the conflict. However, another problem that may emerge is, if, for example, the recruitment of under-18s is prohibited by non-state entities, does that open the door to the possibility that recruitment of over 18 years old could be legal by such groups? Also, it is realistic to visualise that a government fighting a civil war would, try a member of an armed group for treason, and not necessarily the crime of “under-age-recruitment”. In Uganda, if Kony is arrested,⁹⁴⁷ the long list of charges would no doubt include kidnapping and abduction but the crime of “under-age-recruitment” would be way down on the list if present at all !

⁹⁴⁷ see Chapter Six of this thesis.

During the drafting of the OP, the US objected that this was rewriting humanitarian law in a human rights treaty but was countered by the ICRC that as long as the standards set were higher than the existing ones, and that the terms applies carried the same meaning as already established under existing humanitarian law.⁹⁴⁸

The ICRC has also been an active participant in the working group for the drafting of the OP. In fact, it has stressed that the OP should be respected by all parties to the conflict, including those of a non-international nature, because it is precisely these conflicts in the view of the ICRC that put children at risk. According to the ICRC it is therefore crucial that all opposition groups and dissidents taking part in armed conflict be bounds by the norms of the protocol and respect its provisions. The ICRC has further stressed that international humanitarian law as applicable in such situations of non-international or internal conflicts is binding on all parties to the conflict and does not grant these groups any legal status. Importantly the ICRC believes that the OP should contain a complete ban on participation, both direct and indirect by children in armed conflict. They have pointed out that legal measures would be useless without accompanying practical measures. As always for the effective implementation of law, strong political will is necessary. In their statement of 1997, they have underlined the same effects and also clarified the situation of the OP with the existing humanitarian laws. Importantly they have asked for a complete prohibition of recruitment of under 18s and any participation by them.⁹⁴⁹ They have also asked that the recruitment and participation of children in armed conflict be included in the list of war crimes.

IVB. Non Governmental Organisations (NGOs)

NGOs, like The Friends World Committee for Consultation (Quakers), Radda Barnen (Swedish Save the Children) and the Swedish Red Cross, kept putting pressure on the

⁹⁴⁸ According to the Statues of the ICRC in article 4 the ICRC has a role in the perfecting of humanitarian law and the promotion, diffusion and development of the Geneva Conventions. This is further confirmed by the 1952 statute in Article 6, para 7.

⁹⁴⁹ Position Paper of the ICRC "Optional Protocol to the Convention on the Rights of the Child concerning involvement of children in armed conflict" in 322 *IRRC* , 1 March 1998 pp 107-125

representatives at the UN and other places in an effort to improve protection re: Article 38 of the CRC. In June 1998, QUNO along with the other NGOs such as Amnesty International, Defence for Children International, Human Rights Watch, International Federation Terre des Hommes, International Save the Children Alliance, Jesuit Refugee Service formed the “Coalition to Stop the Use of Child Soldiers”. Its primary objective is the adoption of an Optional Protocol to the CRC which will prohibit the “military recruitment and use in hostilities of any person younger than 18 years of age, and the recognition and enforcement of this standard by all armed forces and groups, both governmental and non-governmental.” Further to resolution 1998/76 of the UN Commission on Human Rights, a provisional Draft Optional Protocol was proposed for consideration by the Coalition. The Coalition also requested the Human Rights Commission to include the issue of the involvement of child soldiers in all relevant country resolutions. Commitments obtained from governments and non-governmental entities should be reflected in these resolutions for information, monitoring and thus implementation.⁹⁵⁰

The response of NGOs generally has been already mentioned in the earlier sections of this chapter,⁹⁵¹ and from examples of Sudan, Ethiopia etc. which show international agencies forming protection around these children, it is clear that protecting children means not only providing them with food, water, shelter and medicine but the ability to resist recruitment drives. This has meant physical protection as well, thus making the effort put in by them quite clear.⁹⁵² The Rwandan case is another example, it shows a good example of the UNICEF, UNHRC, ICRC and other NGOs like SCF and others getting together to deal with the problem. In fact, MINIREISO on 5-6 November 1995 organised a workshop on “Definition of Government Policy on assisting the *Kadogo*: a Case for Self-Reliance”.⁹⁵³

⁹⁵⁰ *Action Alert*, Quaker United Nations Office, October -December 1998, Vol. 17, No 4.

⁹⁵¹ pages 291-294.

⁹⁵² *The Independent Newspaper*, 6 June 1992, also “Sudan Update” of 19 June 1992.

⁹⁵³ Cantwell, N., *Starting From Zero: The Promotion and protection of Children's Rights in Post-Genocide Rwanda*, July 1994-December 1996, UNICEF, ICDC, Italy pp 50-54.

The Coalition is working at a regional and international level to develop further awareness and is pushing strongly through with local governments for change in attitudes and policy towards child-soldiering. The coalition organises conferences, produces reports and background papers to create awareness of the problem.⁹⁵⁴ They are developing a strong lobby in the international forum. One major achievement⁹⁵⁵ has been the *Maputo Declaration*,⁹⁵⁶ a response to the fact that more than 120,000 children under 18 including a large number of them being no older than 7 years of age fighting in armed conflicts in Africa.⁹⁵⁷ It declares that the use of children below 18 is unacceptable. It prohibits and condemns the use of children under 18 by all forces. Further, it supports the adoption of the OP to the CRC and the ILO Convention no 182. This Declaration which is scheduled to go before the OAU for adoption as a formal resolution demands an end to the use of children under 18 in armed conflicts both as a legislative and a practical effect.

V. Uganda : Practice And Policy⁹⁵⁸

Uganda, as seen from Chapter Six and Seven, has the unique situation of having been “successful” in rehabilitating and re-integrating the child soldiers of the liberation war in the 1980s. Credit for this to a large extent is due to the NRA policies, discipline and concern regarding the children specifically and the entire ranks of the NRA generally.⁹⁵⁹ And yet there exists a new crop of child soldiers fighting in entirely different circumstances, their experiences, exposure and treatment being completely different. This section takes a brief look at the Government and the NGO response to the current child soldiers situation. It does not present a complete detailed descriptive overview of the NGO work being done in Uganda nor does it attempt the same in terms of government

⁹⁵⁴ see website of the coalition : <http://www.child-soldiers.org/>.

⁹⁵⁵ see also *Children of War*, No. 2/00 July 2000 p 1-2 for update on achievements.

⁹⁵⁶ for text of document see coalition website : http://www.child-soldiers.org/maputo_declaration.htm.

⁹⁵⁷ UN Wire (19 July 1999) reports that the Revolutionary United Front rebels who signed a peace deal with Sierra Leone's government handed over nearly 200 abducted children and teenagers to UNICEF. The story states that the released group included 111 children, 35% of whom are under age 10. Several were infants and children under age 5. At least a quarter of the girls in the group were pregnant, according to the Panafican News Agency. See: <http://www.unfoundation.org>

⁹⁵⁸ for a descriptive account see chapter six.

⁹⁵⁹ see Dodge, CP., and Raundalen, M., in *Reaching Children in War, Sudan, Uganda and Mozambique*, Sigma Publications, 1991, and Dodge, CP., “ Child Soldiers of Uganda : What Does the Future Hold ?” in *Cultural Survival Quarterly* Vol. 10, No: 4, 1986.

policy and practice. An account is to be found in Chapter Six. In this section an attempt is made to assess briefly the “response” in Uganda.

Joe Oloka-Onyango in his paper “Armed Conflict, Political Violence and the Human Rights Monitoring of Uganda: 1971 to 1990”,⁹⁶⁰ states that, given the complexity of the human rights situation in Uganda, (for example the military has undergone three complete sets of destruction and reconstruction), monitoring abuses is a process beset with obstacles and problems.⁹⁶¹ In most human rights situations and with reference to armed conflicts, one can only realise the truth of this statement.

With armed conflicts there seems to be a tendency to label the conflict as “rebel – criminal- activity” or an activity with political motives to achieve political gain of sorts. There have been reports emanating from civilian sources alleging abuses at the hands of rebel forces as well as government forces too. It is easy to say that it is the government in power that is responsible as an institution and from whom one can expect accountability. But as Oloko-Onyango rightly asks, “[d]oes the violation of human rights law by any party (public or private) generate the same response under international law?”⁹⁶² This is deeply relevant to not only the Ugandan situation⁹⁶³ as we see from the behaviour of the LRA forces in Northern Uganda, but also in general to many situations across the globe today. In the case of Northern Uganda this is specially relevant given the blatant Sudanese involvement in support to the forces of the LRA.

Coming specifically to the issue of governmental behaviour, Oloka-Onyango gives the example of the Uganda Human Rights Activists (UHRA) established in 1982 an indigenous Human Rights Monitor (HRM) which suffered state harassment. Its first Executive Secretary, Lance Seera-Muwanga in 1987 was detained for a period over one

⁹⁶⁰ Centre for Basic Research, Kampala, Uganda, CBR Working Paper series Number 12 , p 8.

⁹⁶¹ see also E. Khiddu-Makubuya, “Human Rights Documentation in Uganda” paper presented at the workshop on Human Rights Documentation in Africa, Maseru, August 1987.

⁹⁶² Oloko-Onyango, J., Centre for Basic Research, Kampala, Uganda, CBR Working Paper series Number 12 , p 13.

⁹⁶³ Chapter Six.

year for alleging that violations committed by the NRA in northern Uganda paralleled those committed by earlier regimes. Besides this, there is also the problem that often organisations working don't have access to detention centres and war-zones.⁹⁶⁴ Further, there does not exist an open forum for discussing similar issues with the government. The Museveni government on the other hand has established also an Inspectorate of Government with a specific human rights portfolio, akin to the concept of an *ombudsman*. It has created Resistance Councils and Committees (RC – which work at the grassroots level) an amnesty statute⁹⁶⁵ and regulations and a code of conduct for the National Army. Notably a commission of inquiry was launched to look at abuses for previous regimes and the Human Rights Commission is currently based in Kampala. Such actions indicate a serious attempt by the Government to check abuses of human rights. And yet coming specifically to child soldiers, the Government report entitled “Uganda National Program of Action for Children: Priorities For Social Services Sector . Development in the 1990's and Implementation Plan 1995/6 – 1997/8” in their Child Care and Protection Sector⁹⁶⁶ recognises that children still live in difficult circumstances. This includes “orphans, disabled, street children, sexually and physically abused children. This goes for children in prisons, custody, institutions, refugee children, unaccompanied and displaced children” but *misses* out child soldiers, an issue on the forefront in most local news-papers in the same time period.

Personal experience in Uganda (1997) leads to the submission that the government is aware of the problem and is supporting the work of the UNICEF and other NGOs and hence the army is playing a supportive role as well. As clearly stated in Chapter Six, the child soldiers of the conflict in the north seem beneficiaries of special understanding and treatment by the army, and get strong support from the NGOs. But recently, in 1999, there has been a distinct change. There are reports that 5 former child soldiers have been convicted of treason and executed in Kampala in 1999. This is clearly a violation by the Government of its international obligations regarding the rights of the child, not only the

⁹⁶⁴ see section on the Human Rights Commission of Uganda in Chapter Six.

⁹⁶⁵ see pp

⁹⁶⁶ pp 21 – 45.

CRC, but also humanitarian law and its regional obligations under the African Charter. Further, these children were fighting in the west of the Country (ADF rebels) and not in the north. This requires further research by NGOs on the ground in terms of why a different attitude to the children from other parts of the country exists, this could be an issue of religious and/or ethnic discrimination.

While there are a large number of NGOs working in Uganda, NGOs working specifically with child soldiers are: World Vision-Uganda, GUSCO, AVSI and UNICEF - Uganda. The latter is based in Kampala but works closely with the various NGO organisations. They all provide medical, social, economic and psycho-social support and are running advocacy programs too.

This is a general impression gained, that sometimes the NGOs when based in places like Gulu or Kitgum, where the fighting is ongoing, would like to be able to take a stronger stand with the Army but are unable to do so. The division that most NGOs adopt seems that in war-zones they concentrate on the humanitarian assistance often keeping quiet so that they can provide assistance to a greater number of children, while the head offices in Kampala work on the policy with UNICEF and other IGOs and INGOs. But at the same time I saw the NGO staff of World Vision and GUSCO in Gulu, managing to get their point across without ruffling too many feathers but as a whole NGOs are understandably careful.

In the course of my stay in Uganda,⁹⁶⁷ in talks both formal and informal with a number of former child-soldiers, NGO staff, local people and officials, it is my opinion that in some instances humanitarian assistance and policy advocacy are sometimes at odds. In such instances almost all NGOs, correctly it is submitted, without any doubt, give priority to humanitarian assistance and then wait for the chance to lobby and work on policy change. For example; while travelling with a World Vision relief convoy to a camp outside Gulu, halfway on the route, I was asked to dismount from the relief truck. A staff member of

⁹⁶⁷ chapter six.

World Vision, Gulu who had been informed of fighting on the road had telephoned the army detachment which was on the route. They asked me to dismount from the truck and wait for the staff member of World Vision who would take me back to Gulu town as it was too dangerous to be on that route with the relief convoy due to an ambush by the LRA rebels a few kilometres away from the army detach. I stayed in the army detachment compound for a short while but was warned by the staff member before entry, not to ask questions if and when I saw obviously “young” soldiers and not to take any pictures. This is an illustration that the local NGOs working on the field are aware of the possible presence of “younger soldiers” in the ranks of the national army but refrain from making an issue out of it, as they are concentrating on providing rehabilitation and other medical aid to children abducted by the LRA. A possible course of action for NGOs could be that they be firmer and more bolder in their stand.

There was also some allegations that the armed forces ask “good” soldiers to join them and go back into battle to fight the rebel forces. There has been no substantiation, on asking the former child soldiers who I interviewed if they had been asked to join, some were very clear in their denial but a few were vague or totally non-committal. But the issue does not seem to have been taken up by NGOs as it is understandably a delicate issue. However, the question raised earlier by Oloko-Onyango if “the violation of human rights law by any party (public or private) generate the same response under international law?”⁹⁶⁸ arises again. Recent developments such as the ICC, indicates that the answer to this question in some specific instances may be an emphatic “yes”! Recruitment by governmental or non-governmental forces, in both cases as established by previous chapters of this thesis is in clear violation of international human rights law and the CRC, and also there does exist an international moral code when it comes to children, all are being violated. It is without any doubt the duty of all NGOs to question and check this practice and also to protect the right to a fair trial for all former child soldiers who may now be borderline cases in terms of age and also to fight for clemency and mercy for

⁹⁶⁸ Oloko-Onyango, J., Centre for Basic Research, Kampala, Uganda, CBR Working Paper series Number 12, p 13.

them, as existing international law asks for it by stating that those under 18 should not be given the death penalty. NGOs should develop more proactive networks and use them to raise awareness of the issues, exert pressure on both government and non-governmental fractions and use this as a form of protection at the same time.

When it comes to the issue of providing relief in the form of medical aid, food, shelter and rehabilitation, it is without any doubt that it is submitted that the NGOs are doing an exemplary job in difficult and extreme conditions. In Uganda, they are over-stretched and need more resources both in terms of staff support and financial help to provide for the large number of children who arrive at these centres.

UNICEF Kampala, working with other NGOs is producing reasonably good results as a policy advocacy unit. They have since produced a number of reports including two with AI and the HRW both released on 18 September 1997, besides that they have succeeded in getting the media to cover Uganda and the issue of child soldiers in the limelight without a break now. The issue of child soldiers specifically in northern Uganda has come up in the UN.⁹⁶⁹ At the same time the involvement of Sudan has also been discussed in the GA of the UN. UNICEF officials are in a stronger position to push for reforms and curtail violations of the rights of the child, for example, they could have been prepared for contingencies like the arrest, detention and subsequent execution of 5 suspected rebels aged 14-17.

A final point regarding the government response, as seen from the above submissions. The government though supporting the UNICEF and the work of NGOs, has not always been careful in terms of underage recruitment, and the recent cases of execution of under 18s on charges of treason in Kampala; the detention of 25 others on similar charges indicate a changing policy towards child soldier which is not in the best interests of the child; further reports of insistence by army commanders that ex-combatants have to apply

⁹⁶⁹ see Press Release AFR/72 of 12 June 1998. AFR /77 of 22 June 1998 and UN doc E/CN.4/2000/69 of 27 December 1999. Commission on Human Rights resolution 1999/43 and 1998/75.

for amnesty or declare that they were forced into fighting otherwise they will be considered an enemy and treated accordingly are worrying trends. The Committee on the Rights of the Child in its report has expressed concern about violations of Article 38, 39 and 40 in 1997 itself. The Government seems to be falling steadily behind in its commitments to the rights of children, specifically in armed conflict, by allowing this trend to become stronger. Further there is a lack of trained personnel available to handle the trauma and the impact of the conflict that should be made available to all child combatants specifically. So far it seems to be the responsibility of the NGOs. It is an area where the government should be increasingly involved.

VI. The Arms Trade And Its Effect⁹⁷⁰

"The arms trade today is the largest business in the world, at 800 billion dollars annually".⁹⁷¹ According to a report by Oxfam, 90 percent of casualties in conflict is caused by small arms.⁹⁷² According to Towle,⁹⁷³ it is the cheaper and simpler arms that are more of a threat to civilians today. While referring to Argentina, to Armenians in Turkey, Kulaks in the Soviet Union, Jews in Nazi Germany and Educated Cambodians in the 70s he refers to small arms as the "most effective instruments of repression." He also submits that contrary to most views expressed in debates on the issues of the arms trade, there is no co-relation between the cost of weapons being imported into a region and the existence of warfare in the same region. For e.g. Afghanistan has been torn apart by wars and yet statistics suggest that military expenditure have fallen. This is because most small arms have not been considered important enough to control and are thus widely ignored. These figures of course do not take into account that small arms trade deals are mostly illegal and involve smuggling. The larger deals made are the ones that governments can control more easily, yet history suggests that it is the small arms and anti-personnel landmines which have caused much greater devastation than the current conventional

⁹⁷⁰ for details specially definitions such as "small arms" etc. see Chapter Four , pp 5-8 .

⁹⁷¹ see website : [wysiwyg://137/http://global.issues.org/Geopolitics/ArmsTrade.html](http://137/http://global.issues.org/Geopolitics/ArmsTrade.html) , for paper on *Arms Trade*. by Global Issues

⁹⁷² see Oxfam GB Policy Paper "Small Arms Wrong Hands", Oxfam: UK available on Oxfam homepage. <http://www.oxfam.org/>

⁹⁷³ Towle, P., *Ethics and the Arms Trade* , IEA, London , 1998.

“big” arms. There is therefore urgency and a stronger case for restricting the sale of small arms.⁹⁷⁴

The preliminary findings as reviewed by a panel of experts on arms transfers in Oslo in May 1998, with a final report and possible recommendations expected by the end of the year 1999, lead the Expert Group meeting concluding, inter alia, that “[t]he growth of a culture of violence - encouraged by the easy availability of arms - is a major obstacle to developing peaceful, prosperous and just societies, particularly in countries recovering from violent conflict. The control of arms availability based on humanitarian law, development, human rights and other criteria should be among the international community's highest priorities.”⁹⁷⁵

It has been estimated that more than one half billion small arms and light weapons are in circulation today. There is a strong link between the proliferation, accumulation and accessibility of small arms and the victimisation of children. Largely because of the unique characteristics of these weapons. They are small, easy to conceal, and affordable by both state and non-state actors, moreover they are very easy to use, they require minimal maintenance and have been constructed for and are capable of precise direct fire. As submitted earlier the increasing number of civilian casualties in recent conflicts is the result of indiscriminate warfare that is an outcome of the proliferation and accumulation of these weapons. This has also made it possible for very young children to bear and use arms. In this manner, children become perpetrators as well as victims of violence.

The US, France, Russia and the UK are the biggest suppliers of small arms.⁹⁷⁶ Very little is known about international trade in small arms, which operates through the informal

⁹⁷⁴ *ibid*, pp 19-24.

⁹⁷⁵ The ICRC report *Arms Transfers, Humanitarian Assistance and International Humanitarian law*. served as the basis of further discussion at the 27th International Conference of the Red Cross and Red Crescent in November 1999.

⁹⁷⁶ see Oxfam GB Policy Paper “Small Arms Wrong Hands”, Oxfam: UK available on Oxfam homepage on <http://www.oxfam.org/> and for table below see :

<http://www.fas.org/asmp/library/asm/asm33.html> (Arms Sales Monitor , No. 33 (24 February 97) ASMP Publication.

sector.⁹⁷⁷ Yet they are known to be the fuel to any conflict. As submitted earlier in chapters One and Four, one of the main reasons that children have been put to use in armed conflict is the easy availability of small arms. Combined with the fact that they are easy to use, is the fact that they are so easily available. If these weapons were not so easily available, this practice of using children on the front line would be reduced drastically.

It is quite true that the end of the cold war has effected the arms trade, and yet the willingness of East and West to supply weapons to maintain military balance in specific regions means that no serious consideration has been given to the option of arms control and arms build-up. When it comes to the more traditional arms and weapons control the change seems to be a more positive one.⁹⁷⁸ And yet the problem remains as arms sold to one party turn up in another region. South Africa which supplied arms to fuel the conflict in many neighbouring countries, is today flooded with weapons which have made their way back to it.⁹⁷⁹ Today it has the infamous privilege of having among the highest number of deaths in the world, caused by violence related to guns.

Value of Worldwide Arms Shipments, 1991-1995

	1991	1992	1993	1994	1995	Total
U.S. Gov't	\$9,360	\$10,713	\$10,685	\$9,842	\$12,549	\$53,149
U.S. Industry	\$5,166	\$2,667	\$3,808	\$2,099	\$3,620	\$17,360
Russia	\$6,200	\$2,500	\$3,100	\$1,500	\$3,100	\$16,400
France	\$2,200	\$1,800	\$1,100	\$1,400	\$2,200	\$8,700
U.K.	\$4,700	\$4,700	\$4,600	\$5,200	\$4,900	\$24,100
China	\$1,400	\$1,000	\$1,200	\$700	\$600	\$4,900
Germany	\$2,400	\$1,100	\$1,700	\$1,400	\$1,200	\$7,800
Italy	\$300	\$400	\$400	\$100	\$0	\$1,200
All other Europe	\$1,800	\$3,000	\$1,500	\$1,300	\$1,000	\$8,600
Others	\$1,900	\$1,700	\$2,000	\$2,400	\$2,700	\$10,700
Total	\$34,426	\$29,580	\$30,093	\$25,941	\$31,869	\$152,909

Note: in millions of current year dollars. All data based on calendar year except for U.S. industry-negotiated sales, which is on a U.S. fiscal year basis. Sources: CRS 1988-1995, DSAA 1995

⁹⁷⁷ for an example of how political this trade is, and how difficult to regulate, see Trybus, M., "European Defence Procurement : Towards a Comprehensive Approach" in *European Public Law*, Vol. 4, Issue 1. 1998, pp 126-128.

⁹⁷⁸ for e.g. John Major developed detailed proposals on the he creation of a UN arms register and transparency, Bush proposed a nuclear freeze, France and China agreed to sign the NPT etc.

⁹⁷⁹ see Renner, M., *Small Arms, Big Impact: The Next Challenge of Disarmament*, Worldwatch Paper no 137, Washington DC, 1997, p 26.

It has been suggested that the UN Arms Transfer Register⁹⁸⁰ must be reinforced and if possible must be expanded to include additional categories of weapons, other programs could also be strengthened.⁹⁸¹ Most arms that are regulated today are the “conventional” arms comprising of big deals and major firms. But the small arms industry is not so well regulated. For example, in Sweden all small arms manufactured before 1860 have been removed from their War Materials List, on the assumption that they are no longer harmful, can now be viewed as “objet d’art”. Another example of similar legislation would be the United States of America, the US Munitions list, does away with the need to have an export licence for non-automatic small-arms manufactured before 1898. But it is small arms and rifles and non-automatic rifles that are proving to be lethal⁹⁸² in many conflicts around the world. For example, we know that WWI vintage arms have been used in WWII⁹⁸³ and yet it is common to find WWII vintage weapons in use in conflicts such as Afghanistan or in other regions around us today.⁹⁸⁴ The problem is that older vintage small arms are not considered a “problem issue” demanding control and check points yet these are being smuggled and used to fearsome effects. Given that an AK-47 is the most commonly used weapon today in these armed conflicts,⁹⁸⁵ it is a fact to be remembered that AK- 47s are not the latest in the arms world. They are considered an outdated commodity or a relic! It is submitted that this problem of how to control the destination of old weapons when they are replaced by new ones is crucial, if the aim is to halt the sale of such small arms to poorer and conflict-torn countries.

⁹⁸⁰ This register is intended to include data on international arms transfers as well as information regarding military holdings and procurement through national production and policies.

⁹⁸¹ Latter, R., *Controlling the Arms Trade*, Wilton Park Paper no 68, London, 1993, p 2.

⁹⁸² Stanley, J., Pearton, M., *The International Trade in Arms*, Chatto & Windus, London , 1972, p 53

⁹⁸³ *ibid*, p 51.

⁹⁸⁴ see Smith, C, “Light Weapons and the International Arms Trade” in Smith, Batchelor and Potgieger, *Small Arms Management and Peacekeeping in Southern Africa*, UNIDIR Disarmament and Conflict Resolution Project, New York and Geneva, UN, 1996.

⁹⁸⁵ See Press Release DC/2655 2 August 1996 , out of the 5 million light weapons currently in circulation, 55 million are Kalashnikovs. Out of this number 7 million are to be found in West Africa alone and they come from over 70 countries which are officially listed as manufacturers.

The system even as far back as in the 1970s indicates that it is invalidated simply "by virtue of the fact that the law can be broken".⁹⁸⁶ For example, it is a basic stipulation that arms can be exported on presenting to the relevant authorities a license to do so, issued by the appropriate department by the government of the state. For this purpose most countries have a list of what they consider arms. Now Sweden as we saw earlier⁹⁸⁷ has removed some small arms from their list and yet, in the late 1960s they did export light civil aircraft with rockets, which had been removed from this list to the Biafran Forces in the Nigerian civil war! Today occasionally the problem is not so much the licence but the fact that the stated destination may not be true!⁹⁸⁸ And so arms sold to one country may end up in another. In Germany under the 1961 Weapons Control Act, proof of end-use in arms sales is essential. Today the US, Italy, France all have similar controls. Perhaps such controls should be made mandatory, though ofcourse, it would be better if export-import of ammunition and weapons themselves would be strictly regulated.⁹⁸⁹

An increase in the role of the UN in developing a system of checks on conventional arms production and sale's of such, backed by powers of enforcement would help the situation a long way as this arms control would in addition have "considerable positive, albeit indirect, effects on third world development programmes."⁹⁹⁰

VII. Conclusions:

Children, an ever increasing number are fighting today the official number being an approximated 300, 000 in some 50⁹⁹¹ armed conflict zones. In the previous sections, the response of the international community i.e. both state and non – state entity to the issue has been observed.

⁹⁸⁶ Stanley, J., Pearton, M., *The International Trade in Arms*, Chatto & Windus, London , 1972. pp 27-28
⁹⁸⁷ p 307.

⁹⁸⁸ Editorial, "Highlighting Small Arms at Home and Abroad" in *Arms Sales Monitor*, No 38. Federations of American Scientists Fund : USA. November 1998.

⁹⁸⁹For a European Analysis see Trybus, M., "European Defence Procurement: Towards a Comprehensive Approach" in *European Public Law*, vol.4 Issue 1. and Eikenberg, K., "Article 296 (ex 223) E.C. and Extrenal Trade in Strategic Goods" in 25 *E.L Rev*, 2000.

⁹⁹⁰ Latter, R., *Controlling the Arms Trade*, December 1992, Wilton Park Paper No. 68, p 22-23.

⁹⁹¹ SPSG, presenting to the SC, UN . August 1999.

The issue as seen has been put before the international community by many organisations, who have worked hard to increase the protection to children. From the foregoing discussions it is clear that the law to protect children generally took shape as a series of negotiations and compromises. As it often happens in most international law treaties, the reasons for being in favour of or against a particular provision are not always clear. The view points, expressed seem to indicate that there exists a fear that one will have to change their national policies and an unwillingness to do so in the case of a few states, and yet there clearly exists a consensus on the age of 18 as the minimum age of majority, and yet today we are still unable to put this into a clear legal document in the form of the OP to the CRC of 1989. While the drafting of the CRC dealt with a number of issues, with the OP it is dealing with one crucial issue, and it is submitted that if it does not significantly address the problem, it may be another lost chance. Mainly due to the opposition of the United States of America, a country that has signed the CRC but has yet to ratify or accede to it, but as reported by the Quakers will be allowed in what is a completely unprecedented move to become party to the OP.⁹⁹² The US is now in the position of “main opponent” interesting given the US position on child labour⁹⁹³ and the fact that the ILO Convention 182 has stated that child soldiering is one of the *worst forms of child labour*.

Recent years and situations have shown that States are no longer the only actors on the stage, though they are the more powerful ones, as they can restrict the mandates of the organisations working on the ground. NGOs play an extremely crucial role too, in not only being the first port of call but also largely responsible for policy advocacy and related change in law. But it is important to remember that with both aspects i.e. that of State Power and NGO power is tied a moral responsibility and duty towards the well-being of the worlds children. Some of the questions that this discussion raises are that the “defacto legal and administrative structures of the international organisations must be recognised as one part of the legal framework which has come to influence the treatment

⁹⁹² see QUNO, *Geneva Reporter*, vol. 18. No. 4 October-December 1999 , p 2.

⁹⁹³ See Harkins Bill, USA .

of unaccompanied children".⁹⁹⁴ Yet do states authorise organisations to "decide" to what extent assistance will be provided and in what contexts is the given organisation authorised under its own mandate or terms of operation to intervene to assist children in armed conflict and to what extent is this mandate accepted by sovereign states? The ICRC as we saw, waits for permission and to a large extent so do most organisations, can we expect in the future a change may occur that in the case of children intervention by the international community in the form of active support to such organisations may be possible even if state permission has not been granted.⁹⁹⁵ Perhaps one can hope for a change⁹⁹⁶ but it is too early for it yet.

International bodies and the world press have not only focused on child soldier but have also expressed concern at the problem of rehabilitation and reintegration of these child soldiers.⁹⁹⁷ Another problem that must be looked at in solving the issue of child soldiers is as the Pakistani delegate pointed out is that 16 year old recruits join voluntarily, a situation that provides them with job stability and access to education and other facilities which they would otherwise not be able to avail. Also if as the case study of Uganda /NRA showed sometimes it is possible that the survival of separated or lost, abandoned children may depend on their joining an armed group.⁹⁹⁸ All of this points to the fact that if one has to stop this practice one must look for remedies that deal with the lack of options that children have.⁹⁹⁹

It is also submitted that raising the age from 15-18 is not enough. From the situation in the UK for example, it is clear that legal protection has to be enforced by stronger

⁹⁹⁴ Ressler, E., Boothby, N., Steinbock, D., *Unaccompanied Children : Care and Protection in Wars, Natural Disasters, and Refugee Movements*, Oxford University Press : Oxford, 1988. p 273.

⁹⁹⁵ See Nicaragua Case, ICJ Reports, 1986 on p 114 "emphasis on consent is not a requirement under customary international law." Referring to strictly humanitarian aid.

⁹⁹⁶ see Corell, H., "Humanitarian Action and the Charter of the United Nations" paper presented at the International Congress on Humanitarian Action and State Sovereignty, San Remo, Italy , 31 August - 2 September 2000. Mr Corell is the UN Under-Secretary-General for Legal Affairs.

⁹⁹⁷ Furley, O., *Child Soldiers and Youths in African Conflicts: International Reactions*, African Studies Centre, Occasional Papers Series No 1, Coventry University, UK, 1995, p 21.

⁹⁹⁸ Van Beuren, "The Rights of Children in Armed Conflict", in *The International Law on the Rights of the Child*, p 335.

⁹⁹⁹ See Chapter nine.

methods than those currently in use. Another aspect that needs to be looked at in more detail is that to what degree has jurisdiction over the children been delegated to the organisation by the relevant sovereign? What are the policies and procedures of the organisation in caring for and placing the children. To what extent and degree do the organisations fill the legal void with a body of their own law? If one can resolve these issues, we might be in a position to provide better protection to our children.

Additionally to re-iterate, from all the above it seems that there are two actors on stage and both seem to be inclined to pursue protection to children from this abuse of them as child soldiers. There exists a consensus on the age of 18 and there is one country blocking it. There has been recognition and acceptance of the fact that this is a violation of the rights of the child, and also that children are extended protection upto the age of 18 in all cases *except* in situations of armed conflict. It does seem that given the factors discussed above such as the consensus on the cut-off age of 18, and the statements and opinions expressed and actions of many states, it seems that also given the long duration of the issue being a topic of debate (never mind the result the eventual compromise achieved) it seems that a lack of political will to halt this practice exists, because for example if safe havens for children could be established in Turkey in 1991 it is clear that they “could occur only because of all but global unanimity among the nations concerning the actions of a joint enemy”.¹⁰⁰⁰

The strongest protection that the international community can offer to children in armed conflicts however is to adopt a straight 18 ban on all kinds of participation, with all kinds of forces, in all kinds of conflicts. The double standard currently existing (text of the OP to the CRC) of a different set of rules for non-state entities and another for state entities should not be retained. It should rethink the lawmaking, enforcing and implementation that it can work into the OP or a similar instrument making protection to all children under 18 a reality.

¹⁰⁰⁰ Black, M., *Children First : The Story of UNICEF, Past and Present*, 1996, p 254.

Chapter Nine

CONCLUDING REMARKS

*"I see the world gradually being turned into a wilderness, I hear the ever-approaching thunder, which will destroy us too, I can feel the suffering of millions, and yet, If I look up into the heavens, I think that it will all come right, that this cruelty, too, will end."*¹⁰⁰¹

Children are our future. They are the core of any society. It is a universally accepted fact that children are entitled to special status because we accept and recognise that childhood is a special time in our lives. Childhood is important in itself. Children have a right to be children and not adults or mini-adults. They are for many reasons such as physical, psychological and emotional differences, an especially vulnerable group. The biggest reality of children's lives is that their lives are ruled by others, i.e. adults. There is therefore a great moral responsibility on adults in terms of obligatory responsibility towards children. Children are developing and potential personalities, and have no previous idea of right from wrong and are influenced by the adults surrounding them. It has been established that most adults are, but not *all* adults are always the best guardians for children and their actions are not always guided by the "best interests of the child". Children therefore need protection and care.

Children are as we saw in chapters Two and Three, the holders of specific rights. It has been submitted earlier that the theory advocated by Freeman that of "liberal paternalism" which aims at maximising the independence and autonomy of the child, yet justifying paternal intervention under special circumstances is most suitable. Children need protection and respect for their autonomy at the same time. It has been accepted that human rights today are based on foundations comprising of "common needs, interests and values." The very fact that one is a human being entitles one to specific rights. Children have been granted these rights as we noted in chapter Three in detail. Children's rights as

¹⁰⁰¹ Anne Frank, *The Diary of a Young Girl*, M Vallentine: London, 1954.

indicated by the CRC the most important legal document currently bringing together in one document the many various facets of children's lives clarifies that children's rights are an issue of "justice and not of charity". It has also been established that "children are above and beyond politics and ideologies".¹⁰⁰²

And yet, each report brings home the fact that children are being subjected to abuse and violence all over. One of the worst forms of this abuse being the readiness of adults to use children as soldiers fighting on the front-line. Why are we exploiting our children and to what end? The 1999 figures from UNICEF and the office of the SRSG of children participating in armed conflict are now 300, 000. This figure as we can see from research has risen steadily instead of declining with the awareness of the problem. It is also possible that the magnitude of the problem is such that this figure which we have accepted as difficult to gauge exactly, in reality could even be much higher. From these figures and the experiences undergone by children it does seem that "children pay the highest pricefor our wars".¹⁰⁰³

During war or armed conflict, as chapters Two and Three point out, they are offered protection as civilians, non-combatants and because they are children. The reality of children fighting in wars today is that they are being used as they are expendable, easy to manipulate, control and exploit. What has the international community done to halt this "morally abhorrent" practice? According to the Machel report, not enough has been done. Children today are caught up in warfare not as a coincidence, but as a deliberate and conscious decision made by adults. And yet we are all aware and accept that childhood is inviolate and as the Machel report stresses "it must be spared the pernicious efforts of armed conflict". This report which is a "call to action" states its most fundamental demand which is that "children simply have no part in warfare. The international community must denounce this attack on children for what it is - intolerable and

¹⁰⁰² Vittachi, VT., *Between The Guns: Children as a Zone of Peace*, Hodder & Stoughton: London, 1993. p 6.

¹⁰⁰³ UNICEF, *The Rights of the Child* (1990).

unacceptable”.¹⁰⁰⁴ The Machel report became public in 1996. Four years have gone by, has there been an improvement in the situation?

From Chapter Eight, it seems that there is some improvement, but as we can see it is not enough. Until the world community unites and takes a firm stand against the very idea of allowing their children to participate in any form of armed hostilities by putting down concrete rules, this abuse of children will continue to be accepted as another “inevitable result of war”. In chapter Two it was accepted that the drawing of the line at 18 is arbitrary, but there are reasons to do so. As is clear from the preceding chapters: Children are fighting as they are vulnerable, impressionable and expendable; The impact of armed conflict is devastating on their lives. Children below 18 are not given political power for reasons of a growing maturity. It has been established that not all children grow and mature at the same rate, however most reach a level of physical and physiological, cognitive maturity by the age of 18, no doubt it is a process that continues, but 18 seems to be the age acceptable to a vast majority of states. Further, most states allow only individuals above 18 or 21 to join in the police or civil forces on the same grounds of maturity. Today with the knowledge that we have of the negative impact of armed conflict on children along with the protection and care that we accept as a child's legal right; the emerging consensus that the age of participation should not be lower than 18, the law must therefore be changed to have a flat ban on all kinds of participation in any kind of conflict for all children under 18.

In implementing this rule and in providing aid for the purpose of rehabilitation and re-integration humanitarian organisations can and must make a contribution along with states and governments. Accepting that the resources of organisations are limited but it the very magnitude and moral imperative of this problem which calls for a united stand on the part of the entire international community.¹⁰⁰⁵ In fact, “[a] new world ethic which rejects unnecessary political hindrances to provide children with their rights has to be

¹⁰⁰⁴ Machel Report, p 5.

¹⁰⁰⁵ Statement by MT Dutli, “Protecting and Promoting the Rights of the Child”, Delegate of the ICRC, at the UN GA , 49th Session 1994, Friday 11 November 1994.

encouraged and supported".¹⁰⁰⁶ We must transform children's rights into our social obligations.¹⁰⁰⁷

If we want to halt this practice then there are a few things that need to be realised. Firstly, if we look at existing law as it is, it seems it has had a limited impact in some ways and yet, a strong impact in others. The reasons for this is a failure to implement in some situations, and in others a lack of political will. The Machel study is a point in case. It has "demonstrated the centrality of children and their human rights to the peace and security agenda. It posed a fundamental challenge to the way the United Nations system and especially the humanitarian community responded to violations of children's rights in armed conflict."¹⁰⁰⁸ These violations and abuses reflect a "political, moral and legal vacuum" throughout the world. With reference to child soldiers, it is clear that children between 15-18 are not being protected as the political will to do so does not exist. The use of children below 15 then does occur, it is not because of the absence of legal protection for them, but because of lack of governmental will to implement the protection.¹⁰⁰⁹ The problem seems to be that governments are not always willing to accept the applicability of AP II. It seems that mechanisms created by the UN are present, however we need to ensure that these are real standards and are working well, "the results of political compromise and reluctance to re-structure organs and procedures should change".¹⁰¹⁰ Is it enough that we have the CRC? The CRC today it is true is the most significant form of legal protection existing for children. An all encompassing document and powerful too, it does not allow derogation and is applicable in totality even in emergencies. We should look beyond the CRC as in specifically Article 1 and Article 38 it fails children in armed conflict. Carol Bellamy states that "there is no doubt in my mind that this convention has improved the lives of millions of children and made the world a

¹⁰⁰⁶ Dodge and Raundalen, *Reaching Children in War: Sudan, Uganda and Mozambique*, Sigma: Forlag, 1991, p 87

¹⁰⁰⁷ *ibid*, p 87.

¹⁰⁰⁸ GA/SHC/3382, 30th Meeting (PM) 8 November 1996.

¹⁰⁰⁹ Francesca Pometta, Vice-President of the ICRC in GA/SHC/3382, 30th Meeting (PM) 8 November 1996.

¹⁰¹⁰ Hopkinson, N, *The United Nations in the New World Disorder*, Wilton Park Paper No. 75, HMSO: London, July 93. p 30

better place.” This is true and it is also true that it has “stimulated legal reforms in dozens of countries around the world, enjoined governments to take the health and well being of children seriously and initiated a process of goal-setting that keeps everyone honest about global progress or lack of it”. Currently the CRC has spurred more than 50 countries to amend their constitutions and or amend legal codes to take account of children’s rights. An additional 23 States are in the process of reviewing their laws. All this is the strong impact of the CRC, where the political will exists and yet the reality is that the CRC in some instances is still not able to give stronger protection than some already existing legislature does i.e. AP II is stronger protection compared to the CRC with reference to restricting the recruitment of children below 15 on both sides i.e. state and non-state entity. In a regional perspective the African Charter is stronger too. According to Hammerburg, Article 38 of the CRC has several shortcomings. He is rightfully severe when he states that on the issue of child soldiers it is weak. And in terms of protection of civilians specifically children it is a matter of “feasibility and not of necessity”.¹⁰¹¹ Cantwell described it as “shameful”. The ICRC has suggested that the wording of 38(4) has undermined international humanitarian law.¹⁰¹² In the opinion of this author, the CRC is not protection enough for children in armed conflict. It does not protect children between the ages of 15-18 years. Further, the ICC Statute too offers protection only upto to the age of 15 years. The UN expert believes that the impact of conflict and participation in conflict on children justifies the raising of the minimum age to 18.¹⁰¹³

The Optional Protocol dealing with only the issue of child participation in armed conflict and aiming to raise the age from 15 to 18 is a strong protection that is required today. The text agreed upon, is a disappointing trade-off, narrow military interests have been allowed to take precedent over children’s lives. It is submitted that “in considering the future of children , we must be daring. We must look beyond what seems immediately possible and find new ways and new solutions”.¹⁰¹⁴ *If* we wish to bring about a change in the situation

¹⁰¹¹ Hammarburg, T., “The UN Convention on the Rights of the Child - and How to Make it Work.” in 12 *HRQ* 1990, p 101.

¹⁰¹² *Dissemination*, August 1989, p 12

¹⁰¹³ paragraph 38 of UN Doc E/CN.4/1996/110.

¹⁰¹⁴ Machel Report , para 312.

of children on the front-line that the OP has to make a significant impact and progress. To achieve this goal it has to ban all kinds of participation as, most children graduate from indirect to direct participation on the front-line rapidly. Further, it is very important that all states parties must realise and behave according to the knowledge that they have a direct obligation to ensure that their domestic law is in accord with their international obligations. Until the OP becomes a reality, it is important for the advocates of child rights to "ensure that while the fullest attention be given to the Convention on the Rights of the Child, other paths to the highest level of protection are not ignored as a tendency exists to ignore all other child-care legislation and simply refer to the CRC."¹⁰¹⁵ In short, the concept of the best interests of the child must be ever present.

Secondly, it has been established that most children volunteer because of a lack of options. The international community must therefore look at the options it can offer to children in difficult circumstances. One of the most important findings that has emerged is that if we can provide education to children it provides them with stability that they need and also becomes a seed of hope, and helps them to resist recruitment drives. True there are as has been established many occasions when the need to protect them physically from such use of force would be required as has been noted in many situations for example such as in refugee camps in Uganda, Sudan, Ethiopia. As established by the preceding chapters and especially chapter One the reasons for this practice or abuse of children continues as children are easy to manipulate by adults. In the words of Lt. William Calley,¹⁰¹⁶ "[c]hildren are very good at planting mines, and, well, just basically they are dangerous." Soldiers fighting rebel forces for example in Uganda say the same, that the children are more dangerous as they seem to know no fear, because they do not understand the consequences of their actions.

¹⁰¹⁵ Cohn, I., "The Convention on the Rights of the Child: What it means for Children in War" in *The International Journal of Refugee Law*, vol. 3, No: 1, 1991, Oxford University Press: Oxford, p 109.

¹⁰¹⁶ Extract from the original transcript of his court-martial after the *My Lai Massacre*, vol. 3, bk. 9 3679 onwards see also US vs., Duffy; 47 CMR 658 (1973)

Thirdly, the fact that the CRC has been ratified by 191 states leaving only the United States of America and Somalia: It does seem that the US is the main objector to raising the age from 15 to 18 . Should one state be allowed to dictate terms, to a treaty that is optional and one they can not be a party to as they have yet to ratify the CRC itself?¹⁰¹⁷ If the US does not wish to become a party to it, it is as in any international law treaty a matter of choice, but should be pressed upon to stop blocking the formation of stronger protection to children. The OP should protect all children upto the age of 18 to make real the protection children need.

Fourth, awareness of the national laws and international laws would help. "In all conflict situations, individuals and groups are working in defence of the well-being of children. Ultimately, support and technical assistance for this work, creation of public awareness of war's effect on children, education and stimulation of popular participation in the defence of children's rights, and the promotion of human rights consciousness at all levels of society, are among the most valuable contributions to be made".¹⁰¹⁸ One major step would be disseminating the protection offered by the GCs, the APs of 1977 specially that of APII and the CRC and OP to the CRC and the ICC statute relating specifically to children and child soldiers. Dissem. Awareness

A few practical efforts towards protecting children would be making essential the goal of relief programmes to provide assistance to families to prevent separation.¹⁰¹⁹ The active and early documentation of unaccompanied children along with registration of children at birth could be very crucial as well. "The lure of ideology is particularly strong in early adolescence, when young people are developing personal identities and searching for a sense of social meaning. As the case study of Rwanda shows, the ideological indoctrination of youth can have disastrous consequences".¹⁰²⁰ To date no peace treaty

¹⁰¹⁷ a special agreement has been reached, the US will be allowed to sign the OP before the end of the Clinton Administration.

¹⁰¹⁸ Cohn, I., "The Convention on the Rights of the Child: What it means for Children in War" in *The International Journal of Refugee Law*, vol. 3, No: 1, 1991, Oxford University Press: Oxford, p 109.

¹⁰¹⁹ Machel Report, para 69.

¹⁰²⁰ Machel Report, para 43.

has recognised the existence of child combatants,¹⁰²¹ they continue to be an invisible category. It is important to recognise them, as only with recognition of the problem will there be the need to deal with the problem. It is crucial that international law also relates to their need for re-integration. Effective social reintegration depends upon support from families and communities. Further, the issue of reintegration and rehabilitation remains one of the most essential issues that this problem brings up and this thesis lays emphasis on. We must not forget that for most nations they simply do not have the resources to provide such treatment or facilities for children.¹⁰²² It is therefore incumbent upon the international community to help secure the rights embodied in Article 39.¹⁰²³ The links between education, vocational opportunities and economic security have been emphasised by field visits and research. Education must be a priority especially primary education. For the child soldier this is more than mere literacy and a possible hope for employment. It helps to normalise life and to develop an identity, separate from that of a soldier. The Machel report stresses that "education, vocational opportunities and economic security" as being the most important factor to prevent - re-recruitment of child combatants.¹⁰²⁴

Another crucial factor that needs regulating is the small arms trade. Governments must exercise the political will to control the transfer of arms to conflict zones. "Although armed conflicts occur in developing states, they are fought with arms supplied by the developed states. 75% of the world trade in arms is directed towards the developing world, and a quarter of the accumulated developing states debt is due to weapons import".¹⁰²⁵ The UN too must adopt a firmer stand on the arms trade. As established the arms trade is unregulated and no one knows exactly how many weapons are in circulation

¹⁰²¹ *ibid.*, p 12, see also footnote no. 26 below.

¹⁰²² For example Stephen Toope acknowledges in the context of Canada and the CRC that resources are a problem, if such is the case for a country like Canada, it must be a greater problem for poorer countries. see, Toope, S., "Convention on the Rights of the Child: Implications for Canada" in Freeman, M., (ed.) *Children's Rights A Comparative Perspective*, Dartmouth: Aldershot, 1996,

¹⁰²³ Kent, G., *Implementing the Rights of the Child in Armed Conflict*, University of Hawaii, Honolulu, 1991. Cohn, I., "The Convention on the Rights of the Child: What it Means for Children in War" in *International Journal of Refugee Law*, vol. 3, no. 1, 1991.

¹⁰²⁴ Machel Report para 53.

¹⁰²⁵ Van Bueren, G., *International Law on the Rights of the Child*, 1995, p 328.

among the general population of most countries. One figure that has been suggested is that "eighty-five percent of arms are produced by those guardians of peace and eighty-five percent of their customers are Third World governments."¹⁰²⁶ If small arms were not as easily available, the number of children that can be deployed on the front line would be reduced drastically. This is therefore one way of making it difficult to deploy children i.e. if the arms trade were to be regulated and the flow of such arms could be severely curtailed then the number of children that could be used would fall drastically.

A point that has been commented upon is the invisibility of children today, specially as child soldiers. As stated in Chapter One of this thesis, no peace treaty to date refers to children as child soldiers.¹⁰²⁷ This must change. The abuse of children on the numerous frontlines of the world must stop, and to achieve this aim, the invisibility of children must disappear. Peace negotiations, agreements, declarations and all peacekeeping efforts should take into account the experiences of children on these frontlines. Rehabilitation and reintegration must be a priority, along with a strong and constant emphasis on child protection before, during and after any conflict.

The international community should work on improving the early warning systems and should be prepared to act on this anticipated displacements or threats of which lead to an escalation of tension. Currently, these warnings have been largely ignored by the international community until the situation spiralled completely out of control such as Rwanda, or East Timor. "When it comes to children, a higher law than sovereign rights and territorial imperatives should prevail, children have a supervening right to protection from the consequences of governmental or anti-governmental forces struggling to attain and re-tain power." International IGOs and NGOs are in a position to gauge this on the ground, they should be more proactive in this regard. It is not an easy task, but such

¹⁰²⁶ Vittachi, VT., *Between the Guns: Children as a zone of Peace*, Hodder and Stoughton: London , 1993, p 106.

¹⁰²⁷ Cohn, I., "The Protection of Children in Peacemaking and Peacekeeping Processes", in vol. 12 *Harvard Human Rights Journal*, 1999, pp 128-195. Child Protection has been mentioned for the first time in peace agreements reached in Burundi in August 2000 , Sierra Leone July 1999 and Northern Ireland April 1998. see UN Doc A/55/442, p 21.

networks are being built and strengthened, one for example by the International Alert an NGO based in London, UK.

We have before us the concrete examples of what is possible to achieve when the will to do so exists,¹⁰²⁸ for example, "Social Mobilisation" in Colombia. This proved a permanent boon for the country. The active involvement of so many sectors reminded everyone that successful development was not something that was passively dependent on foreign aid combined with state action but a common popular effort in which many kinds of people play active roles in their own-life drama of survival, growth and sharing.

During the civil war UNICEF suggested the concept of "Children as a Zone of Peace." In Colombia parish priests distributed pamphlets with the simple and yet stunning message "THOU SHALL NOT KILL, NOR SHALT THOU LET A CHILD DIE FROM A PREVENTABLE DISEASE!" This campaign succeeded in raising immunisation rates from 30 percent to around 70 percent.

This concept of social mobilisation has since been used in Turkey, Sri Lanka, Nigeria to name a few countries. Another classic example of what is possible if the political will is present is El Salvador.

In El Salvador, the mission was to immunise children in the entire country, *including the rebel areas*. The Pope and the Vatican were approached to reach the rebel areas. The Vatican wrote to the Archbishop Arturo Rivera Damas seeking co-operation. President Durante was requested to publicly appeal for a nation-wide cease-fire to guarantee the safety of mothers and children coming to the vaccination centre. So in effect the need was not only a cease-fire of 3 days but a few days of peace before the campaign started so that people could feel free to leave homes and travel some distance with their children. This also meant arranging a series of cease-fires and maintaining the level of interest among the parents over a period of three months, during which the combatants would be fighting

¹⁰²⁸ *ibid.*

a stop-go war. When this was discussed a long silence ensued and Duarte turned to his senior general and asked, "How long do you think I would remain as president if I asked for a cease-fire as suggested by Mr Grant?"¹⁰²⁹ The General answered, "[a]bout three days" and Duarte explained to Mr Grant that calling for a cease-fire would "give too much status to the rebels". Grant then suggested an arrangement i.e. for the rebels to agree unilaterally not to shoot on those days and would the government then also be willing to agree unilaterally not to shoot? It is then that two unilaterals made an unlinked bilateral agreement. Both sides eventually agreed and this is how Days of Tranquillity, Zones of Tranquillity and Corridors of Peace came into being. Uganda, Mozambique, Somalia, Sudan, Ethiopia, Liberia, Angola, Lebanon, Sri Lanka, Philippines, Yugoslavia are examples of civil wars where there has been international intervention as "Children As a Zone of Peace".

International standards on child participation it has been established by this thesis have already shown themselves to be "inadequate in terms of not only of ambit but of enforceability, it is surely correct to question the usefulness of a new treaty standard which merely reiterates existing standards and approaches..... In order to provide children with the maximum level of protection, the preferred approach would be a combination of Article 4(3) of Protocol II and Article 22(2) of the African Charter on the Rights and Welfare of the Child."¹⁰³⁰ However the problem of implementation remains, though the African Charter proves that with diplomacy the raising of the age to 18 is possible, there is the example of El Salvador - which is party to both the protocols and the CRC and has established the age of 18 as the minimum for recruitment and yet, there are eyewitness reports of boys of 14.¹⁰³¹ On the other hand we have the commitments made recently by rebel forces fighting civil wars (Colombia) to the SRSG that they would not allow children to enlist and fight.

¹⁰²⁹ UNICEF Head negotiating in EL Salvador.

¹⁰³⁰ Van Beuren, *International Law on the Rights of the Child*, 1995, p 335.

¹⁰³¹ UN Doc , E/CN.4/Sub.2/1989

Sir Arthur Lewis,¹⁰³² the West Indian economist has been quoted as saying there could be no development without any “political will”. This has been accepted as the case and the political will of a country is associated with the political will of a government and often times that of its head. But political will at the top can be reinforced by the political will of the masses or the people, which in turn is dependent on the media and NGOs and various other groups¹⁰³³ within the country which can galvanise an entire nation into action.¹⁰³⁴

The Human Right Committee in reference to the separation of juveniles from adult prisoners in its general comment on Article 10(2)(b) places an “unconditional” duty on states parties ... and such deviation is not justifiable under any circumstances.¹⁰³⁵

Further, we note from its advisory opinion the ICJ on reservations against genocide convention stated that - “certain principles are binding on all states regardless of their treaty obligations, these include genocide and arguably torture”.¹⁰³⁶ From the South African experience, detention, it has been established can amount to torture¹⁰³⁷ in that case it is submitted that forcing children to fight and kill should also constitute torture.¹⁰³⁸

¹⁰³²Vittachi, VT., *Between the Guns: Children as a zone of Peace*, Hodder and Stoughton: London , 1993 p 225

¹⁰³³See UN Doc A/54/2000, Millennium Report of the Secretary-General of the United Nations, *We the Peoples: The Role of the United Nations in the 21st Century*, UN: New York, April 2000, paras 332, 333, 334-341.

¹⁰³⁴Vittachi, VT., *Between the Guns: Children as a zone of Peace*, Hodder and Stoughton: London , 1993 p 225, p 16.

¹⁰³⁵ UN Doc CCPR/C/21/Add 1.

¹⁰³⁶ Van Beuren, *International Law on the Rights of the Child*, 1995, p225.

¹⁰³⁷ Article 1, of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, in part reads : “ ‘torture’ means any act of pain by which severe suffering, whether physical or mental is intentionally inflicted on a person.”

¹⁰³⁸ It has been established that children suffer disproportionately and differently from adults. Further, a single experience has a devastating effect on children and their lives. Repeated and continuous exposure to violence and killing only compounds the impact. See: Black, D and Newman, M, “The Effects on Children of Witnessing Violence Perpetrated against their Parents or Siblings” and Whitman, L., “The Torture of Children: Assessing Torture and Devising Methods to Prevent it” in Van Beuren, G., (ed.) *Childhood Abused: Protecting Children Against Torture, Cruel, Inhuman and Degrading Treatment and Punishment*, Ashgate: Dartmouth, 1998. Also see; Schwab-Stone, M., “The effects of violence exposure on urban youth. No Safe Haven ” in Journal of the American Academy of Child and Adolescent Psychiatry, April, 1999; Wolfe, J., and Proctor, SP., “The Persian Gulf War: New Findings on Traumatic Exposure and Stress” , PTSD Research Quarterly, vol. 7, No. 1, Winter 1996; Hamblen, J., “PTSD in Children and Adolescents” A National Center for PTSD FactSheet, see http://www.ncptsd.org/facts/specific/fs_children.html; Harkness, L., “The Effect of Combat-Related PTSD on Children” in NCP Clinical Quarterly 2(1): Fall 1991 available on <http://www.ncptsd.org/treatment/cq/v2/n1/harkness.html>; Schnurr. PP., “Trauma, PTSD, and Physical Health” in PTSD Research Quarterly vol. 7, No. 3, Spring 1996; Danieli, Y., “International Handbook of Multigenerational Legacies of Trauma” PTSD Research Quarterly Vol. 8, No. 1, Winter 1997 ; Dunham,

“Where rights and needs of children are concerned, universality is not negotiable and conditionality is unacceptable”.¹⁰³⁹ A collective voice and action is required. International law increasingly uses the benchmark of 18 years as the age below which special protection should be afforded. The involvement of children in armed forces is not inevitable. The recruitment and participation of children in armed conflicts was always a decision made by Government and/or leaders of armed opposition groups. While the purpose of this human rights protocol should be to protect children from involvement in armed conflicts, the language used in Article 1 only required States Parties to take “feasible measures”, and even then only protected persons under 18 years of age who took a “direct part” in hostilities. This could mean that the child soldiers who were taking a direct part in hostilities but who were in an area of armed conflict became legitimate targets for attack. Amnesty International¹⁰⁴⁰ considered that the purpose of new human rights standards was to significantly develop international law and elaborate clear obligations for States. It believed that the standard required of States in this protocol must be no less rigorous than those in other human rights treaties. States must ensure that persons who had not reached the age of 18 and who were members of governmental armed forces did not participate in hostilities of any kind. It is clear that the practice in recent years of drafting standards by consensus and or unanimity has given each Government an opportunity to block action to defend and protect human rights. Drafting groups have on occasions become and could continue to become hostage to a few states. In fact, all too often they are faced with the stark choice of accepting the lowest common denominator or abandoning the drafting exercise, but, this need not be the case always. In

RG., and Alpert, GP. (Eds), *Critical Issues in Policing: Contemporary Readings*, Waveland Press, 3rd edition, March 1997. This book deals with trauma undergone by policeman who kill in the line of duty. Reviere, SL., Briere, J., *Memory of Childhood Trauma: A Clinician's Guide to the Literature*, Guilford Press, June 1996. Hansel, S, Steidle, A., Zaczek, G., and Zaczek, R., *Soldiers' Heart: Survivors' Views of Combat Trauma*. Lutherville, MD: Sidran Press, 1994. Reichenberg, D., and Friedman, S. “Traumatized Children, Healing the Invisible Wounds of Children in War: A Rights Approach” in Danieli, Y., Rodley, NS., Weissert, L., (eds.) *International Responses to Traumatic Stress*, Baywood Publishing, 1996. Jareg, E., Jareg, P., *Reaching Children Through Dialogue*, MacMilan Press, 1994.

¹⁰³⁹James Grant quoted by Baela Jamil, Program Officer, UNICEF in “The Role of UNICEF in the Implementation of the Convention on the Rights of the Child in Pakistan”, in *Rights of the Child: Report of a Training Program in Asia*, ICJ: Geneva, 1993 on p 68.

¹⁰⁴⁰ UN Doc E/CN.4/1998/102 paragraph 45.

decision making activities in the UN we have seen the use of various modes such as unanimity, consensus, weighted voting, majority voting etc. Unanimity or consensus¹⁰⁴¹ decision-making perhaps should no longer be used unquestionably as the working method for standard-setting initiatives.¹⁰⁴² During the drafting of both the CRC and OP it was this use of consensus that worked as unanimity in actual practice, that made certain articles so weak, if a majority or a wide consensus had been used the relevant articles may have been much more effective in providing children with protection. It is true that a balance must be struck between drafting a text that enough states will ratify and maintaining the highest standard of human rights protection. The majority of states in favour of a strong text should make every effort to persuade the State, or the few States obstructing adoption of a broad consensus text to reconsider their position. Consensus no doubt promotes the process of negotiation, but one state, or a small minority of States, should not be allowed to undermine a broad international consensus on a strong text, especially when the instrument is optional, as in the case with the OP to the CRC.¹⁰⁴³ Ultimately, in order to avoid the lowest common denominator

¹⁰⁴¹ in the UN context has been defined as "making of decisions without a vote and without formal objection by any member state". See Jenks "Unanimity, The Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organisations" in Kirgis, FL., *International Organisations in Their Legal Setting*, 2nd ed. West Publishing Co: Minnesota, 1993, pp 214-217.

¹⁰⁴² An alternate view is that it is one of the most effective ways of promulgating laws. Treaties are not a static body of law, they are a dynamic process, which evolves and takes new shape with practice and time. When Treaties are drafted and adopted by consensus, they indicate what is acceptable to all states participating. Thus making the process of adoption, ratification and hence coming into force quicker. There is also the example of the Bonn Convention on Migratory Species. The US no doubt influenced the outcome, the Convention was adopted by consensus but then the US did not become party to the convention. The Convention has since its adoption, moved away from the restrictive definition of "migratory species" ('cyclically and predictably' as stated in Article 1(1)(a) of the convention, to understand it as 'periodically' which had been opposed by the US) applicable to a much wider range than the US intended. See Lyster, S., *International Wildlife Law: An Analysis of International Treaties Concerned with the Conservation of Wildlife*, Cambridge University Press, 1994, pp 278-298. See also *Convention on the Conservation of Migratory Species of Wild Animals*, Federal Ministry of Food, Agriculture and Forestry of the Federal Republic of Germany, 1979.

¹⁰⁴³ It may be possible for State Parties to a Convention, on finding themselves in agreement to raise the standards to acceptably higher legal obligations, by amendments or an optional protocol. The OP is the case of child recruitment is one such example. It is not the best result but is indicative of an emerging acceptance with regard to a legal obligation that the age of recruitment and participation needs to be and should be changed to a higher age than 15. Perhaps later in time, there may be a further amendment that will prohibit States to allow the voluntary recruitment of 17 year old individuals into their forces even with informed consent. See also statement by Mary Robinson on 9 February 1998, "noted the growing consensus for setting the minimum age for all forms of participation in hostilities at 18 and welcomed the fact that some delegations had indicated their readiness to adjust their positions." in UN Doc E/CN.4/199/102 of 23 March 1998, para 38.

approach, voting¹⁰⁴⁴ for example with a two-thirds majority on the text might be necessary.¹⁰⁴⁵ It was the view of Amnesty International that "the text currently before the working group did not yet provide the necessary protection for children a risk of participating in hostilities and recruitment into armed forces".¹⁰⁴⁶

Legal measures are of reduced value unless they come with practical measures to implement them, there should be specific programmes at national levels involving all civic society to ensure that children are not made victims of armed conflict. A strong political will to do so will be of much use! And to influence and or bring about a change in the political will is possible only when there is strong desire for change at the grassroots level¹⁰⁴⁷ and this change permeates upwards. It has been said that "[b]etter governance means greater participation, coupled with accountability".¹⁰⁴⁸ The Secretary-General of the UN has stated that depending on the issues at hand, civil society organisations, the private sector, local authorities, educational institutions etc. all must participate in the international public domain including the UN as they are essential to making the world a better place for all.¹⁰⁴⁹ ICRC delegations have stressed that only preventive measures will improve protection for children. "In particular concrete steps must be taken without delay in areas of health, education, proper care for abandoned and demobilised children".¹⁰⁵⁰ Long term solutions must be worked out. A united stand taken by the international community will help.

¹⁰⁴⁴ Voting may sometimes mean that a state that does not agree strongly with a specific article, finds itself in the absence of reservations clauses unable to become a party to the convention. This may in certain circumstances effect the coming into force of a treaty, or simply mean that a smaller number of states may become party to it.

¹⁰⁴⁵ See summary of suggestions made by Johan Kaufmann in Kirgis, FL., *International Organisations in Their Legal Setting*, 2nd ed. West Publishing Co: Minnesota, 1993, p 216.

¹⁰⁴⁶ UN Doc E/CN.4/1998/102, paragraph 45.

¹⁰⁴⁷ through education, social mobilisation etc. this is possible. NGO efforts and media are well established actors in this field. See section on El Salvador above. See also UN Doc A/54/2000.

¹⁰⁴⁸ Annan, KA., *We the Peoples: The Role of the United Nations in the 21st Century*. UN: New York, 2000. p 13.

¹⁰⁴⁹ *ibid*, p 13, 67, 70.

¹⁰⁵⁰ Statement by the ICRC, New York, 12 November 1996 in the UN GA, 51st session, Third Committee agenda item 106.

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PUBLIC RELATIONS OFFICE
UGANDA PEOPLES' DEFENCE FORCES
4TH DIVISION HQRS GULU

INTERNAL MEMO

To: MED. SUPERINTENDENT LAJOR HOSPITAL Date: 11-9-53 Your Ref:	From: 4 PDF- PRO Tel: Our Ref:
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SUBJECT: MISS CATRA MASSEY

THE ABOVE MENTIONED LADY HAS OBTAINED
A NOTE OF "NO OBJECTION" FROM THIS OFFICE
TO TALK TO SOME OF THE WAR VICTIMS IN
YOUR HOSPITAL ESPECIALLY CHILDREN.

SHE MAY HOWEVER NOT TALK TO MILITARY
PERSONNEL SINCE I REPRESENT THEM HERE.

PLEASE, GIVE HER ALL THE NECESSARY
ASSISTANCE AND COOPERATION.

To Staff ~~on~~ on duty Surgeon I
Allow Justin or any other staff
to direct and assist Mrs today to
talk to the affected children in your
Mother

NAME: Shasank San RANK: 4 APPT: PRO SIGN: Leon

Send Mrs paper back to my office.

Annexe II

Selective List of Contacts in Uganda

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SCF, UK
Kampala , Office .

GUSCO , Gulu

ICRC, Kampala

WFP, Gulu

