

# CAN THE OPTIONAL PROTOCOL FOR THE CONVENTION ON THE RIGHTS OF THE CHILD PROTECT THE UGANDAN CHILD SOLDIER?

## I. INTRODUCTION

*Me and my brothers and cousins were playing football. Five rebels came and took all six of us, my three brothers, two cousins and myself. They tied us with ropes around our waists and gave us heavy loads to carry. [They led us to a larger group.] There were about eighty rebels and fifty abductees in the group. At night, we stopped to rest, and they beat us—they used a bicycle chain to beat us. The next morning we came to the government soldiers when we were walking. They were firing at us. We ran with the luggage. My eldest brother escaped but the rebels caught him and they killed him. They beat him on the back of the head with a club. I watched him being killed. His tipu (spirit) came to me and covered me and told me, "Today, I am dead." I was in shock. . . . My other two brothers and I were allowed to stay together but we were told that if any of us escaped, one of us would be killed.<sup>1</sup>*

Children suffer as war rages on around the world. This problem, however, permeates further than many would think. It is generally believed, by those not versed in the severity of such atrocities, that the children suffer as a result of being displaced, losing family members or friends, and having their towns or villages being "accidentally" targeted by stray artillery. Not discounting the grievousness of these issues and problems, however, many children are effected much more severely.

Most children located near warring localities are subject to recruitment and are often required to participate in the armed conflicts (internal or international).<sup>2</sup> As many as 300,000 children under the age of eighteen are

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1. *Human Rights Watch, Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda, reprinted in Human Rights Watch: Uganda* (visited Oct. 8, 1999) <<http://www.hrw.org/hrw/pubweb/Webcat-102.htm>>. The quote was found in Section II. This quote is from a fourteen-year-old child that had been abducted by an armed military group in Africa. His story was given to a correspondent of Amnesty International and it was ultimately relayed to the authors of this work, *The Scars of Death*.

2. See ILENE COHN & GUY S. GOODWIN-GILL, CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT 23-31 (1994). Participation can include almost anything, from carrying food and water to fighting on the front lines as a human shield for the adults who have recruited them. See *id.* Fourteen-year-old Timothy, from Uganda, recounts his experience:

I went for several battles in Sudan. . . . The commanders . . . would tell us to run straight into gunfire. The commanders would stay behind and would beat those of us

currently used in such hostilities.<sup>3</sup> Estimates reveal that the number of African children used in armed combat has reached nearly 120,000.<sup>4</sup> The number of children that have been killed as a result of participation in armed conflicts is estimated at approximately twenty million.<sup>5</sup> To be noted, however, this figure only includes those children killed since 1945. The areas most effected by the use of children in armed conflicts include "Algeria, Angola, Burundi, Congo-Brazzaville, the Democratic Republic of Congo, Liberia, Rwanda, Sierra Leone, Sudan, and Uganda."<sup>6</sup>

This Note illuminates the current trend of exploiting children in armed conflicts, specifically in Uganda, by discussing the current international standards regarding the protection of children in armed conflicts. More specifically, the new Optional Protocol on the Rights of the Child (Optional

who would not run forward. . . . I remember the first time I was in the front line. The other side started firing, and the commander ordered us to run towards the bullets. I panicked. I saw others falling down dead around me. The commanders were beating us for not running, for trying to crouch down. I don't know why we were fighting. . . . We were just ordered to fight.

*Uganda: Child Victims of Rebels— Abduction and Killing of Children by Ugandan Rebel Group* (visited Oct. 11, 1999) <<http://www.africapolicy.org/docs97/ugan9710.htm>>.

3. See Thalif Deen, *Children: NGO Groups Seek Tougher U.N. Stand on Child Conscripts*, INTER PRESS SERVICE, Aug. 29, 1999, available in LEXIS, News Library. See also *Appropriations for the Department of Defense for Fiscal Year 1999: Section 8128(a) of the Conference Report Accompanying H.R. 4103, reprinted in* <<http://www.hrw.org/hrw/hrw/campaigns/crp/congress.htm>> (discussing U.S. Congressional findings for Fiscal Year 1999). It was reported that children as young as seven or eight are being abducted and forced to participate in armed combat. See A. GLENN MOWER, JR., *THE CONVENTION ON THE RIGHTS OF THE CHILD: INTERNATIONAL LAW SUPPORT FOR CHILDREN* 42 (1997).

4. See *U.S.A. Support Needed for International Campaign to Stop the Use of Child Soldiers* (last modified May 28, 1999) <<http://africapolicy.org/docs99/chil9905.htm>>. This document was re-posted by the Africa Policy Home Page. It is an action alert from the Washington Office on Africa, and it basically sets forth the plight of the child soldier in Africa. It is based upon an outcry from South Africa's First Lady Graca Machel (she is also the chosen expert of the Secretary General for the United Nations) and the Africa Conference on the Use of Children as Soldiers, which was held in Mozambique in April 1999. The conference called for international support to raise the internationally recognized age limit of fifteen to eighteen to participate in armed conflicts. See *id.*

5. See Susan O'Rourke von Struensee, *Lead Articles: Violence, Exploitation, and Children: Highlights of the United Nations Children's Convention and International Response to Children's Human Rights*, 18 SUFFOLK TRANSNAT'L L. REV. 589, 621 (1995). "In the past ten years alone, more than 1.5 million children have died from war-related injuries." *Id.*

6. *More Than 120,000 Child Soldiers Fighting in Africa* (last modified April 19, 1999) <<http://www.hrw.org/press/1999/apr/cs0419.htm>>. This list is only representative of the areas that are most effected by the use of child soldiers. There are many other areas in the world that are dealing with the use of children in armed forces and armed conflicts, including the United States which allows seventeen-year-olds to volunteer for recruitment into the United States armed forces. See *Africa-At-Large: U.S. Blocks Efforts to Ban the Use of Child Soldiers*, AFRICA NEWS, June 15, 1999, available in LEXIS, World News Library.

Protocol) will be presented and discussed.<sup>7</sup> The Optional Protocol, recently drafted, will increase the minimum age for recruitment and participation of children in armed conflicts (both internationally and domestically) from the age of fifteen to eighteen, and it will increase the recruitment age to sixteen. The most important aspect of the discussion, though, is the practical potential for success of the protocol and its effects.

Ultimately, the Optional Protocol for the Convention on the Rights of the Child is a much-needed addition to international humanitarian law, because the current international humanitarian standards do not protect children from recruitment and participation in armed conflicts. However, the practicality of enforcement of the Optional Protocol and the reality of changing the plight of the Ugandan child soldier remains doubtful unless further developments occur in the acceptability and enforceability of international humanitarian law.<sup>8</sup>

Part II of this Note discusses the general background of child soldiers with particular attention regarding the current situation in Uganda. Part III discusses the current international laws and standards regarding children and war, as well as international law in general as it applies to the child soldier. Part IV presents the Optional Protocol to the Convention on the Rights of the Child. Part IV also discusses the opposition to any change in current international laws regarding the recruitment and participation of children in armed hostilities. In addition, Part IV provides a discussion of the possible success of the Optional Protocol in general and with regard to providing additional protections for Ugandan child soldiers. The final part of this Note includes concluding remarks regarding the Optional Protocol and the Ugandan Child Soldier.

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7. There are actually two different Optional Protocols being drafted: one entitled the Draft Optional Protocol to the Convention on the Rights of The Child on the Sale of Children, Child Prostitution and Child Pornography, and the other entitled the Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts. The one that this note is addressing is the Optional Protocol relating to the involvement of children in armed conflicts. See SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 723-37 (1999).

8. An example is for the policies in the Optional Protocol (and the Convention on the Rights of the Child, generally) to become customary international law, which would create a greater obligation for the international community as a whole. See Jonathan I. Charney, Article, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971 (1986); and RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

## II. CURRENT SITUATION

### A. General Background

The international community has discussed the plight of the child soldier for many years. As a result of the continued concern, the Forty-Eighth session of the General Assembly for the United Nations adopted Resolution 48/157. This resolution led Graca Machel, a child soldiers expert, to issue a report regarding the impact of armed conflict on children.<sup>9</sup> Included in the study was a discussion of the impact on children actively participating in armed conflicts as well as recommendations to prevent the travesty.<sup>10</sup> It is important to note that in this report, Ms. Machel used the term "child," as defined by Article 1 of the Convention on the Rights of the Child, as "every human being below the age of eighteen years . . ."<sup>11</sup> This is essential to note because statutory protection of a child is often defined in terms of the child's age. Establishing a "norm" of eighteen for each and every nation is important for the long-term protection of children involved in armed conflicts. It is also essential to create a standard definition for a "child" as all those under the age of eighteen, because each and every nation will be better able to interpret international standards (which set forth protections for "children") without question or ambiguity.

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9. *See Promotion and Protection of the Rights of Children: Impact of armed conflict on children—Note by the Secretary General*, U.N., 51st Sess., Provisional Agenda Item 108, at paragraph 9, U.N. Doc. A/51/306 (1996). The Secretary General submitted the report prepared by Graca Machel (the chosen expert on child soldiers) upon request by the General Assembly (Resolution 48/157 (1993)). Her report was extremely extensive and has greatly impacted both the United Nations and the rest of the international community. Two examples include: European Parliament Resolution B4-1078 (passed December 17, 1998, which made several far reaching decisions based in part on Graca Machel's report. *See generally, European Parliament: Resolution B4-1078, Passed 17 December 1998* (visited Oct. 8, 1999) <<http://www.hrw.org/hrw/campaigns/crp/euro-parl.htm>>. *See also Report of a Canadian Action Roundtable on Child Soldiers: Ottawa, Ontario, March 23, 1998* (visited Sept. 30, 1999) <<http://www.dfait-maeci.gc.ca/peacebuilding/children-e.asp>>. (The Report of a Canadian Action Roundtable on Child Soldiers, held in March 1998 was hosted by the Department of Foreign Affairs and International Trade. The Roundtable made several conclusions based upon, in part, the Graca Machel Report. The conclusions included a request for the minimum age for recruitment and participation of children to be increased to eighteen and that the Optional Protocol be passed with a "straight eighteen" approach).

10. *See Anders Ronquist, United Nations Action on Children's Rights*, 4 LOY. POVERTY L. J. 229, 233 (1998). The study also included recommendations regarding: the need to end the use of children under the age of eighteen years as soldiers and to ensure their demobilization and reintegration into society; to increase efforts at prohibiting anti-personnel mines; and to contribute to mine-clearance efforts. The report also addresses the importance of measures to prevent conflicts and the need to integrate into military programs instruction on military responsibilities towards women and children. *Id.*

11. *The Convention on the Rights of the Child*, reprinted in DETRICK, *supra* note 7, at xxiii.

In Machel's report, she notes that the increased use of children in armed conflicts can be attributed to, inter alia, "the proliferation of inexpensive light weapons."<sup>12</sup> Moreover, leaders in the various conflicts note that using children as soldiers makes their control of the armed group easier, because the children are "more obedient, do not question orders and are easier to manipulate than adult soldiers."<sup>13</sup> In addition, "children are uniquely vulnerable to military recruitment because of their emotional and physical immaturity, are easily manipulated, and can be drawn into violence that they are too young to resist or understand."<sup>14</sup> The unique nature of children creates an atmosphere which encourages abuse of the children by warring groups.

Often the "recruitment" of these children is forced or compulsory; however, there are some children that are said to join voluntarily.<sup>15</sup> Both government and armed opposition groups practice forced recruitment. The use of or the threat of force by these groups makes it virtually impossible for children to avoid recruitment. Often, children are rounded up in schoolyards,<sup>16</sup> market places,<sup>17</sup> and even churches.<sup>18</sup> Once the child is forcibly recruited, children are threatened and/or compelled to kill or observe the killing of someone they know in order for the military leaders to gain greater

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12. *Promotion and Protection of the Rights of Children: Impact of armed conflict on children—Note by the Secretary General, supra* note 9, paragraph 27. The weapons given to children are light and so elementary that young children can dismantle and reassemble them quickly and easily. *See id.*

13. *Id.* at paragraph 34. The increased use of children in combat reveals the notion that military leaders have discovered that children are good soldiers because they have a higher tendency to obey orders without question. *See MOWER, supra* note 3, at 163.

14. *Appropriations for the Department of Defense for Fiscal Year 1999, Section 8128(a) of the Conference Report Accompanying H.R. 4103, supra* note 3, paragraph 3.

In 1986, Human Rights Watch (HRW) described the war being waged by the Soviet occupying forces and the Mujahedin resistance fighters for the allegiance of Afghan children. Thousands were being sent to the Soviet Union for long-term indoctrination or training as spies, saboteurs and assassins. A resistance commander explained: "[The Soviets] saw that they couldn't conquer us and they realized that there was no way to change the people. That's when they decided to take the children, because they think that they have 'empty brains.'

COHN & GOODWIN-GILL, *supra* note 2, at 37.

15. *See* COHN & GOODWIN-GILL, *supra* note 2, at 24.

16. *See Uganda: Child Victims of Rebels—Abduction and Killing of Children by Ugandan Rebel Group* (visited Oct. 11, 1999) <<http://www.africapolicy.org/docs97/ugan9710.htm>>.

17. *See* COHN & GOODWIN-GILL, *supra* note 2, at 24.

18. *See id.*

control over the child.<sup>19</sup> Such tactics are part of "brutal induction ceremonies" which many, if not all, of the children must undergo.<sup>20</sup>

Voluntary recruitment is actually more of a term of art. Children 'volunteer' for service in armed military groups for a variety of reasons: religious beliefs, social and community values, peer pressure, feelings of helplessness, feelings of vulnerability, a desire for revenge, and identity formation.<sup>21</sup> Ms. Machel reports, though, that the most common reason a child volunteers is because of economic reasons.<sup>22</sup>

Once children are recruited, either voluntarily or forcibly, into a military regime, they are forced to fight, kill, steal food, and even forced into sexual submission. The children are either eventually killed or released from duty (as a result of an international request or an end to the conflict). Ultimately, the impact of the combat and violence on children is severe. "Former child

19. See *id.* at 27. Such tactics take "place in such a way that the community [knows] that he had killed, thus effectively closing the door to the child ever returning to his village." *Id.* By removing any chance for children to return home, they must turn to the only other way of remaining alive: to follow and obey those that have abducted them.

20. See *Promotion and Protection of the Rights of Children: Impact of armed conflict on children—Note by Secretary General, supra* note 9, paragraph 44. "The children undergo a brutal initiation into rebel life: they are forced to participate in acts of extreme violence, often being compelled to help beat or hack to death fellow child captives who have attempted to escape." *Abduction and Killing of Children by Ugandan Rebel Group, supra* note 2.

21. See COHN & GOODWIN-GILL, *supra* note 2, at 37-43.

Anecdotal evidence supports the supposition that many young people voluntarily join armed groups or forces because of their personal experiences and circumstances, and in light of their subjective appraisal of the decision to volunteer. Children's subjective understanding of 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, schools, religious communities and other community based institutions—might exert pressures or send messages that lead children to participate in hostilities. Members of children's ecologies may also influence how a youth appraises the choice to participate in hostilities or not. Developmental processes, or stages children pass through at different ages, that influence a child's understanding of objective experiences can induce a child to respond to circumstances by joining an armed group. Developmental stage will also affect a child's perception of the decision to join. Children's expectations and feelings of empowerment and competence, both before and during war, have an impact on their decision to take up arms. Differences in children's 'attributional styles' are equally at work.... As adolescents enter the identity formation stage, the meaning they attach to the roles that conflict offers, such as combatant, victim, hero, or leader, may influence their decision to join an armed group. At this developmental stage, the ability to project a meaningful future for themselves is also powerfully and intimately tied up with their role in the conflict.

*Id.* at 30-31.

22. See *Promotion and Protection of the Rights of Children: Impact of armed conflict on children—Note by Secretary General, supra* note 9, paragraph 39.

soldiers have grown up away from their families and have been deprived of many of the normal opportunities for physical, emotional and intellectual development.”<sup>23</sup>

Child soldiers that are finally freed from “bondage,” often exhibit symptoms of post traumatic stress disorder (PTSD).<sup>24</sup> “Symptoms of PTSD and related stress reactions common in children include: avoidance/numbing, . . . insomnia, inability to concentrate, ‘intrusive re-experiencing’ . . . , lethargy, confusion, fear, aggressive behavior, social isolation, . . . hopelessness in relation to the future, and hyper-arousal as evidenced in hyper-vigilance and exaggerated startle responses.”<sup>25</sup> Normal children face a variety of challenges in their development; however, armed conflict is considered to be extremely detrimental to healthy physical and emotional development.<sup>26</sup>

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23. *Id.* at paragraph 50.

24. See Edward C. Green & Alcinda Honwana, *Africa: War-Affected Children—Indigenous Healing of War-Affected Children in Africa* (last updated July 22, 1999) <<http://www.africapolicy.org/docs99/viol9907.htm>>.

25. *Id.* “[C]hildren in conflict areas demonstrate that they ‘lose their sense of safety, acquire a high tolerance for violence, are haunted by terrifying memories, are mistrusting and cautious of others, and have a pessimistic view of the future.’” MOWER, *supra* note 3, at 163.

26. See Stuart Maslen, *Symposium: Implementation of the United Nations Convention on the Rights of the Child: II. Implementation and International Bodies: Relevance of the Convention on the Rights of the Child to Children in Armed Conflict*, 6 TRANSNAT’L L. & CONTEMP. PROBS. 329, 331 & n. 2 (1996). Stuart Maslen is:

[A] consultant for the United Nations Children’s Fund (UNICEF). He was formerly the Research Officer to the United Nations Study on the Impact of Armed Conflict on Children, a study requested by the Committee on the Rights of the Child in 1993 in accordance with Article 45(c) of the Convention on the Rights of the Child.

*Id.* at 329. In addition, it has been reported that “many more children are wounded psychologically, emotionally, or culturally than are wounded physically. The widest impact of armed conflict on children is, therefore, on normal childhood development. This impact extends far beyond the immediate battle zone.” *Id.* at 332.

## B. *Child Soldiers in Uganda*<sup>27</sup>

The use of child soldiers is rampant in Uganda.<sup>28</sup> According to a United Nations Report from the Secretary-General, for the past thirteen years Uganda has been struggling through an internal war.<sup>29</sup> As a result, more than ten thousand children have been abducted, for participation in the armed conflict, by the Lord's Resistance Army (LRA).<sup>30</sup> Many of the children abducted are fourteen to sixteen years old; however, many are as young as eight or nine.<sup>31</sup>

27. The general background information given above is also applicable to the following specific description of the plight of the Ugandan child soldier.

28. See *Abduction and Killing of Children by Ugandan Rebel Groups*, *supra* note 2. See also *Rights of the Child: Abduction of Children from Northern Uganda*, Report of the Secretary-General, U.N. Economic and Social Council, Commission on Human Rights, 55th Sess., Provisional Agenda Item 13, at paragraph 4, U.N. Doc. E/CN.4/1999/69 (1999). "[O]ne of the most egregious examples of the use of child soldiers is the abduction of some 10,000 children, some as young as eight years of age, by the Lord's Resistance Army in northern Uganda." *Appropriations for the Department of Defense for Fiscal Year 1999: Section 8128(a) of the Conference Report Accompanying H.R. 4103*, *supra* note 3, paragraph 6. These human rights violations are occurring both at the hand of the armed opposition group (the LRA) and by the Ugandan Government Forces. See *Amnesty International—News Release—AFR 59/05/99: Uganda—The Full Picture—Uncovering Human Rights Violations by Government Forces in the Northern War* (last modified Mar. 17, 1999) <<http://www.amnesty.org/news/1999/15900599.htm>>.

29. The war described is "a complex war that pits the LRA, backed by the Sudanese government, against units of the rebel Sudan People's Liberation Army (SPLA) on the one hand, and against the Ugandan army on the other." *Confessions of Uganda's Child Soldiers* (last modified April 21, 1998) <<http://www.mg.co.za/mg/news/98apr2/21apr-uganda.html>>. The areas affected by the conflict include Kitgum, Arua, Adjumani, Gulu, Moyo, Apac, and Lira (all cities or towns in and around Uganda). See *id.*

30. See *Appropriations for the Department of Defense for Fiscal Year 1999: Section 8128(a) of the Conference Report Accompanying H.R. 4103*, *supra* note 3, paragraph 6. The LRA alone has abducted approximately 10,000 children since 1986, 5,000 to 8,000 since 1995 alone. See *Rights of the Child: Abduction of Children from Northern Uganda—Report of the Secretary-General*, *supra* note 28, paragraph 4. Guerrilla factions consist of as much as 80% children. See *Africa: Africa's Child Soldier Fight Well, Eat Little*, CHILDREN OF WAR (A Newsletter on Child Soldiers From Radda Barnen) Oct. 1999, at 5. An additional note: the LRA is an armed opposition group opposing the Ugandan government. The LRA is often referred to as the "Koney Rebels" because the leader's last name is Kony. It routinely abducts children and adults to fight against the Ugandan Army and the Sudan People's Liberation Army. As the LRA works to overthrow the Ugandan government, it routinely strikes civilian areas, killing and looting as it moves through. See *Scars of Death*, *supra* note 1. "The LRA is headed by herbalist Joseph Kony, whose goal is to rule Uganda on the basis of the 10 Biblical Commandments. It began its fight against Museveni's government in 1987, shortly after the defeat of a rebellion by the Holy Spirit Movement, led by Kony's cousin Alice Lakwena." *Confessions of Uganda's Child Soldiers*, *supra* note 29.

31. See *Scars of Death*, *supra* note 1. See also *Abduction and Killing of Children by Ugandan Rebel Groups*, *supra* note 2 and *Rights of the Child – Abduction of Children from northern Uganda—Report of the Secretary General*, *supra* note 28, paragraph 4 (Discussion of the abduction and forced recruitment of children in Uganda).

Once abducted, the children are forced to march the fifty to one hundred miles to the Sudan, where they are placed in camps and taught to fight and use weapons.<sup>32</sup> The children are then forced to fight, steal, and do chores, such as carry large loads of supplies from one torched city to another. Often, young girls are forced to become the “wives” of commanders.<sup>33</sup> In recent years, the LRA’s most common recruitment tactic has been child abduction.<sup>34</sup> The atrocities against children however, are not only taking place at the hands of the armed opposition groups. The Ugandan Government Army is also participating in this action.<sup>35</sup>

Children who have escaped, are released, or are removed from captivity, are said to be given amnesty by the Ugandan Government.<sup>36</sup> At a Counseling Center for Children in Gulu,<sup>37</sup> recently freed child soldiers are given food,

32. See *Rights of the Child—Abduction of Children from northern Uganda—Report of the Secretary General*, *supra* note 28, paragraphs 5-6. During their long march, children are forced to carry supplies through the brush in the hot climate. If a child attempts to escape, he is killed and if the escapee is successful, any relative remaining in the group may be killed. If the children are not killed in this fashion, they may simply die from the trek itself. See *id.* A fourteen-year-old child, Odur Leko, was abducted from his Primary School in Kitgum (a town on the border of the Sudan) and he had this to report from his training to use weapons: “At the camp we were trained to use guns. Those who disobeyed had their ears and fingers cut off. I didn’t want to participate in the killing, but they threatened to shoot me if I refused to do it.” Comment by fourteen-year-old Odur Leko, *Confessions of Uganda’s Child Soldiers*, *supra* note 29.

33. See *Abduction and Killing of Children by Ugandan Rebel Group*, *supra* note 2. See also *Appropriations for the Department of Defense for Fiscal Year 1999: Section 8128(a) of the Conference Report Accompanying H.R. 4103*, *supra* note 3, paragraph 8. Many of the soldiers seem to practice bigamy because they often have multiple wives. Such practices gave rise to epidemics of sexually transmitted diseases and unwanted pregnancies. See *Rights of the Child: Abduction of Children from Northern Uganda, Report of the Secretary-General*, *supra* note 28, paragraph 5.

34. See *Amnesty International—Report—AFR 59/01/97: Uganda: “Breaking God’s Commands”: The Destruction of Childhood by the Lord’s Resistance Army* (visited Oct. 11, 1999) <<http://www.amnesty.org/ailib/aipub/1997/AFR/15900197.htm>>.

35. See *id.* See also *Amnesty International—News Release—AFR 59/05/9: Uganda—The Full Picture—Uncovering Human Rights Violations by Government Forces in the Northern War*, *supra* note 28. The participation of the Ugandan Government in the abuse of children during the hostilities is not necessarily of the same type, but they are nonetheless contributing to the abuse.

In March 1998, 30 children who had been abducted by the LRA were shot dead by government soldiers at Ogole in Kitgum. The UPDF opened fire within 10 metres of their targets. The children had been bound together and many became tangled up as they ran in panic. There has been no investigation—the army has simply denied that children were killed.

*Id.*

36. See *Rights of the Child—Abduction of Children from Northern Uganda—Report of the Secretary General*, *supra* note 28, paragraphs 17-29.

37. “Gulu, the main town in northern Uganda, is situated some 200 kilometres north of the capital Kampala.” *Confessions of Uganda’s Child Soldiers*, *supra* note 29, para. 4.

clothing, and counseling. Many are even reunited with their families and able to return to school.<sup>38</sup>

The impact of such conflict on the children gives rise to great concern in the United Nations and around the world. The Special Representative of the Secretary-General on the Impact of Armed Conflict on Children, Olara Otunnu, met with both Sudanese and Ugandan officials to discuss the ongoing armed conflict. These talks included discussions regarding the "issue of abducted children, . . . the plight of traumatized victims of rape, child mothers, displaced, maimed or abandoned children."<sup>39</sup> However, the officials accomplished nothing substantial because children are still being abducted and forced to participate in armed combat even today.

Many of the countries in Africa have already set the minimum age for recruitment of children into armed forces at eighteen years of age.<sup>40</sup> There are, however, a few exceptions: Angola allows children to be conscripted<sup>41</sup> into the military at age seventeen, and Uganda "appears to allow children over 13 years of age to enlist in certain circumstances."<sup>42</sup> After such a discussion, it would seem appropriate to ask, "where are the laws regarding the use of

38. See *Rights of the Child—Abduction of Children from Northern Uganda—Report of the Secretary General*, *supra* note 28, paragraphs 17-28. It should be noted, however, that this information (reported by the Secretary-General) was provided by the Ugandan Government itself. This raises questions of consistency and completeness in the assistance that is said to be provided by the Ugandan government for these children. It should also be noted that many children are not able to be reunited with their families because they have been displaced or they have been killed during the fighting. Odur Leko (a fourteen-year-old abductee) reported that "he has lost hope in rejoining his family or school. 'I know I'm on my own now. My family may not want to see me again, because of the terrible things I did,' he says." *Confessions of Uganda's Child Soldiers*, *supra* note 29. According to a UNICEF report, "The State of the World's Children 1996," the past ten years has given rise to millions of dead, disabled, and homeless children. As well as another million "unable to locate their parents." See MOWER, *supra* note 3, at 163.

39. *Rights of the Child—Abduction of Children from Northern Uganda—Report of the Secretary General*, *supra* note 28, paragraphs 19. See also *Abduction and Killing of Children by Ugandan Rebel Groups*, *supra* note 2.

40. See *Rights of the Child: Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts on its Second Session*, U.N. Economic and Social Council, Commission on Human Rights, 52d Sess., Provisional Agenda Item 20 of paragraph 22, U.N. Doc. E/CN.4/1996/102 (1996). Not only do many of Africa's nations already espouse 18 as the minimum ages for recruitment and participation in armed conflicts, but, in a 1996 United Nations Report, it was reported that 70 out of 99 countries already had 18 or more already set as their minimum age. See *id.*

41. The definition of conscript is "to enroll for compulsory military service." THE POCKET WEBSTER SCHOOL & OFFICE DICTIONARY 169 (1990).

42. *More than 120,000 Child Soldiers Fighting in Africa*, *supra* note 6. The "certain circumstances" described was not defined, however, it seems that certain circumstances means whenever there is a need for soldiers and there are no other adults that are available for recruitment. Moreover, the 'certain circumstances' seem to represent (to some degree) the whim of those actively searching for "recruits."

child soldiers?" The answer is long, vague, and saddening. Moreover, even though well-intended solutions exist, such as the Optional Protocol to the Convention on the Rights of the Child, the likelihood that it will be successful remains questionable.

### III. CURRENT INTERNATIONAL STANDARDS

There are a variety of international legal standards which, at first glance, seem to give some direction and guidance to nations with regard to age requirements for recruitment and participation of persons in armed conflicts. First and foremost is the Convention on the Rights of the Child, specifically Articles 38 and 39.<sup>43</sup> Other international standards regarding humanitarian law (some addressing child soldiers and their rights specifically) include: Article 77 of the Additional Protocol I to the 1949 Geneva Conventions,<sup>44</sup> Article 4 of the Additional Protocol II to the 1949 Geneva Conventions,<sup>45</sup> and the African Charter on the Rights and Welfare of the Child.<sup>46</sup> These and other important international agreements are discussed below.

#### A. *International Human Rights Instruments Directly Pertaining to Children*

##### 1. *The Convention on the Rights of the Child*

The United Nations General Assembly adopted the Convention on the Rights of the Child (CRC) on November 20, 1989.<sup>47</sup> It was the culmination of many years of dedicated work to establish a document applicable to all children. The final document encompassed forty rights specifically applicable to children.<sup>48</sup> Four "hot topics" surfaced during the drafting of the CRC; one

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43. See *Convention on the Rights of the Child*, U.N. Doc. A/RES/44/736 (1989), reprinted in MARIA RITA SAULLE & FLAMINIA KOJANEC EDS., *THE RIGHTS OF THE CHILD: INTERNATIONAL INSTRUMENTS* 9 (1995).

44. See *Additional Protocol I to the Geneva Conventions of 1949, Art. 77*, reprinted in SAULLE & KOJANEC, *supra* note 43, at 725.

45. See *Additional Protocol II to the Geneva Conventions of 1949, Art. 4*, reprinted in SAULLE & KOJANEC, *supra* note 43, at 729.

46. See *Charter on the Rights and Welfare of the African Child*, Organization of African Unity, Addis Ababa, reprinted in SAULLE & KOJANEC, *supra* note 43, at 759.

47. See *United Nations: Convention on the Rights of the Child*, 28 I.L.M. 1448 (1989).

48. See *id.* at 1450. The rights included in and of themselves were not extraordinary. What made this document special was the fact that it was directed at children. See *id.* The rights enumerated in the CRC include protections from violence, abuse, abduction, and from hazardous employment and exploitation. The CRC also includes a right to adequate nutrition; free compulsory primary education; adequate health care; and equal treatment regardless of gender, race or culture. Moreover, it provides a right to express opinions and freedom of thought in matters affecting the child. The drafters also seemed to recognize the fact that these

of which was the minimum age for participation in armed conflicts.<sup>49</sup> That issue, addressed by Article 38, remained one of the most difficult issues to resolve until the final draft of the treaty was complete.<sup>50</sup> The minimum age of eighteen was supported by many of the working group for the CRC; however, the United States (the most vocal protestor) steadfastly opposed establishing eighteen as the minimum age for recruitment and participation of children in armed conflicts. Ultimately, the only agreement that could be reached was the age of fifteen for recruitment and participation in armed conflicts.<sup>51</sup>

Despite these difficulties, the CRC has been ratified by 191 of the 193 participating nations. More important, though, it has been ratified at "record-breaking rates; no other specialized United Nations human rights treaty has entered into force so quickly and been ratified by so many states in such a short period of time."<sup>52</sup> Burma, China, and Cuba, which are not parties to the

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were children that they were talking about and also included provisions for safe access to leisure, play, culture, and the arts. See *UNICEF\*USA: United Nations Convention on the Rights of the Child—Frequently Asked Questions* (visited Sept. 10, 1999) <<http://www.unicefusa.org/infoactiv/rights.html>>. The protections provided under the CRC are arranged thematically with interrelated provisions under individual headings. Such an approach "reflect[s] the CRC's holistic perspective of children's rights: that they are indivisible and interrelated; that equal importance should be attached to each and every right recognized in the CRC because each one is fundamental to the dignity of the child; and that the implementation of each right should take into account the implementation of or respect for all the other rights." DETRICK, *supra* note 7, at 22.

49. See *United Nations: Convention on the Rights of the Child*, *supra* note 47, at 1450. The other three hot topics included "the rights of the unborn child, the right to foster care and adoption, [and] the freedom of religion..." *Id.* See also Karen A. McSweeney, Note, *The Potential for Enforcement of the United Nations Convention on the Rights of the Child: The Need to Improve the Information Base*, 16 B.C. INT'L & COMP. L. REV. 467, 484 (1993).

50. See *United Nations: Convention on the Rights of the Child*, *supra* note 47, at 1450. At the outset of the drafting process, the precise age a person could participate in armed combat was not discussed because many nations assumed that the age would coincide with Article 1 of the CRC, which defined a child to be anyone under the age of eighteen. See LAWRENCE J. LEBLANC, *THE CONVENTION ON THE RIGHTS OF THE CHILD: UNITED NATIONS LAWMAKING ON HUMAN RIGHTS* 150 (1995).

51. See *United Nations: Convention on the Rights of the Child*, *supra* note 47, at 1451. The United Nations decision making process is conducted by consensus. This procedure resulted in a "watering down" of the final provisions of the CRC. The United States was able to successfully push for the redefinition of the child under Article 38 (in contrast to Article 1 which defines a child as anyone under the age of eighteen) because of the consensus process. They argued that since Protocols I and II of the 1949 Geneva Conventions already mandated fifteen as the minimum age for recruitment and participation, this was not the time nor the place to alter existing international humanitarian standards. See *id.* Along with the United States, the United Kingdom, Canada and the Soviet Union also objected to eighteen as the minimum age. See LEBLANC, *supra* note 50, at 150. The argument which lost the debate was that by increasing the minimum age under Article 38, they would be advancing international law, not causing inconsistencies. See *id.* at 150-51.

52. LEBLANC, *supra* note 50, at 45. Though the United States signed the CRC in 1995, they have failed to ratify it. This failure can be credited to several misconceptions about the goals and beliefs espoused by the CRC. See *How to Help the US Ratify* (visited Sept. 16, 1999)

U.N. Covenants on Human Rights, have even signed and ratified the CRC.<sup>53</sup>

Despite the widespread acceptance of the CRC, several major defects remain which render it incapable of successfully protecting children involved in armed combat. First, one of the greatest inadequacies is the inconsistency between Article 1 and Article 38 of the CRC. Article 1 defines a child as everyone under the age of eighteen, while Article 38 specifically redefines the child for the purposes of participation in armed combat at age fifteen.<sup>54</sup> This inconsistency seems to portray child soldiers as less worthy of protection than all other children. On the contrary, these children are in need of even more protection. Ugandan children (as defined by Article 1) are being abducted, tortured, and killed. But because they are being used as "soldiers," they are afforded less protection.

Second, the CRC includes a large number of reservations. Such reservations weaken the sweeping requirements set forth in the CRC and work to lessen the protection of children.<sup>55</sup> Although the Commission on Human Rights, as well as many humanitarian organizations, have repeatedly requested that states remove their reservations, such requests have mostly been in vain.<sup>56</sup> There is simply little point in an international human rights law which provides those bound by it to pick and chose which provisions they will follow and which ones they will not follow.

Finally, "[t]he only international implementation mechanism provided for in the CRC is the system of period reporting by States parties to the relevant human rights treaty body, the Committee on the Rights of the Child."<sup>57</sup> Once the reports are received and reviewed, the Committee simply makes suggestions and other forms of constructive criticism to the state party.<sup>58</sup> This method of assuring compliance is "limited by the signatories' willingness to comply."<sup>59</sup> It does not actually punish noncompliance with the CRC or force compliance in the future, though compliance is "requested" by

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<<http://www.unicef.org/crc/updates/us-how.htm>>.

53. See Ronquist, *supra* note 10, at 230.

54. See DETRICK, *supra* note 7, at 22. See also *supra* note 48.

55. See Ronquist, *supra* note 10, at 230-32.

56. The main purpose of the Committee is to ensure state compliance with the CRC. Reports are submitted to the Committee by each state party after the first two years of ratification and then every five years thereafter. See *Convention on the Rights of the Child*, Article 44(1), reprinted in SAULLE & KOJANEC, *supra* note 43, at 26.

57. DETRICK, *supra* note 7, at 41.

58. See *Convention on the Rights of the Child*, Article 44(1), reprinted in SAULLE & KOJANEC, *supra* note 43, at 25-26. Each report is to contain a record of the measures that the state party has taken that will give "effect to the rights recognized . . . [in the CRC] and on the progress made on the enjoyment of those rights." *Id.* at 25.

59. O'Rourke von Struensee, *supra* note 5, at 590.

the Committee. Moreover, there is no provision that allows for complaints from third parties regarding violations of the CRC, whether by individuals or organizations within or outside of that state.

Despite these problems, the CRC was successful in recognizing the rights of children on an international level. It raised issues and concerns that were not addressed in the past or that were not adequately dealt with. However, the Ugandan child abducted and forced to fight in armed combat is not protected by the CRC.<sup>60</sup> Uganda has since signed and ratified the CRC but abductions of children for forced participation continues without abatement.<sup>61</sup> The CRC, as it currently stands, is not a viable solution for Ugandan child soldiers.

## 2. *The African Charter on the Rights and Welfare of the Child*

The African Charter on the Rights and Welfare of the Child (African Charter) explicitly protects children involved in armed conflicts.<sup>62</sup> This Charter, though only a regional charter, is important for several reasons. First, it recognizes that the rights and welfare of the child are more important than the type of conflict in which the child is involved.<sup>63</sup> Second, is its definition of a child. The fact that it establishes a child as anyone under the age of eighteen (including those children involved in armed combat) advances current international humanitarian protections for children.<sup>64</sup> Last, Article 22(2) of the Charter states “[p]arties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities

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60. See *U.N. Convention on the Rights of the Child: 195 States Have Ratified the Convention on the Rights of the Child* (visited Oct. 8, 1999) <[wysiwyg://207/http://www.freethechildren.org/ratify.htm](http://www.freethechildren.org/ratify.htm)> (listing the states and dates of ratification).

61. See *Army Captures 48 Child Soldiers From Lord's Resistance Army Rebels*, THE BRITISH BROADCASTING CORPORATION, Feb. 23, 2000, found in the LEXIS News Group File, Most Recent 60 Days. Most of the children that were recovered from the LRA were between the ages of eight and ten. However, there were several older children found as well, some ages fifteen or sixteen and even a couple as old as age twenty-two. See *id.*

62. See GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 332 (1995).

63. See *id.* Article 22(3) of the Charter reads:

States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension or strife.

*Charter on the Rights and Welfare of the African Child, Organization of African Unity*, Addis Ababa, July 11, 1990, art. 2, reprinted in SAULLE & KOJANEC, *supra* note 43, at 768.

64. See *id.* at 760.

and refrain in particular, from recruiting any child."<sup>65</sup> The African Charter is broader than the CRC and the newly adopted Optional Protocol to the Convention on the Rights of the Child.<sup>66</sup>

In addition to acting as a compliment to the CRC, the African Charter also attempts to correct some of the problems found within the CRC.<sup>67</sup> Despite these good intentions, however, there are several shortfalls. The Charter has only recently become binding upon those African states which signed and ratified it. Therefore, though the states that did sign it may be bound, numerous others that have not signed or ratified it remain unaffected.<sup>68</sup> Second, Article 1(3) states that "[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of [sic] such inconsistency be null and void."<sup>69</sup> Therefore, cultural or religious inconsistencies with the African Charter greatly increases the likelihood for noncompliance with the Charter.

The Charter may be extremely helpful for the Ugandan child soldier. In some respects, it may potentially be more effective than the Optional Protocol.<sup>70</sup> For instance, the monitoring function for the Charter resides within the same continent as an infraction to the Charter;<sup>71</sup> any violations by the Ugandan Government, or by any of the various rebel groups within the Ugandan borders, may be brought forward by various entities—not just

65. *Id.* at 768, art. 22(2).

66. See *infra* notes 106-127 and accompanying text.

67. See B. Rwezura, *The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa*, in *THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURAL AND HUMAN RIGHTS* 82-83 (Philip Alson ed., 1994) (reminding that the African Charter has only recently become effective.). The intent of the Charter was described to:

[P]rovide[] for the establishment of an African Committee of Experts to promote the rights of the child, monitor implementation and ensure protection, and interpret the treaty's provisions. States are to report on their measures of implementation, and the Committee 'may receive communications from any group or non-governmental organization recognized by the Organization for African Unity or the United Nations relating to any mater covered by [the] Charter.' Moreover, the Committee has the power to investigate the alleged violations.

COHN & GOODWIN-GILL, *supra* note 2, at 159. It is important to note that at the time this book was written, the African Charter had not yet become effective.

68. See *The African Charter on the Rights and Welfare of the Child Entered into Force November 29, printed in CHILDREN OF WAR: A NEWSLETTER ON CHILD SOLDIERS FROM RADDA BARNEN*, No. 4/99, December 1999.

69. *African Charter on the Rights and Welfare of the Child, Organization of African Unity*, Addis Ababa, July 1990, Art. 1(3), *quoted in* ALSTON, *supra* note 67, at 100-101. Recognizing cultural differences that conflict with the intent of the Charter is important. In such cases, it must be determined whether the Charter should override such beliefs and if so, what considerations must be taken into account when making this decision.

70. See *infra* footnote 106 and accompanying text.

71. See generally *Part II of the African Charter on the Rights and Welfare of the Child, reprinted in SAULLE & KOJANEC, supra* note 43, at 772-76.

through the reports submitted by Uganda to the oversight committee. Furthermore, the African Charter will create a greater obligation on the part of the Ugandan government in attempts to enforce the provisions within the Charter. Acceptance of the African Charter and of the Optional Protocol could supply double protection for the Ugandan child soldiers, provided enforcement and accountability of the provisions are upheld.

3. *The Declaration of Geneva, Council of the League of Nations Assembly, March 1924, and The Declaration on the Rights of the Child 1959*

The first attempt to recognize and protect children's rights came in the form of the Declaration of the Rights of the Child in 1924 (Declaration of 1924).<sup>72</sup> The intent of the declaration was evident even though the document did not include numerous provisions. It was geared toward the economic, psychological, and social needs of children. But more specifically, it guaranteed the child the best that mankind is able to offer.<sup>73</sup> This document paved the way for many future international efforts to protect the rights of children.<sup>74</sup>

The most distinct shortfall of the Declaration of 1924 is that it was too vague. The statement that "the child must be the first to receive relief in times of distress"<sup>75</sup> does not address exactly what a time of distress is or what kind of relief the child should receive. Moreover, there was no direct protection for children involved in armed conflicts. And last, there was little obligatory pressure for nations to enforce the beliefs set forth within this document.<sup>76</sup> An unbinding declaration really does nothing more for a child than pay lip service to their plight. It does even less for the child soldier.

Ultimately, the League of Nations, which created the Declaration of 1924, disbanded and the United Nations was formed. In order to continue the protection of children and their rights, the Declaration on the Rights of the Child (Declaration of 1959) was created.<sup>77</sup> This revised Declaration continued

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72. See *Declaration of Geneva, Council of the League of Nations Assembly, Geneva, March 1924*, reprinted in SAULLE & KOJANEC, *supra* note 43, at 3. See also, VAN BUEREN, *supra* note 62. The Declaration of 1924 "owed its origins to the concern for children affected by armed conflicts in the Balkans, the only express provision provided that in times of distress children should be the first to receive relief." *Id.* at 329.

73. See VAN BUEREN, *supra* note 62, at 6-7. From the language of the document, it was evident that the children were "recipients of treatment rather than as the holders of specific rights." *Id.* at 7.

74. See *id.* at 8. This author also noted that the mere fact that this Declaration occurred in 1924 eliminated the notion that the interest in children's rights is a new concept. See *id.*

75. *Id.* at 7, art. 3.

76. See *id.* The preamble actually places the burden of accomplishing the provisions of the declaration upon the "men and women of all nations." *Id.*

77. "After the Second World War, which caused considerable suffering of children, immediate efforts were made by the General Assembly of the newly established United Nations

to use the basic format and nature of the original Declaration, however, it was agreed that it would have to be reinvented to some degree in order to comport with the new character of the United Nations.<sup>78</sup> The final draft of the Declaration of 1959 included a preamble and ten principles. This version was less vague because it made a better effort to particularize the protections of the child and it called for the States' parties to create appropriate legislation and other measures to ensure enforcement of the Declaration.<sup>79</sup>

Article 9 is the Declaration's attempt to protect children from neglect, cruelty, and exploitation as well as to prevent children from forced employment under an appropriate minimum age.<sup>80</sup> The Declaration makes no specific reference to children involved in armed combat. But with little debate, the use of a child in armed combat constitutes neglect, cruelty, and exploitation of children, but it also forces them to work in an environment which could endanger their health or education at a young age.

Regardless of the benefits of this declaration, there is still another shortcoming. The Declaration of 1959 does not define what is meant by the term "child." The absence of an established and agreed upon minimum age basically allows each nation to establish its own minimum age as long as it is supported by some purpose or reason. Allowing each State party to establish its own appropriate minimum age allows each state to retain the greatest amount of autonomy possible. But, it does little for the child of sixteen who is being forced to fight instead of attending school and earning an education for himself. In addition, even if some of the provisions in the Declaration of

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to adopt a revised declaration of the rights of the child." DETRICK, *supra* note 7, at 14.

78. See VAN BUEREN, *supra* note 62, at 9-10. Three different options were initially discussed regarding the nature and design of the new declaration. 1) "they could reaffirm the original Declaration of Geneva with a few minor textual alterations, [2]) they could maintain the form, structure, and contents of the Declaration, adding such amendments as would transform the document into a United Nations Declaration of the Rights of the Child, or [3]) they could prepare an entirely new Charter." *Id.* at 9. It was ultimately decided to follow the second suggestion. The initiative included twenty-one different governments working together to redevelop what is now the Declaration of 1959. See *id.* at 9-10.

79. See DETRICK, *supra* note 7, at 14. An important note is that this Declaration was intended to give the children rights rather than see the children as recipients of assistance. See *id.*

80. See *Declaration on the Rights of the Child, reprinted in SAULLE & KOJANEC, supra* note 43, at 5. I believe that the title to the Declaration in the authors' book however contains a typographical error. It reads that the Declaration was adopted in 1989, but it was actually adopted in 1959. Principle 9 reads:

The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.

*Id.* Principle 9, at 7.

1959 would assist the Ugandan child, it is uncertain if the children affected are actually "covered" by the Declaration itself because the term "child" is never clearly defined.

Last, the Declaration of 1959 is no more binding than the Declaration of 1924.<sup>81</sup> Though Uganda has signed and ratified the Declaration, it is not enforceable unless it is considered customary international law.<sup>82</sup>

## B. *International Human Rights Instruments Not Pertaining Directly to Children*

### 1. *The Four Geneva Conventions*

International humanitarian law of armed conflicts is encompassed in the four Geneva Conventions of 1949.<sup>83</sup> The purpose of the four Geneva

81. See VANBUEREN, *supra* note 62, at 12. Though the document is non-binding, it was adopted unanimously. This is significant because it is therefore believed that it is held with greater importance than other non-binding resolutions which are less than unanimously received. "At its lowest, a unanimous adoption by the General Assembly implies that the Declaration has a moral force because its principles have the approval of all the Member states of the United Nations." *Id.*

82. See *id.* See also *infra* note 98 and accompanying text discussing humanitarian international law as applied to internal conflicts.

83. See *The Four Geneva Conventions: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (Geneva Convention I); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (Geneva Convention II); *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Geneva Convention III); and *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Geneva Convention IV) cited in Laura Lopez, Note, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916, at n. 4 (1994). "In the second half of the nineteenth century, the laws of war, which, until then, had been derived almost entirely from international customary law, began to be codified and extended by treaties." DETRICK, *supra* note 7, at 648. Before the four Geneva Conventions of 1949, there were many treaties that codified customary law: the Geneva Conventions of 1864 and 1906, the three Hague Conventions of 1899, the thirteen Hague Conventions of 1907, the London Treaty of 1930 and its Protocol of 1936, and the Geneva Protocol of 1925. See DETRICK, *supra* note 7, at 648. After the 1949 Geneva Conventions, several others followed as well: the Hague Convention of 1954, Convention of 1972, Convention of 1976, the two additional Protocols of 1977 to the 1949 Geneva Conventions, and a Convention and three Protocols of 1981. See DETRICK, *supra* note 7, at 648. See generally Major Thomas J. Murphy, Article, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 3, 13-18 (1984) (discussion of the creation of the four Geneva Conventions). The result of the 1949 Geneva Conventions yielded 429 articles that establish "a wide range of general principles and specific rules governing the treatment to be accorded to individuals, and in some circumstances to the whole of a region's population, in times of armed conflict." Murphy, at 3.

Conventions "is to provide minimum protections, standards of humane treatment, and fundamental guarantees of respect to individuals who become victims of armed conflicts."<sup>84</sup> In simpler terms, the Geneva Conventions were intended to be guidelines for individuals and countries with regard to the treatment and protection of those impacted by armed conflict. However, this does not necessarily include the protection of those who participated directly in the armed conflict.<sup>85</sup> The completeness with which the Geneva Conventions has been received and accepted by the various nation states gives rise to the notion that almost every nation, even those who have not signed it, must comply with its provisions.<sup>86</sup>

The Geneva Conventions falter with respect to the protection of children, especially the use of child soldiers. Many of the provisions encompassed in the Geneva Conventions are applicable to only certain kinds of conflicts as well as to certain classes of people.<sup>87</sup> This limits those who may receive the benefit of the Conventions. The benefits are even more limited in that the Conventions do not specifically relate to children, but to "people" as defined within each class protected, not to children specifically within those protected classes.<sup>88</sup>

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84. Murphy, *supra* note 83, at 3.

85. *See id.*

86. *See id.* at 5.

87. *See* Murphy, *supra* note 83, at 23. Many of the provisions enumerated under the Geneva Conventions are applicable only to international types of conflicts. Common Article 3 is the location of specifications for application to conflicts which are not international in nature. Common Article 3 also encourages the various State parties to voluntarily agree to follow the other provisions (which are not applicable to internal conflicts) with regard to the internal conflict they are experiencing. *See id.* at 22-24. Each individual Convention lists those that it is intended to cover: Convention 1 protects wounded or sick combatants, while Convention 2 protects "wounded and sick combatants aboard ships and combatants who are shipwrecked from any cause, . . ." *Id.* at 23. Convention 3 protects prisoners of war, while Convention 4 protects civilian persons that are not members of the armed forces. *See id.* at 23-24.

88. In 1946, after the cessation of [World War II] . . . , a Draft Convention for the Protection of Children in the Event of International Conflict or Civil War was submitted by the Bolivian Red Cross to the Preliminary Conference of National Red Cross Societies for the Study of the Geneva Conventions. The resolution recommended that the provisions of the draft Convention should be incorporated into the future Geneva Convention on the Protection of Civilians in preference to an additional fifth treaty. In 1947 the Conference of Government Experts approved this decision, and the possibility of a separate Convention focussing on the particular vulnerabilities of children in armed conflicts was abandoned. As a result the international treaty law governing children who are caught up in armed conflicts is found either in general humanitarian treaties focussing [sic] on adults and children, or in global and regional treaties

The greatest problem with regard to the Geneva Convention and its applicability to child soldiers is that "the laws of war codified in the Geneva Conventions are increasingly irrelevant."<sup>89</sup> Most, if not all, of the conflicts occurring today are internal in nature.<sup>90</sup> Weak internal or domestic provisions regarding the laws of war have resulted in few safeguards in this area, especially with regard to the use and abuse of children in armed conflict.

The four Geneva Conventions cannot help the Ugandan child soldier for many reasons; the main reason is because the conflict that is enveloping the children is internal (and sometimes referred to as "low level") in nature. As stated earlier, the Geneva Conventions generally do not provide protections or sanctions for these kinds of hostilities. The child soldier in Uganda desperately needs something that is applicable to children specifically and which is applicable to those kinds of conflicts in which they are involved, otherwise protection will not be provided. Several years after the acceptance of the Geneva Conventions though, two additional protocols were drafted and ultimately accepted by many of those who were already a party to the four existing Geneva Conventions.<sup>91</sup>

## 2. *Protocol I and II to the 1949 Geneva Conventions*

The additional Protocols I and II of the 1949 Geneva Conventions were the result of several meetings in 1971-1972 by the International Committee of

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which regulate states' behaviour [sic] in both peace and armed conflicts.

VAN BUEREN, *supra* note 62, at 329 (footnote omitted).

89. Lopez, *supra* note 83, at 916.

90. See COHN & GOODWIN-GILL, *supra* note 2, at 149. Significant figures in the international humanitarian law field have identified several types of human rights violations in internal conflicts that are not currently addressed by international humanitarian laws and standards, they include "summary and arbitrary execution; torture and inhumane treatment; disappearances; hostage-taking; terror and intimidation of civilian populations; deportation and forced relocation; abuse or lack of judicial process; large-scale and prolonged administrative detention; and collective punishment." *Id.* An additional violation is the use and abuse of children in armed conflict.

91. See Murphy, *supra* note 83, at 46-48. The adoption of the two additional protocols happened as a result of a variety of factors:

Since the adoption of the four Geneva Conventions in 1949, a proliferation of new nations have entered the world community, a multitude of armed conflicts have taken place under a variety of conditions, and marked changes have occurred in the nature of both international and non-international hostilities. These factors led to widespread views that the body of traditional law for the protection of victims of armed conflicts, as embodied primarily in the Geneva Conventions of 1949, the Hague Conventions of 1907, and the customary law of nations, was not adequate to fulfill its purpose in the modern age.

*Id.* at 46.

the Red Cross and various other government experts.<sup>92</sup> Protocol I provides for the protection of victims of international armed conflict while Protocol II provides for the same protections except it is geared toward non-international armed conflicts.<sup>93</sup> Included in both Protocols are a few provisions which apply directly to children.<sup>94</sup> The two most relevant provisions include Article 77 to the Additional Protocol I and Article 4 of the Additional Protocol II.<sup>95</sup>

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92. See Sylvia Junod, Conference, *The American Red Cross—Washington College of Law Conference: International Humanitarian and Human Rights Law in Non-International Armed Conflicts, April 12-13, 1983: Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29, 31 (1983). Instead of two Protocols, many parties argued for only a single Protocol which would encompass all of the provisions set forth. They argued “that in the face of equal suffering, victims have the right to the same protection in all armed conflicts, whether internal or international.” *Id.* at 33.

93. See Howard S. Levie, Article, *The 1977 Protocol I and the United States*, 38 ST. LOUIS U. L.J. 469, n. 1 (1993-1994) and see Junod, *supra* note 92, at 29.

Geneva Protocol I supplements the preexisting conventional humanitarian law provisions regarding their implementation and enforcement by extending protection of the humanitarian law to more persons, by enunciating new substantive norms in defining additional categories of grave breaches and in clarifying standards of responsibility, and by enumerating additional or supplemental enforcement and implementation measures.

Murphy, *supra* note 83, at 48. Protocol II

applies to armed conflicts ‘which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.’

Junod, *supra* note 92, at 36.

94. Protocol I actually has several articles which are specifically relevant to children: Articles 8, 70, 74, 75(5), 77, and 78. Article 77 is the most significant. See VAN BUEREN, *supra* note 62, at 331.

95. See *Stop the Use of Child Soldiers! International Legal Standards Governing Child Soldiers* (visited Sept. 7, 1999) <<http://www.hrw.org/campaigns/crp/int-law.htm>>. Article 77 of Protocol I (which addresses the victims of international armed conflicts) seems to afford the most comprehensive protection. For example in Article 77(2), the protocol states that “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.” *Protocol I of 1949 Geneva Convention, reprinted in SAULLE & KOJANEC, supra* note 43, Article 77(2), at 726. Moreover, subsection (5) of the same article provides that “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.” *Id.* However, Article 4(3)(c) of Protocol II (which addresses victims of non-international armed conflicts) states that “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.” *Protocol II to the 1949 Geneva Conventions, reprinted in SAULLE & KOJANEC, supra* note 43, at 729-30. Protocol II is more comprehensive regarding the recruitment and participation of children in armed conflicts because it does not permit any recruitment or any kind of participation, where as Protocol I simply says that children should not take a direct part in the armed hostilities and that the recruiters should refrain from recruiting the children. However, Protocol I does provide for protection of the children after the conflict has come to

The additional protection provided in these provisions cannot be entirely dismissed. But their acceptance is not as wide spread as the four Geneva Conventions or the CRC, so the benefit is minimal.

Uganda has signed both, but to little avail for the Ugandan child soldier.<sup>96</sup> Article 77 of Protocol I prescribes fifteen as the minimum age for recruitment and participation in hostilities while Article 4 of Protocol II establishes similar requirements for domestic hostilities as well. This requirement for fifteen to be the established minimum age presents a problem in countries like Uganda. Proof of age is not an easy task in Uganda because many children are not registered at birth as they are supposed to be.<sup>97</sup> More protection is needed.

### 3. *Inadequacy of Current International Standards and the Limitations of International Humanitarian Laws to Internal Conflicts*

As evidenced by the preceding discussion, current international provisions, with the possible exclusion of the African Charter for the Rights and Welfare of Children, are simply inadequate protections for children who are being forced to participate in wartime activities. However, a discussion of international humanitarian law in relation to customary international law is necessary before proceeding to a discussion of the Optional Protocol and its probability of success.

International humanitarian law, which deals with the regulation of armed conflicts,<sup>98</sup> is similar to the traditional notions of law, in that it promotes "order, guiding, restraining, [and] regulating behavior."<sup>99</sup> It is created by the

an end in its protection of them from capital punishment if they were found to be involved in the conflict. *See id.* at 726-30.

96. *See* COHN & GOODWIN-GILL, *supra* note 2, at 206. This information is included in a comprehensive chart that establishes the acceptance of various international human rights treaties among the many nations. Each nation is listed along with those human rights treaties in which it has signed and ratified, including: the CRC, the four Geneva Conventions of 1949, the additional Protocols to the 1949 Geneva Conventions, the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. *See id.* at 186-208. This chart also includes each nation's established voting age, military recruitment minimum age, and whether the nation participates in conscription of minors. *See id.*

97. The CRC and other humanitarian laws require the registration of children at birth. *See* Article 7 of the CRC, *reprinted in* DETRICK, *supra* note 7, at xxiv.

98. *See* VAN BUEREN, *supra* note 62, at 329. International humanitarian law is usually divided into two subcategories: international armed conflicts and non-international armed conflicts. Even the subcategory regarding non-international armed conflicts is limited in scope because it does not include provisions for smaller scale conflicts. *See id.* *See also* Theodor Meron, Editorial Comment, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238 (1996).

99. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U. S.: INTRODUCTORY

practices of the nations themselves (customary international law), through agreements (treaties, conventions, etc.) among and between the various nations, and/or from obtaining general principles that are common to the various legal systems in the world.<sup>100</sup> The problem with statutory international law is that it only binds those states that have signed and ratified the treaty or convention.<sup>101</sup>

The important point is the relation of customary international law with regard to child soldiers. Customary international law is believed by some to be binding upon all states, even those that are not signatories to the respective treaty.<sup>102</sup> In addition, the Restatement suggests “[i]nternational agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.”<sup>103</sup> Even more interesting,

NOTE § 1 (1987).

100. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U. S.: SOURCES OF INTERNATIONAL LAW § 102(1) (1987). Restatement (Third) Section 702 provides a list that establishes a basis for determining if a state violates international law.

A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.

RESTATEMENT (THIRD) § 702, *supra* note 8. Comment A goes further and states that this list is “not necessarily complete, and is not closed.” *Id.* at cmt. A.

101. See Gary L. Scott & Craig L. Carr, Article: *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT’LL. & POL’Y 71 (1996). At first glance, this concept only seems fair. However, it leaves a large void where a nation does not agree to abide by the treaty or convention. The result is often a lack of regulation and control in the areas that seem to most need the regulation and control.

102. See *id.* But see Charney, *supra* note 8, at 971. It is believed by others, however, for example, the members of the International Court of Justice, that international agreements play a limited role in the development and identification of customary international law. See Charney, *supra* note 8, at 971-72. One author commented that “treaties such as the Geneva Conventions that are accepted by virtually the entire international community through formal and solemn acts have as strong a legal claim to observance as customary law, which by and large rests on the practice of a limited number of states.” Theodor Meron, *The Geneva Conventions as Customary Law*, 81 A. J. I. L. 348, 349-50 (1987).

103. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(3), *supra* note 100. It is noted in the Restatement’s comments that the time frame needed for the creation of customary international law may actually be short in duration. See *id.* Moreover, the Restatement (Third) Section 702 states that:

In general, a state is responsible for acts of officials or official bodies, national or local, even if the acts were not authorized by or known to the responsible national authorities, indeed even if expressly forbidden by law, decree or instruction.... The violations of human rights cited in this section, however, are violations of customary international law only if practiced, encouraged, or condoned by the government of a state as official policy. A state is not responsible under this section for a violation of human rights by an official that was not authorized, encouraged, or condoned by the responsible

some multilateral agreements may become binding as customary international law on those states that do not actively protest during the formation and establishment of the treaty.<sup>104</sup>

If the important treaties regarding the use of child soldiers become recognized as customary international law, the enforcement and understanding of such practices may become more widespread. Arguably, it could be said that the policies in the CRC might already be considered customary international law, in light of the fact that it has been so widely recognized and accepted. However, the new Optional Protocol to the CRC might also become customary international law; binding upon more states than those who are signatories. This theory is of some hope only if the CRC is deemed to establish international customary law and if the Optional Protocol is seen as an amendment to the CRC rather than as an optional addition.<sup>105</sup>

The Ugandan child soldier might be afforded greater protection if customary international law prohibits children under the age of eighteen from being recruited for participation in hostilities. The change in the minimum age however, is not going to be accomplished through the current international laws. Discussion should now turn to the new Optional Protocol for the Convention on the Rights of the Child. Its goal is to increase protections for children involved in armed conflicts and it is discussed below.

#### IV. THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD

##### A. *The Optional Protocol History and Provisions*

In the past several years, an interest arose to increase the minimum age for recruitment and participation of children in armed conflicts.<sup>106</sup> As

governmental authorities of the state.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702, *supra* note 8, cmt. b.

104. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, *supra* note 100, cmt. i. "Some multilateral agreements may come to be law for non-parties that do not actively dissent. That may be the effect where a multilateral agreement is designed for adherence by states generally, is widely accepted, and is not rejected by a significant number of important states." *Id.*

105. Some proponents of the Optional Protocol are requesting that it become an amendment instead of a voluntary addition to the Protocol. See *Rights of the Child: Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts on its Fifth Session*, Commission on Human Rights, 55th Sess., Agenda Item 13, paragraph 21, U.N. Doc. E/CN.4/73 (1999).

106. An historical note:

In 1938 the International Committee of the Red Cross (ICRC) resolved, because of the low standard of international protection, to cooperate with the International Union for Child Welfare in producing a draft Convention for the Protection of Children in Emergency and Armed Conflict. On 12 January 1939 the ICRC, together with Save the

evidenced by the recent enactment of the African Charter and other current international initiatives,<sup>107</sup> current international humanitarian law is inadequate to address the special needs of child soldiers. Modification of international law was necessary in order to attempt to bring the law into accord with current sentiments. However, as discussed below, the resulting Optional Protocol may have fallen short of this desire.

The need to change current international law was identified by various groups including the Red Cross, the Red Crescent,<sup>108</sup> various non-governmental organizations (NGOs), and even many nation states. One of the major forces behind such identification is the inability of current standards to address problems found in the overwhelming amount of internal disputes currently raging.<sup>109</sup> The loop hole created by this inapplicability to internal strife created a necessity for the Optional Protocol.

Legal scholar Theodor Meron and others suggested that such an instrument should not include terms like "participant," "combatant," or "civilian," but should instead address general standards of humane treatment for children, irrespective of the type of conflict taking place.<sup>110</sup> Ultimately, it was decided that the necessary provisions would be compiled in an Optional Protocol to the Convention on the Rights of the Child (Optional Protocol).<sup>111</sup> As a result, the United Nations requested that the Committee on the Rights of the Child (Committee) address the issue.

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Children Union, accepted the draft, but the work to secure its adoption was somewhat overtaken by events. With the outbreak of World War II the draft was taken no further. VAN BUEREN, *supra* note 62, at 329 (footnotes omitted). Such an early effort to give children this needed protection, especially in times of armed conflict, reveals that the concern has been, at least, on the 'back burner' of the international communities' minds for a very long time. *See id.*

107. *See infra* notes 136-54 and accompanying text.

108. The International Federation of the Red Cross and the Red Crescent (IFRCRC) is an international humanitarian organization. The mission of the IFRCRC is to "improve the situation of the world's most vulnerable people." *The International Federation: Action for the Most Vulnerable in 176 Countries Worldwide—Who We Are* (visited Nov. 15, 1999) <<http://www.ifrc.org>>. The goal of the Federation is to assist victims of natural and technological disasters, to assist refugees and to aid those in health emergencies. *See id.*

109. *See* COHN & GOODWIN-GILL, *supra* note 2, at 149.

110. *See id.* These phrases and others have been susceptible to misinterpretation and prejudicial distinctions. *See id.* Theodor Meron is one of the major authors in the area of international humanitarian law. An article of possible further interest includes Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995).

111. *See* COHN & GOODWIN-GILL, *supra* note 2, at 150. There was a debate over whether to issue the new standards by code, by declaration, or by an optional protocol. *See id.*

The Committee started discussions of the Optional Protocol at its second session in 1992.<sup>112</sup> By the third session, the Committee recommended that a comprehensive study "should be undertaken of the serious problem of children in armed conflict."<sup>113</sup> Ultimately, the U.N. Commission on Human Rights established an open-ended working group on the development of an additional protocol to the CRC, which would address the use and recruitment of children in armed conflicts.<sup>114</sup> "The purpose of the working group is to elaborate, as a matter of priority, a legal instrument in the form of a draft optional protocol to the Convention on the Rights of the Child, the aim being to achieve a universal agreement, on raising the minimum age for recruitment into armed forces and other groups as well as for participation in hostilities from the age of 15 years. . . ."<sup>115</sup>

Since 1994, the working group drafted and redrafted the Optional Protocol with due diligence.<sup>116</sup> In its most recent address to the United Nations, the working group requested that the states' parties to the CRC adopt and ratify the Optional Protocol without further delay.<sup>117</sup> Soon after this plea,

112. *See id.* at 158. The Committee (which, inter alia, monitors and examines the reports issued by the CRC affiliated nations) decided to study the problem of child soldiers for the following reasons:

[I]t believed that armed conflicts had important implications for the protection of children's rights in general. Second, it believed that many conflicts in the early 1990s had serious consequences for children, whether or not they were direct participants. . . . Third, the committee believed that several articles of the convention, not just Article 38, were relevant to the topic because armed conflicts had an impact on the physical and mental well-being of children. Fourth, . . . the committee believed that it was important to give some thought to the ways and means of protecting children exposed to situations of armed conflict. . . .

LEBLANC, *supra* note 50, at 154.

113. COHN & GOODWIN-GILL, *supra* note 2, at 158. *See also* LEBLANC, *supra* note 50, at 155.

114. *See Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts on its First Session*, U.N. Doc. E/CN.4/1995/96 (1995), noted in DETRICK, *supra* note 7, at 658 n.66.

115. *Rights of the Child: Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts on its Fifth Session*, *supra* note 105, para. 10 of the Annex. The need for a working group is also based upon the notion that current international standards regarding the protection of children in times of hostilities is inadequate. *See id.*

116. The drafting session of the working group included discussion regarding "the minimum age for participation in hostilities, the issue of direct or indirect involvement in hostilities, the age of recruitment, be it voluntary or compulsory, into armed forces, and the possibility of including a clause to prevent child recruitment by non-governmental armed groups." *Id.* at para. 15 of the Annex.

117. *See Comments on the Report of the Working Group: Report of the Secretary-General*, U.N. Economic and Social Council Commission on Human Rights, Inter-sessional Open-Ended Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts, 5th Sess., U.N. Doc. E/CN.4/WG.13/2 (1999).

the various nations working on the draft came to an agreement which will be presented for adoption by the United Nations General Assembly this year.<sup>118</sup> The Provisional Draft Optional Protocol to the CRC on the Involvement of Children in Armed Conflict was intended to strictly forbid the recruitment and participation of children under the age of eighteen.<sup>119</sup> However, the recent agreement for the Optional Protocol accomplished less than the abovementioned goal.<sup>120</sup>

The United States, which steadfastly opposed the provision which prevented recruitment of children under the age of eighteen, has finally won. The committee ultimately agreed to set the minimum age for recruitment at sixteen while the minimum age for participation was raised to eighteen.<sup>121</sup> However, the Draft Protocol does not provide for reservations by any state party that chooses to adopt and ratify it.<sup>122</sup>

The specific wording of the Optional Protocol was the biggest issue of debate. Some states wanted the voluntary recruitment of children under the

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118. See *Amnesty International: Child Soldiers—Governments Agree to Ban Use of Child Combatants but Treaty Fails to Prohibit All Recruitment of Under-18's*, M2 Presswire, Jan. 25, 2000, available in LEXIS, News Library.

119. See *Provisional Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts*, reprinted in the *Report of the Working Group* in its 5th Sess., *supra* note 117, art. 1 & 2.

120. See *Amnesty International: Child Soldiers—Governments Agree to Ban Use of Child Combatants but Treaty Fails to Prohibit All Recruitment of Under-18's*, *supra* note 118. The important provisions of the Optional Protocol which were agreed upon include:

- Establishes eighteen as the minimum age for conscription and for direct participation in hostilities;
- Requires governments to raise their minimum age for voluntary recruitment beyond the current minimum of fifteen, and to deposit a binding declaration stating the minimum age they will respect;
- Prohibits the recruitment or use in hostilities of children under the age of eighteen by rebel or other non-governmental armed groups, and requires states to criminalize such practices;
- Requires government measures to demobilize and rehabilitate former child soldiers, and reintegrate them into society.

*Id.*

121. See *id.* The United States is not the only nation that is breathing a sigh of relief (though it was the only nation lobbying for the lower age) in the decision to lower the age for recruitment of children in armed combat. The United States, the U.K., Canada, New Zealand, and the Netherlands all actively recruit children below the age of eighteen, though none of these nations has requested that it be able to use them in combat before the age of eighteen. See *World News: Anger at U.S. Stance on Child Soldiers*, FINANCIAL TIMES (LONDON), January 11, 2000, available in LEXIS, News Library, Major Newspapers; and *Teen Recruits to Stay, Military Says*, THE TORONTO STAR, Jan. 17, 2000, available in LEXIS, News Library, Major Newspapers.

122. See *Draft Optional Protocol to the Convention on the Rights of the Child*, reprinted in DETRICK, *supra* note 7, Art. 4 at 733. At the time this Note was written, there was uncertainty as to whether the final version of the Optional Protocol includes a reservation clause since the agreed upon version has not yet been made available in printed form.

age of eighteen with parental permission while others wanted the age raised to only sixteen or seventeen, instead of eighteen.<sup>123</sup> The Optional Protocol, if adopted as drafted, would have eliminated all forms of recruitment of children under the age of eighteen into any military group (including the acceptance of volunteers under the age of eighteen). In addition, it called for state parties to the protocol to adopt measures that would make it a crime for anyone to recruit or to use children in its armed forces in any hostility (internal or international).<sup>124</sup> These changes would have totally reconciled Article 2 of the CRC with Article 38 of the CRC. However, these goals were not completely accomplished.

Many of the provisions of the Optional Protocol echo the findings made by Ms. Graca Machel.<sup>125</sup> She noted that the impact of such militaristic conflicts is extremely harmful to anyone, but especially so for children. The physical and emotional impact of war, which she studied, resulted in heinous findings.<sup>126</sup> As a result, she recommended that the minimum age for recruitment *and* participation be increased from fifteen to eighteen.<sup>127</sup> Her recommendations were not fully adhered to since voluntary recruitment can occur with children as young as sixteen.

As stated earlier, the revised Optional Protocol is considerably weaker than it was originally intended. But a document was finally agreed upon and it is a good starting place for change. Below is a discussion of the likelihood for success of the Optional Protocol and its application to the Ugandan child soldier.

## B. *Likelihood for Success of the Optional Protocol*

### 1. *Possible Problems the Optional Protocol May Face*

There are a variety of possible problems that the Optional Protocol may face in the ensuing years. The first problem is its ability to become approved by the United Nations General Assembly and for its adoption and ratification by all nations states that are parties to the CRC.<sup>128</sup> It should be noted that

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123. See *id.* at 659-60.

124. See generally *Provisional Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict*, as reprinted in *Comments on the Report of the Working Group*, *supra* note 117.

125. See generally *Impact of Armed Conflict on Children: Report of Graca Machel, Expert of the Secretary General of the United Nations—Selected Highlights*, U.N. Dept. of Public Information Publication (1996).

126. See generally *id.* at 31.

127. See *id.*

128. An important aspect to be remembered is that a nation may only ratify the Optional Protocol if it has already ratified the CRC. See *Optional Protocol to the Convention on the Rights of the Child*, reprinted in DETRICK, *supra* note 7, art. 7, at 736.

during the drafting of the Optional Protocol, the drafting Committee was adamant in establishing a straight eighteen approach to the protection of children associated with armed conflicts.<sup>129</sup> There is a slight chance that the United Nations will refuse to adopt the resolution and make it available for ratification, since it does not comport with the desired straight eighteen (the age requirement for participation and recruitment) approach. But even if the United Nations does adopt the resolution, it will be greatly limited in effect if it is not adopted and ratified by enough countries to really give it much worth.

Another problem may be the enforcement of the Optional Protocol, especially in internal or domestic struggles. Currently, the standard set forth by the CRC (which establishes fifteen as the minimum age for recruitment and participation) is not enforceable.<sup>130</sup> There is little reason to believe that just because the age limit has been increased that there will be sudden compliance with the new provisions. The Optional Protocol itself does not provide for additional measures to ensure compliance other than those already set forth in the CRC. The only way enforcement of the provisions will actually take place is for the CRC to become better enforced, or to include additional enforcement measures within the Optional Protocol itself.

Further difficulties of the Optional Protocol include the lack of a definition for the term "voluntary." The Protocol allows children to be voluntarily recruited as young as the age of sixteen.<sup>131</sup> As described earlier in this note, voluntary recruitment is already a questionable tactic used by many government and rebel forces.<sup>132</sup> Until the term is defined, many of the same "voluntary" recruitment tactics and reasons that children "voluntarily" join will continue, thus affording children as little protection as the CRC.

In addition, the new Optional Protocol continues to promote two double standards: protecting all children under almost any circumstance, except those involved in armed conflict, and prohibiting recruitment by non-governmental agencies while permitting governmental recruitment of sixteen- and seventeen-year-olds.

As discussed earlier, the CRC provides protection for all children under the age of eighteen. However, there is one caveat: the Optional Protocol stealthily redefines the child as one under the age of sixteen for purposes of

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129. See *Global Accord to End Use of Child Soldiers in Wars*, THE TORONTO STAR, Jan. 22, 2000, available in LEXIS, News Library, Major Newspapers.

130. This statement is evidenced by the fact that as recently as January, 2000, at least 48 children were recovered from the LRA. "[M]ost of the captives were between eight to 10 years, though some are 15 or 16 years, with about four aged 22." *Army Captures 48 Child Soldiers from Lord's Resistance Army Rebels*, THE BRITISH BROADCASTING CORPORATION, Feb. 23, 2000, available in LEXIS, News Group File.

131. See generally *Amnesty International: Child Soldiers—Governments Agree to Ban Use of Child Combatants but Treaty Fails to Prohibit All Recruitment of Under-18s*, *supra* note 118.

132. See *supra* text accompanying notes 12-15.

protection during times of armed conflict. This seemingly innocuous distinction actually provides less protection for children in the worst possible situation: a situation in which one would expect protection for children. This alteration simply states that children are important and should be protected unless there is a war and more manpower is needed to win.

Regarding the second double standard, during an internal civil war, generally the two or more warring factions are each vying for recognition as the government entity within that state. Each faction may consider itself the appropriate government entity and thus recruit 'volunteers' into their armed forces as young as fifteen. In addition, though, participation in war-time activities, whether on behalf of the government or on behalf of a non-governmental organization, is extremely detrimental to the child's well-being. Participation in the governmental army will not reduce the grave impact of conflict on the participating children.

And last, violations in internal strife are far more difficult to recognize than violations of the Optional Protocol in international conflicts. But it is even more difficult to hold the violator of an internal dispute accountable for wrongdoing. State sovereignty is often used as a defense from interference with internal control or other domestic issues, such as religion or culture. One argument for a restriction on interference with state sovereignty is that an international proclamation for the age of adulthood or childhood might interfere with various national beliefs and practices.<sup>133</sup> "On the contrary, taking cultural diversity seriously is the best way to combat such abuse by challenging its basis in the consciousness of the relevant constituencies."<sup>134</sup> One important note, though, is that humanitarian intervention has been regarded as the exception to the rule of total state sovereignty.<sup>135</sup> Without this exception to total state sovereignty, many kinds of domestic atrocities remain unchecked. However, the argument remains that it is still difficult to intrude upon another state's sovereignty without prior agreement and the CRC does not specifically provide for such intrusion.

The Optional Protocol has many hurdles to overcome before it will be successful in accomplishing everything it is intended to accomplish. The problems described above are not necessarily insurmountable. Much needs to be done to correct the problems so that these problems are just hurdles that can be overcome and not hopeless obstacles.

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133. For a general study on the comparative perspectives of the CRC on various cultural ideologies in various nations, see generally MICHAEL FREEMAN ED., *CHILDREN'S RIGHTS: A COMPARATIVE PERSPECTIVE* (1996).

134. Abdullahi An-na'im, *Cultural Transformation and Normative Consensus on the Best Interests of the Child*, reprinted in ALSTON, *supra* note 67, at 80.

135. See Michael Reppas, *The Lawfulness of Humanitarian Intervention*, 9 ST. THOMAS L. REV. 463 (1997).

## 2. *Positive Aspects of the Protocol Which May Assist in Its Success*

The best possible support for the success of the Optional Protocol is the almost universal support to eliminate the use of children in armed combat. Though the Optional Protocol does allow for the voluntary recruitment of children as young as sixteen, it strictly forbids the use of children in armed combat under the age of eighteen.<sup>136</sup> This provision was totally agreed upon and, therefore, it can be assumed that it will have a greater chance of compliance than if the provision was not totally agreed upon.

Recently, there has been an enormous amount of regional initiatives<sup>137</sup> which support the basic premise held in the Optional Protocol. The additional initiatives may create an added incentive for the various countries to comply with the standards espoused in the Optional Protocol, thus lending itself to further assisting in the success of the document as well. Increased awareness and support for banning children in combat will create an atmosphere where it is harder for any group to use the children. Violators may bring unwanted interest in their activities if they use children when they are not supposed to use them.

Another positive outlook for the Optional Protocol was created by the Rome Statute for the International Criminal Court (ICC).<sup>138</sup> The ICC will have jurisdiction to hear cases regarding the crimes enumerated within the

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136. See *Amnesty International: Child Soldiers—Governments Agree to Ban Use of Child Combatants but Treaty Fails to Prohibit All Recruitment of Under 18's*, *supra* note 118.

137. See *infra* notes 141-156 and accompanying text for a discussion of the various regional initiatives.

138. The Rome Statute will not become effective until it has been signed and ratified by the requisite number of states (which is sixty). See Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 42 (1999).

Rome Statute.<sup>139</sup> The final draft of the Rome Statute includes crimes that were a culmination of various international humanitarian treaties and other binding agreements.

Included in the Rome Statute is a provision that will give the ICC the jurisdiction to "prosecute the conscription or active use of children under the age of fifteen years in armed forces."<sup>140</sup> The inclusion of this provision is extremely important to the increased awareness and protection of children used in armed conflicts. It may be one of the major accountability procedures to provide enforcement of the protection of children in war.

The ICC will create a much-needed international court designed to enforce certain specific rules and regulations. However, if and when it becomes binding, a large loophole will be created in the protection of children involved in armed hostilities. As stated above, the protections afforded by the Rome Statute address only the use and recruitment of children under the age of fifteen. The Optional Protocol's provisions provide for protection of children as young as sixteen and as old as eighteen; however, there will be little to no enforcement of protection for children between the ages of sixteen and eighteen. Therefore, even if the Rome Statute is signed and ratified by the Ugandan government, the practice of recruiting children fifteen and older will be required to change, but not completely unless the Rome Statute is amended as well.

139. Jurisdiction of the ICC was a topic of great discussion during the entire drafting period of the Rome Statute. Ultimately it was decided that, with respect to the Court's jurisdiction over war crimes, "the court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." *Id.* at 33. Articles 12-19 of the Rome Statute cover jurisdiction under the ICC. Arguments about the comprehensiveness of jurisdiction ensued during the drafting process. Included in the disagreements was the issue over automatic jurisdiction to hear certain enumerated crimes. Almost all parties agreed that the ICC should attain immediate jurisdiction over the crime of genocide. However, crimes against humanity, war crimes, and crimes of aggression were areas of concern and debate. It was agreed that jurisdiction over lesser crimes should come in a form of a consent regime. It was ultimately agreed that

the court may exercise jurisdiction with respect to the crimes listed in the statute, if it has the consent of the state of the territory where the crime was committed or the consent of the state of nationality of the accused (Article 12). But this requirement does not apply if a situation is referred to the court by the Security Council. . . .

*Id.* at 26. Jurisdiction within the bounds of the ICC will also include the competence of the prosecutor to investigate allegations and crimes brought to the attention of the ICC. *See id.* The crimes included within the jurisdiction of the ICC include: genocide, war crimes, crimes against humanity, aggression, and other enumerated crimes. "The first four crimes were known as the four core crimes. *Id.* at 30.

140. *International Criminal Court to Prosecute Conscription and Use of Child Soldiers!!!* (visited Sept. 8, 1999) <<http://www.hrw.org/campaigns/crp/icc-statute.htm>>. The ICC will have jurisdiction over this crime in both the international and non-international realm of armed conflicts. *See* Art. 8(2)(b)(xxvi) and Art. 8(2)(e)(vii) of the Rome State, *discussed in* Arsanjani, *supra* note 138, at 34.

### 3. *Support for the Optional Protocol*

Recently, many regional initiatives to raise the minimum age for participation and recruitment of children have occurred. The following is a discussion of several of them and their possible implications in the success of the Optional Protocol.

In June 1998, an international campaign to stop the use of child soldiers launched the Coalition to Stop the Use of Child Soldiers (Coalition). It was formed as a response to the problems that arose during the United Nations Working Group negotiations for the establishment of the Optional Protocol to the CRC. A steering committee of ten regional and international NGOs head the coalition.<sup>141</sup> In addition, the goals of the Coalition coincide with the Plan of Action Concerning Children in Armed Conflict which was adopted by the International Red Cross and the Red Crescent Movement in 1995.<sup>142</sup>

The basic goal of the Coalition was to assist in the adoption and ratification of the Optional Protocol to the CRC. It was hoped that a "grass roots" movement would assist in the adoption of the Optional Protocol, similar to the result in the movement to ban the production and use of land mines, which was somewhat successful.<sup>143</sup> The Coalition has been extremely active in the drafting efforts of the working group; assisting in lobbying efforts of the Optional Protocol; and spreading concern for the child soldier around the world via news stories, the Internet, and almost any other type of available media. The Coalition also assisted in the organization of four different

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141. The NGOs' spearheading the Coalition include Amnesty International, Human Rights Watch, International Federation Terre DesHommes, International Save the Children Alliance (represented by Swedish Save the Children), Jesuit Refugee Service, Geneva, and Quaker U.N. Office, Geneva. See *Amnesty International News Release—ACT 76/01/98—International Campaign Launched Against the use of Child Soldiers* (visited Sept. 7, 1999) <<http://www.amnesty.it/new/1998/A7600198.htm>>. The steering committee consists of African Coalition to Stop the Use of Child Soldiers, Amnesty International, Defense for Children International, Human Rights Watch, International Federation Terre des Hommes, International Save the Children Alliance, Jesuit Refugee Service, Latin American Coalition to Stop the Use of Child Soldiers, Quaker United Nations Office, Geneva, and World Vision International. The steering committee meets four times a year to discuss and agree upon policy and strategy regarding the Use of Child Soldiers. See *News from the Coalition to Stop the Use of Child Soldiers*, CHILDREN OF WAR, *supra* note 30, at 3.

142. See *Amnesty International News Release—ACT 76/01/98—International Campaign Launched Against the Use of Child Soldiers*, *supra* note 141.

143. See *Coalition Decries Child Soldiers*, SAN ANTONIO EXPRESS-NEWS, July 4, 1998, B10, available in LEXIS, News Library. "Today, children in at least 68 countries live amid the threat of more than 110 million landmines still lodged in the ground, awaiting an unwary step." MACHEL, *supra* note 125, at 39. In 1992, the International Campaign to Ban Landmines, spearheaded by a coalition of NGO's, was created. Since its inception, "considerable progress has been made: the United Nations Secretary-General has advocated strongly for an end to the landmine scourge and a number of countries have already taken steps to ban the use, production, trade and stockpiling of such weapons." *Id.* at 40.

conferences which have requested a ban on the use and recruitment of children under the age of eighteen in armed conflicts (both on an international level and on a domestic level).

To date, three of the Conferences have taken place with what seems to be great success.<sup>144</sup> The results in the first three were essentially the same. Each welcomed the adoption of the Rome Statute for the International Criminal Court, each called for the cessation of the use and recruitment of children in armed conflicts, each called for the adoption of the Optional Protocol, and each called for the adherence to and further acceptance of the CRC. The conferences also called for nations to voluntarily raise their minimum age for recruitment and participation to the age of eighteen.<sup>145</sup>

Two of the Declarations, the Montevideo Declaration, and the Berlin Declaration, requested that its nation states to the Convention also adopt the ILO's Convention 182.<sup>146</sup> In addition, the Maputo Convention requested that

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144. See generally *The Home Page for Child Soldiers* (last modified Oct. 31, 1999) <<http://www.child-soldiers.org/what's.htm>>. This web page lists the most current happenings regarding the use of child soldiers. The most important references, however, are The African Conference on the Use of Children as Soldiers (the Maputo Convention and Declaration), the Latin American Conference on the Use of Children as Soldiers (the Montevideo Convention and Declaration), and most recently the European Conference on the Use of Children as Soldiers (The Berlin Convention and Declaration). See *id.* According to a report by the Human Rights Watch, there is to be a fourth Conference held in Asia in Spring 2000 as well, but there has been no final word on that convention to date. See *id.* The Maputo Convention was attended by 250 representatives of governments, NGOs, and U.N. Organizations. See *Maputo Conference Speaks Out Against Recruiting Child Soldiers*, AGENCE FRANCE PRESSE, Apr. 23, 1999, available in LEXIS, World News Library. The immense amount of support that this Convention was shown simply by the sheer number of attendees infers that the concern over the plight of the child soldier is not a figment of anyone's imagination. The support for change and the concern for the children's safety are real.

145. See generally *Stop the Use of Child Soldiers: Montevideo Declaration on the Use of Children as Soldiers* (July 8, 1999) (visited Sept. 8, 1999) <<http://www.hrw.org/campaigns/crp/montedec.htm>> and *Stop the Use of Child Soldiers: Maputo Declaration on the Use of Children as Soldiers* (Apr. 22, 1999) (visited Sept. 8, 1999) <<http://www.hrw.org/campaigns/crp/maputo-declaration.htm>>. The Berlin Declaration seems to be a bit more relaxed in the requirements called for. In the Berlin Declaration, the members have called for the cessation of the participation of those under the age of eighteen in hostilities, but they do not call for the cessation of recruitment for those under the age of eighteen. See *European Conference on the Use of Children as Soldiers: Berlin Declaration on the Use of Children as Soldiers* (last updated October 28, 1999) <[http://www.child-soldiers.org/berlin\\_declaration.htm](http://www.child-soldiers.org/berlin_declaration.htm)>. See also *Weekly Defense Monitor: Europeans Act on Child Soldiers Issues* (last modified Oct. 28, 1999) <<http://www.cdi.org/weekly/1999/issue42.html>>.

146. See *Stop the Use of Child Soldiers: Montevideo Declaration on the Use of Children as Soldiers*, *supra* note 145. This convention was established for Latin American and Caribbean nations to discuss the plight of the child soldier and to attempt to establish a regional document setting standards for such practices. The Maputo Declaration did not request acceptance of the ILO convention because the Maputo Convention took place before the ILO convention. See also *Weekly Defense Monitor: European Conference on the Use of Children as Soldiers: Berlin*

all African States adopt and adhere to the African Charter on the Rights and Welfare of the Child.<sup>147</sup>

In June, 1999, the International Labour Organization (ILO)<sup>148</sup> issued a report establishing the worst forms of child labor.<sup>149</sup> At its most recent labor convention,<sup>150</sup> the ILO's intention was to supplement and support the already existing international child labor standards that were established in 1973. The ILO stated that the Convention "seeks to prohibit anyone under the age of 18 from carrying out hazardous tasks . . . [that are] likely to jeopardise the health, safety or morals of young persons."<sup>151</sup> According to Article 2 of this convention, the ILO defines a child as all persons under the age of eighteen.<sup>152</sup>

*Declaration on the Use of Children as Soldiers* (last updated Oct. 28, 1999) <[http://www.child-soldiers.org/berlin\\_declaration.htm](http://www.child-soldiers.org/berlin_declaration.htm)>.

147. See *Stop the Use of Child Soldiers: Maputo Declaration on the Use of Children as Soldiers*, *supra* note 146. This document was established at the African Conference on the Use of Children as Soldiers. Its purpose is to set forth principles governing the plight of the child soldier, especially since there currently is a vast amount of children being used in armed conflicts in Africa. Moreover, the conference attempted to assist in the acceptance and ratification of the African Charter on the Rights and Welfare on the Child and the Optional Protocol to the CRC. It was noted in a report by the Radda Barnen (the Swedish Save the Children organization) that there is disappointment expressed in the fact that few African nations have actually participated in the drafting of the Optional Protocol. See *STOP USING CHILD SOLDIERS!: African Conference on the Use of Children as Soldiers* (last visited Oct. 7, 1999) <<http://www.rb.se/childwardatabase/docs/africanconf.htm>>.

148. The ILO was established in 1919. Its purpose was to create and adopt international standards to cope with international labor condition problems. In 1944, the scope of the ILO was broadened to include concerns regarding social policy, human and civil rights matters, and the like. See *What Are International Labour Standards?* (last modified Aug. 2, 1999) <<http://www.ilo.org/public/english/50normes/whatare/index.htm>>.

149. See *International Labour Organization: C182 Worst Forms of Child Labour Convention*, 1999 (last modified June 17, 1999) <<http://ilolex.ilo.ch:1567/scripts/convde.pl?C182>>. It should be noted that the ILO standards have no force in international law unless governments sign and ratify the recommendations set forth by the convention. It is hoped, however, that the major nations will sign the treaty to avoid the embarrassment that other states will see those who do not ratify as supporting child labor. Robert Taylor, *Under 18s May be Barred from Forces*, FINANCIAL TIMES (LONDON), June 5, 1999, National News, pg. 8., available in Lexis, News Library.

150. ILO standards take the form of international labor Conventions and Recommendations. Each Convention is an international treaty that can be ratified by any member state to the ILO. However, each Recommendation is non-binding upon the member states. They are "suggestions" regarding guidelines which direct governments toward policy and action. At each annual ILO Convention, the members also discuss and agree upon less formal conventions and recommendations; usually referred to as codes of conduct, resolutions, and declarations. These standards are generally not considered to be a part of the ILO's system of international labor standards, however, the policies are intended for consideration by the member states. See *What Are International Labour Standards?*, *supra* note 148.

151. Taylor, *supra* note 149. It is easily argued that participating in armed conflicts can be considered likely to jeopardize the health, safety and morals of a young person.

152. See *International Labour Organization: C182 Worst Forms of Child Labour Convention*, 1999, *supra* note 149, art. 2.

In addition, it concluded that the terminology "the worst forms of child labour" means "all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, *including forced or compulsory recruitment of children for use in armed conflict.*"<sup>153</sup> Though the Convention has not yet been entered into force, the message is clear: the use and recruitment of children under the age of eighteen is considered to be a form of child labor and should be discontinued immediately.<sup>154</sup>

Each of these recent developments<sup>155</sup> illustrates the changing sentiment of many of the nations around the world. The desire to protect all children is becoming a great force in the effort to change the minimum age for recruitment and participation of children in armed conflicts. An international

153. *Id.* at art. 3 (emphasis added). The wording of this article was weakened at the strong insistence of the United States. The United States refused to support the ILO's convention if it contained a ban on recruitment of children under the age of eighteen, however, they would support such a measure if the wording was changed to include forced or compulsory recruitment. In order to obtain the support of the United States, a highly influential state (as seen by the effect of their opposition to the Optional Protocol), the ILO conceded and changed the wording. *Africa-at-Large: U.S. Blocks Efforts to Ban the Use of Child Soldiers*, *supra* note 6.

154. The convention was drafted and unanimously adopted by the member states of the ILO. It is assumed that those who assisted in the drafting and adoption of such a document must be in favor of the standards set forth. It should be noted however, that the definition of the use of child soldiers was restricted to the current standard because of the overwhelming pressure that the United States placed on the drafters. See *Africa-At-Large: U.S. Blocks Efforts to Ban the Use of Child Soldiers*, *supra* note 6. Shortly after the adoption of the Resolution by the ILO, President Clinton requested that the Senate consent to ratify the Convention. The United States is able to support this document because it only forbids forced recruitment of persons under the age of eighteen, not the use of volunteers under the age of eighteen. See *Clinton on Child Labor Treaty—Statement by the President* (visited Sept. 23, 1999) <<http://usia.gov/regional/nea/sasia/topics/child806.htm>>.

155. The recent positive changes do not stop at those listed, there are others as well. For example, on October 29, 1999, the Nordic Foreign Ministers Against the Use of Child Soldiers agreed upon and signed a declaration of the strictest nature. No child under the age of eighteen shall be recruited or shall participate in any kind of hostility, that states parties shall make sure that no armed group (governmental or not) shall participate in such recruitments, and that these regulations are relevant to both international and internal armed conflicts. The Nordic states include: Denmark, Finland, Iceland, Norway, and Sweden. See *Declaration by the Nordic Foreign Ministers Against the Use of Child Soldiers* (last modified Oct. 29, 1999) <<http://www.child-soldiers.org/nordic%20declaration.htm>>. Another example is the recent Hague Appeal for Peace Conference which took place May 11-15, 1999. This conference included over 10,000 participants, including activists, government representatives, and community leaders from over 100 countries. This convention was unique in that it was organized entirely by civil activists, and not by government parties. At this conference, seven initiatives were launched: the International Action Network on Small Arms, the Global Campaign for Peace Education, the Global Ratification Campaign for the International Criminal Court, the International Campaign to Ban Landmines, the Abolition of Nuclear Weapons, the Global Action to Prevent War, and support to the effort to Stop the Use of Child Soldiers. See *The Hague Appeal for Peace Conference: A Great Success* (last modified July 8, 1999) <<http://www.haguepeace.org>>.

desire to codify the internationally held standards (in the form of the Optional Protocol<sup>156</sup>) for the protection of children may result in what is known as international humanitarian law. But more over, it could eventually become customary international law and therefore become binding upon more than just the signatories to the Protocol.

### B. *Application of the Optional Protocol for Ugandan Child Soldiers*

The effect of the Optional Protocol on Ugandan children remains uncertain. Uganda is already a party to the CRC which allows the recruitment of children as young as fifteen. The Ugandan government and the LRA are going beyond this threshold by recruiting children under the age of fifteen. Therefore, they are disobeying the CRC, even though Uganda ratified the document. Moreover, the CRC prohibits the abduction of any child, no matter how young or old, and yet this practice is still commonplace in Uganda as well. How will adding more international requirements, such as the Optional Protocol actually help?

The Optional Protocol itself will probably not stop the use and recruitment (or abduction) of the children for the reasons stated above. However, by adding this kind of provision to the CRC and international humanitarian law, there will be more checks on such practices. Nations in general are supposed to comply with the provisions of the Protocol. Ratification of the Optional Protocol would mean they have to attempt to alleviate such practices within their borders by making it a criminal act to allow children to participate in armed conflicts. By improving the laws and regulations regarding the use and recruitment of children in combat, nations and rebel groups will find it more difficult to engage in such practices. One Amnesty International Report added that “[t]he vicious circle of violence in Uganda’s northern war zone will not be broken unless government forces confront their own largely hidden pattern of human rights violation . . .”<sup>157</sup>

However, the adoption of the Optional Protocol will also make it more difficult for Ugandan forces, both governmental and rebel, to recruit children by “accident” if they are not registered at birth and cannot prove their age.<sup>158</sup> The key to this kind of success, however, lies in the enforcement of these rules

156. An international codification is the ultimate goal, but it seems that such laws should start in the domestic realm. See generally *Weekly Defense Monitor: Europeans Act on Child Soldiers Issue*, *supra* note 145.

157. *Amnesty International—News Release—AFR 59/05/99; Uganda—The Full Picture—Uncovering Human Rights Violations by Government Forces in the Northern War*, *supra* note 28.

158. According to Article 7 of the CRC, a “child shall be registered immediately after birth. . . .” *Convention on the Rights of the Child*, reprinted in DETRICK, *supra* note 7, at xxiv. It is evident that since many children are being “recruited” into various armed groups the State party to the CRC is not fulfilling their duty to uphold the provisions of the CRC. See *id.*

and in the ability to hold violating parties accountable for such actions; which, at this point, seems highly unlikely. Moreover, the principles in the Optional Protocol must become customary international law and the ICC must amend its current war crimes list to increase the minimum age from fifteen to eighteen in order for Ugandan children to truly have hope.

#### IV. CONCLUSION

One of the precursors of additional rights for children is the establishment that the person protected by the various international provisions is actually a child rather than an adult. This determination of "child" or "adult" is a social construction that may be difficult to define. However, in order to define specific rights (such as those established by the CRC and the Optional Protocol), the age for childhood and adulthood requires certainty. Remember, though, that much of the current international humanitarian rights laws regarding children already describes a child as any person under the age of eighteen.<sup>159</sup> But, the definition of a child does not extend to the child involved in armed conflict, which creates a need for this area of law to be updated and clarified.<sup>160</sup>

The CRC currently provides that a child is anyone under the age of eighteen. In addition, it protects all children regardless of race, color, or creed, except for those participating in armed conflicts. In cases such as these, the age for protection ends at sixteen under the Optional Protocol and fifteen under the ICC. This discrepancy allows a child (who in any other situation would be given any one of the enumerated protections under the CRC) to endure abuse, abduction, and even murder, simply because of their "participation" in armed combat.

In places like Uganda, many children are not registered at birth, and therefore, have little or no proof of age. This, in turn, creates an atmosphere in which children as young as twelve or thirteen are "recruited" into the armed forces<sup>161</sup> if the recruiter interprets the child's appearance to indicate that he or she is fifteen years old or older. This kind of activity can be evaded to some degree by maintaining that the age of a child is below eighteen and by reconciling the discrepancy in protections for children in general with those who are participating in armed conflicts. If the Optional Protocol was adopted as the drafters insisted (with the minimum age for recruitment or participation being age eighteen), then it might have prevented abductors or recruiters from "mistaking" children of twelve or thirteen for an adult of eighteen or older.

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159. See COHN & GOODWIN-GILL, *supra* note 2, at 177.

160. See *id.*

161. This recruitment (forced or compulsory) places children into armed forces of both the opposition (such as the LRA) and of the government of Uganda.

But the ability of a government group to recruit a sixteen-year-old is not far from allowing them to use the child in combat. It will be extremely tempting for a military leader to accidentally allow the new recruit to participate, especially in times of necessity.

Moreover, by establishing a clear minimum age for recruitment and participation as age eighteen, there can be no mistake as to which rights and protections a child of, say sixteen, might have if he or she is found to be participating in armed conflicts. For example, once a military disturbance is squelched (or even before), it is uncertain what should be done with the children on the losing side who were participating in the conflict. Often, the adults are arrested and imprisoned for things such as treason and other war crimes.<sup>162</sup> However, children who were forced to participate (or even those who volunteer) should not be subject to similar punishments.<sup>163</sup> It would be more simple and humane to proscribe such participation from the beginning and avoid such controversial issues.

One way to accomplish this would be to promote and adopt the Optional Protocol to the CRC as drafted. However, it was not adopted as drafted, since it was altered at the last minute because the United States protested long and hard enough. Despite acceptance of the revised document, adoption will not be enough. Increased enforcement of the established policies and increased awareness of the plight of the child soldier must occur. Accordingly, wide acceptance and international support of this policy should hopefully achieve the status of customary international law.

As a fifteen-year-old girl stated to an Amnesty International representative, "I would like to give you a message. Please do your best to tell the world what is happening to us, the children. So that other children don't have to pass through this violence."<sup>164</sup> Unfortunately, the Optional Protocol to the Convention on the Rights of the Child at this point in time, will probably not provide her, and the other children of which she speaks, with the needed relief.

*Marsha L. Hackenberg\**

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162. See generally Chen Reis, *Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflicts*, 28 COLUM. HUM. RTS. L. REV. 629 (1997).

163. "Abuses perpetrated by child soldiers may require rehabilitative responses, rather than retributive measures." COHN & GOODWIN-GILL, *supra* note 2, at 177. Rehabilitative services though require money, qualified personnel, and a vast array of other scarce resources. See *id.*

164. *Uganda: "Breaking God's Commands": The Destruction of Childhood by the Lord's Resistance Army*, Amnesty International—Report—AFR 59/01/97, *supra* note 34.

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