



**TURNING THE DOUBLE NEGATIVE OF GIRL-SOLDIERS' HUMAN RIGHTS
INTO A POSITIVE**

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HR THESIS

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Executive Summary

This thesis is concerned with the state of human rights of girls in internal conflicts in African countries over the past 20 years (both past and present girl-soldiers). On the surface of human rights doctrine girl-soldiers in African countries are entitled to almost as many human rights as any average white male Western adult person for they are just as human as the latter and undoubtedly endowed with the same measure of human dignity. But in the field, this is by no means the case. The girls from the bush have no rights, they are invisible, non-existing, forgotten.

Some of the questions fundamental for this research are how can the ‘double negative’ of girl-soldiers’ rights be turned into a ‘positive’ after the end of the conflict and how can the protection of human rights of girls victimised during conflict be strengthened. The method used is analysis of existing scholarly work and primary binding instruments as well as non-binding documents. Some seminal examples of case law are also included.

The first chapter explores the contemporary feminist critiques of human rights law. The research places itself within the scholarly feminist debates. It identifies the weaknesses and gaps in the protection of women’s human rights and more specifically, emphasises on the problems of its implementation and enforcement in African countries.

The second chapter embarks upon an assessment of consequences of child soldiering and its implications. It first familiarises the reader with the devastating impact of armed conflict on children. Secondly, it resolves some definitional problems and enumerates the major international law provisions relevant to the protection of children during armed conflict. Further, it gives ideas on how to use the existing jurisprudence to develop new mechanisms and to contribute to the evolution of international jurisprudence concerning the rights of child- and especially girl-soldiers.

The third chapter manifests the intersection of the problem of women rights (the first human rights grey zone called “a negative”) and the problem of the rights of the child during armed conflict (the second human rights lacuna i.e. “negative”). It depicts the particularly vulnerable situation of the girl child and goes on to establish the characteristics of the “girl-soldier diagnosis”. Eventually, it quests for solutions to this intersectional discrimination issue by drawing upon examples from the field, examining the gender of conflict and ultimately, suggesting that the transgression of gender roles caused by the inevitable destruction of the social fabric during the conflict may be the most opportune to initiate the “positive of girls’ human rights”.

The period of post-conflict social reconstruction can in practice bring about an improvement of the position of former girl-soldiers. However, the work offers a plenty of examples for the limitations to empowering women through acquiring self-determination, humanitarian intervention and the traditional toolbox of human rights. Based on the large number of obstacles identified during the research, it can be deducted that the solutions to girl-soldiers’ rights’ violations do not lie in the nearest future.

The next step is the proliferation of projects, initiated by international and regional NGOs but gradually transferring responsibility to the community level, dedicated to the legal empowerment of young women and girls in Africa.

Introduction

This thesis is concerned with the state of human rights of girls in internal conflicts in African countries over the past 20 years. For the purposes of this work “girls” or the “girl-child” is every human being of female sex below the age of 18.¹ This work is devoted to girls involved in armed conflict (both past and present girl-soldiers). On the surface of human rights doctrine girl-soldiers in African countries are entitled to almost as many human rights² as any average white male Western adult person for they are just as human as the latter and undoubtedly endowed with the same measure of human dignity. But in the field, this is by no means the case. The girls from the bush³ have no rights, they are invisible, non-existing, forgotten.

In many countries available indicators show that the girl child is discriminated against from the earliest stages, through her childhood to the very end of her life. In some areas of the world, men outnumber women by 5 in every 100 since fewer girls than boys survive into adulthood.⁴ Girl-soldiers are in a ‘double negative’⁵ position with regard to their human rights. On one side, their rights are denied because of their sex and on the other, abused particularly during conflict as a part of the plight of child-soldiering. Some of the questions fundamental for this research are how can this ‘double negative’ be turned into a ‘positive’ after the end of the conflict and how can the protection of human rights of girls victimised during conflict be strengthened.

¹ This is the age defining a child in the United Nations Convention on the Rights of the Child as well as the African Charter on the Rights and Welfare of the Child

² Apart from the limitations to children’s rights (see Chapter Two)

³ A colloquial expression denoting participation in the armed forces on the side of the rebels

⁴ The United Nations Fourth World Conference on Women, Platform for Action, The Girl-child, paragraph 259

⁵ A “double negative” is a self-invented term of art representing the negative convergence of two phenomena: sexual/gender discrimination and child vulnerability in armed conflict

Although brief mention of these phenomena could be encountered in the text, this thesis does not look at the issues of sexual violence outside of the scope of armed conflict (at the workplace, in the home, in the school and elsewhere), female infanticide, prenatal sex selection, female genital mutilation, labour discrimination, trafficking of girls, nor with the fate of internally displaced girls or girl-refugees, disarmament, rehabilitation, child prostitution and pornography. Only two of the most heated debates are to be unravelled: whether women's rights are human rights and how to protect children from the scourge of war. This is why feminist critique of Public International Law and Human Rights Law adds a crucial perspective to this research. These two problems intersect in the case of girl-soldiers. The question is what happens when two legal grey zones meet.

The significance of seeking practical solutions to the legal void of the 'girl-soldier diagnosis' spreading in more than 30 countries in Africa, where 120,000 girls are withering in bloody decade-ongoing internal conflicts during the past 20 years, cannot be overestimated. This research is locating possible solutions at the international, the regional, the national and the community level.

The method used in pursuit of putting across the message of this work is analysis of existing scholarly work and primary binding instruments as well as non-binding documents. Some seminal examples of case law are also included. The fundament of the analysis are the texts of all the relevant humanitarian Geneva laws, United Nations (UN) human rights conventions and protocols, and also the Organisation of African Unity/African Union conventions and protocols as well as a significant bulk of soft-law produced by various organs and agencies of the UN as well as the International Committee of the Red Cross (ICRC).

The first chapter of this thesis explores the contemporary feminist critiques of human rights law. The research places itself within the scholarly feminist debates. It identifies the weaknesses and gaps in the protection of women's human rights and more specifically,

emphasises on the problems of its implementation and enforcement in African countries. The rationale behind choosing this stand as a point of departure are the distinctive traces of discrimination on the basis of sex that women and the girl-child continue to endure every day.

The first chapter consists of three main parts. Part one is devoted to the literature review and the exploration of the main strands of feminist epistemology. Part two catalogues the existing norms in two levels: the international level represented by the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) and its implementation mechanism the CEDAW Committee, and the regional level represented by the Protocol to the African Charter on Human and Peoples' rights on the Rights of Women in Africa (hereinafter African Women's Protocol) and its implementation mechanism – the African Commission. Part three directs its attention to the protection of women during internal conflict as reflected in International Humanitarian Law (IHL). It accommodates certain feminist critiques of IHL and underlines the lack of implementation machinery for these norms.

The second chapter embarks upon an assessment of consequences of child soldiering and its implications. Its first (part 1) familiarises the reader with the devastating impact of armed conflict on children. Secondly, (in part 2) it resolves some definitional problems and enumerates the major international law provisions relevant to the protection of children during armed conflict, starting with the human rights law international norms (the Convention on the Rights of the Child (CRC) and the CRC Committee) and later describing the regional arrangements the African Charter on the Rights and Welfare of the Child (hereinafter the African Child Charter). Part 3 commences with the law applicable to internal conflict: humanitarian law and continues with the latest developments, namely the Statute of the International Criminal Court and the Statute of the Special Court for Sierra Leone. The concluding part of this chapter (part 4) takes the occasion of the adoption of the Optional

Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (hereinafter the CRC Armed Conflict Protocol) to provide ideas on how to use the existing jurisprudence to develop new mechanisms and to contribute to the evolution of international jurisprudence concerning the rights of child- and especially girl-soldiers.

The third chapter is the crux of this work. It manifests the intersection of the problem of women rights (the first human rights grey zone that we would call “a negative”) and the problem of the rights of the child during armed conflict (the second human rights lacuna i.e. “negative”). It depicts the particularly vulnerable situation of the girl child and goes on to establish the characteristics of the “girl-soldier diagnosis” or the so called “double negative of the rights of the girl-soldier”. Eventually, it quests for solutions to this intersectional discrimination issue by drawing upon examples from the field, examining the gender of conflict and ultimately, suggesting that the transgression of gender roles caused by the inevitable destruction of the social fabric during the conflict may be opportune to initiate the “positive of girls’ human rights”. It proposes the period of post-conflict social reconstruction as the most appropriate to bring about an improvement of the position of former girl-soldiers.

The focus is on global international mechanisms and regional mechanisms. The role played by individual states is not described in detail, although clearly it can be important. The community level mechanisms are briefly mentioned but not discussed at length.

1. Feminist Approaches to International Human Rights Law

1.1. Literature Review – The Feminist Debate

“Hominum causa omne jus constitutum est.” (Law is established for the benefit of man. Law is created for the sake of humanity.)

1.1.1. A Feminist Look at Human Rights

Human rights epistemology includes a broad range of contentious issues sometimes referred to as ‘grey zones’ or ‘margins’. The feminist debate turns to one of these grey zones – women’s human rights. Women receive only ten percent of the world income and hold roughly one percent of the world property.⁶ These types of statistics finger a significant shortcoming in international human rights law.⁷

The ongoing debate between generations of feminists, on whether there is such a category as women’s human rights, sheds a light on the major lacunae in the recent developments of the women rights movement. Feminist critique of the entire system of Public International Law and International Human Rights Law in particular convincingly reveals that women’s rights are still a problematic category.⁸ According to three leading authors in the field, Hilary Charlesworth, Christine Chinkin and Shelley Wright the state-centred structure

⁶ Statement by Mrs. Gertrude Mongella Assistant Secretary-General and Secretary-General of the Fourth World Conference on Women: Action for Equality, Development and Peace to the World Summit on Social Development Copenhagen, Denmark 6-12 March 1995 at <http://www.un.org/documents/ga/conf166/una/950308112405.htm>

⁷ Aaron Xavier Fellmeth, Feminism and International Law: Theory, Methodology, and Substantive Reform Human Rights Quarterly, Vol. 22, No. 3 (Aug., 2000), pp. 658-733, The Johns Hopkins University Press Stable URL: <http://www.jstor.org/stable/4489298>, p. 711

⁸ See generally Hilary Charlesworth, Christine Chinkin and Shelley Wright, Feminist Approaches to International Law, 85 AJIL (1991) 613

of Public International Law suffers from an inherent bias against women.⁹ The exercise of manmade law instead of empowering women may further entrench women's marginality.¹⁰

Even the branch of International Law most preoccupied with the fate of the individual – human rights law – instead of embracing the needs and concerns of women, adheres to the age-old dichotomy public/private¹¹ and provides more comfort to concepts like family privacy.¹² The right to family life, for example, is overprotected, being incorporated in all of the major human rights instruments even though often it is exactly the family which is the lieu of oppression of women and children. Human rights prove to have started as a field built on women's marginalisation and erasure.¹³

International law embodies 'the male norm' – the hidden standard underlying all power relationships which obliges women to 'be like men' and at the same time perpetuates their inferior position in the gender hierarchy. Catharine MacKinnon's understanding of gender issues¹⁴ as power imbalances finds a stark confirmation in the sphere of male dominated states and international organisations which postulate the provisions of International law.

The question that continuously haunts international feminism is the marginalisation of women and the 'ghettoisation' of gender issues by the dominant structures of race, capitalism,

⁹ Hilary Charlesworth, Christine Chinkin and Shelley Wright, *Feminist Approaches to International Law*, 85 AJIL (1991) 613

¹⁰ Dianne Otto, *Disconcerting 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law*, pp. 105-131 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 107

¹¹ Martha Albertson Fineman, *What Place for Family Privacy*, *George Washington Law Review* June-August 1999, *Privacy and the Law: A Symposium Privacy and the Family*, pp. 1207-1224

¹² Hilary Charlesworth, Christine Chinkin and Shelley Wright, *Feminist Approaches to International Law*, 85 AJIL (1991) 613

¹³ Dianne Otto, *Disconcerting 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law*, pp. 105-131 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 107

¹⁴ See in general Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination* [1984], pp.81-94 in *The Moral Foundation of Civil Rights*, ed. by Robert K. Fullinwider and Claudia Mills, Rowman and Littlefield, 1986

and patriarchy. To cite only one sphere – women are still largely under-represented in decision-making positions.¹⁵ Women currently make up two percent of military personnel.¹⁶ All significant United Nations treaty bodies¹⁷ are populated by men.¹⁸

In her overview of the development of feminist discourse with regard to International Human Rights, Karen Engle discusses the proliferation of articles theorising gender and human rights. She divides feminist jurisprudence into three main stages, all of which are of relevance to this work. The first stage - the ‘liberal inclusion’ critique of human rights law - tries to involve the notion of women’s rights into the existing framework and pushes for its improvement. It focuses on the problem of enforcement of women’s rights. Another debated issue is the role of non-state actors in human rights law known also as the horizontal application/effect of human rights law.¹⁹

The second, so-called ‘structural bias’ stage of feminist critique is the most radical one. It seeks to introduce a sweeping change into the system of International law. Its main contributions reside in the domain of International Humanitarian Law and the recognition of rape as a war crime (see *infra* footnote 98). The feminist understanding of male over female

¹⁵ J. Oloka-Onyango and Sylvia Tamale, "The Personal Is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism, *Human Rights Quarterly*, Vol. 17, No. 4 (Nov., 1995), pp. 691-731, The Johns Hopkins University Press Stable URL: <http://www.jstor.org/stable/762486>, p. 694

¹⁶ Aaron Xavier Fellmeth, *Feminism and International Law: Theory, Methodology, and Substantive Reform* *Human Rights Quarterly*, Vol. 22, No. 3 (Aug., 2000), pp. 658-733, The Johns Hopkins University Press Stable URL: <http://www.jstor.org/stable/4489298>, p. 715

¹⁷ A ‘treaty body’ is a term of art used for the quasi-judicial institutions vested with the function to monitor/oversee the implementation of major human rights instruments

¹⁸ Hilary Charlesworth, Christine Chinkin and Shelley Wright, *Feminist Approaches to International Law*, 85 *AJIL* (1991) 613

¹⁹ Karen Engle, *International Human Rights and Feminism: When Discourses Keep Meeting*, pp. 47-67 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005

domination makes requirements such as collaboration of evidence²⁰, and the consent defence meaningless when it comes to rape²¹ in times of armed conflict.

Another example of the structural bias critique is disagreement with the priority accorded to civil and political rights over economic and social rights as mirroring the male norm as well as the neglect of third generation rights. The structural bias critique emphasises the “inability of human rights law to attend to women” and illustrates it with the case of torture.²² “While state action might bring torture within the scope of human rights law, state inaction with regard to violence against women is likely to leave women outside international law’s scope.”²³

1.1.2. Culture, Relativism and Regionalism: An Intersection

The third stage indicated by Engle, ‘third world’ critique of the human rights doctrine turns to the ‘double negative’ of being a woman in a third world country while unmasking essentialist tendencies in Western feminist epistemology.²⁴ It asserts that “no monolithic women’s point of view can be assumed”²⁵ and thus feeds into the avant-garde of human rights doctrine – the discourse on multiple or intersectional discrimination.²⁶ Feminists from this

²⁰ See Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000

²¹ Rome Statute of the International Criminal Court, Art.7 para 1 (g), Art.8 para 2 (b) (xxii), (e) (vi)

²² Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment, Art.1

²³ Karen Engle, *International Human Rights and Feminism: When Discourses Keep Meeting*, pp. 47-67 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 53

²⁴ Martha Minow, *Feminist Reason: Getting It and Loosing It* [1988], pp. 358-369, 38 *Journal of Legal Education* 47 (1988)

²⁵ Karen Engle, *International Human Rights and Feminism: When Discourses Keep Meeting*, pp. 47-67 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 58

²⁶ People have multiple identities and consequently possess more than one characteristic based on which they can be subjected to discrimination i.e. one could suffer discrimination not only because of being a woman but because of being lesbian, black or Muslim at the same time. When the discrimination on those numerous grounds occurs separately it is called multiple

stage negate that culture is responsible for the bulk of women's problems and accuse first world feminists for their failure to see similar types of oppression in their own cultures.²⁷

The effect of International law on women must be examined also in the light of their class, culture and race – the so called intersectional identities.²⁸ The allegedly universal subject of human rights law also reproduces other hierarchies which intersect with constructions of gender.²⁹

Those scholars who deploy the 'third world feminist liberal inclusion' approach focus on third world, or non-Western, women, rather than claiming to attend to all women. They interpret and use existing law to achieve their strategic aims.³⁰ This is the approach adopted in this research. 'Third world feminist structural bias' approaches are more radical but still successful. They are responsible for the near-obligatory references to the existence of non-Western women as subjects, not just objects, of International law.³¹

In the past 10-20 years, fragmentation, dislocation and backlash unleashed against the women rights movement together with the global assault on human rights in general. For

discrimination, while in case the grounds of discrimination are multifaceted and inseparable from each other it is usually referred to as intersectional discrimination.

²⁷ Karen Engle, *International Human Rights and Feminism: When Discourses Keep Meeting in International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, pp. 47-67 at p. 61

²⁸ Karen Engle, *International Human Rights and Feminism: When Discourses Keep Meeting*, pp. 47-67 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 60; see also William Galston, *A Liberal Defence of Equality of Opportunity*, reprinted from *Justice and Equality: Here and Now*, ed. Frank S. Lucash, Cornell University Press 1986, p. 171

²⁹ Dianne Otto, *Disconcerting 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law*, pp. 105-131 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 106

³⁰ Karen Engle, *International Human Rights and Feminism: When Discourses Keep Meeting*, pp. 47-67 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 59

³¹ Karen Engle, *International Human Rights and Feminism: When Discourses Keep Meeting*, pp. 47-67 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 61

African women, which are the focus of this research, the question is particularly important given the incipient nature of the women's human rights movement on the continent and the intricately linked and multistructured layers of oppression by which the movement is confronted.³²

According to African feminists discussion on international feminist theory is generally dominated by contributors from the north. The theoretical discussion of the public and the private excludes the southern voices.³³ Local circumstances and conditions of patriarchy and exploitation in the third world, including Africa's continental marginalisation, are intricately connected to international conditions.

According to feminists within Islamic societies, women's rights should not be perceived as simply a means of achieving equality with men but as recognition that women have different experiences based on characteristics other than gender. They claim that to frame the issues around gender alone is to downgrade diversity and to generalise. For example, gender-based oppression for upper-class women in Islamic countries is one of the few types of oppression they experience, whereas for other women it is one of many.³⁴

Women worldwide have been confronted by the argument that the specifics of local oppression within the domain of the family are not and should not be the concern of the

³² J. Oloka-Onyango and Sylvia Tamale, "The Personal Is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism, *Human Rights Quarterly*, Vol. 17, No. 4 (Nov., 1995), pp. 691-731, The Johns Hopkins University Press
Stable URL: <http://www.jstor.org/stable/762486>, p. 695

³³ J. Oloka-Onyango and Sylvia Tamale, "The Personal Is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism, *Human Rights Quarterly*, Vol. 17, No. 4 (Nov., 1995), pp. 691-731, The Johns Hopkins University Press
Stable URL: <http://www.jstor.org/stable/762486>, p. 700

³⁴ See more on the clash of cultural relativism with women's rights in Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000; also Kathleen Suneja, *The Empowerment of Women Through International Law*, pp. 31-46 in *Women in Developing Countries: Assessing Strategies for Empowerment*, ed. by Rekha Datta and Judith Kornberg, Lynne Rienner Publishers, 2002, p.41

state.³⁵ The systematic and calculated rape of refugee women and women victims of war proves that this is no longer a tenable argument from an internationalist perspective.³⁶

Women's human rights extend directly into the essential operations of the state, society, and the public (political) sphere, as does any other category of human rights.

Women's human rights, more clearly than any other phenomenon, illustrate the interconnectedness and mutuality of all categories of rights.³⁷ Excuses like "we don't do social rights" simply do not work. In many cases women and girls suffer discrimination in the allocation of economic and social resources. This directly violates their economic, social and cultural rights.³⁸ A systematic emphasis on second generation rights and the strengthening of their implementation will have a beneficial impact on women. The economic status of African women – given their pivotal location in the economy and their exclusion from its benefits – is a critical factor in ensuring the realisation of other categories of rights.³⁹

Considered from this perspective, the 'right to peace' and other so-called 'third generation rights' are essential to the exercise and realisation of the so-called 'first and second generation rights'.⁴⁰ In conflict settings the role of rights such as the right to self-

³⁵ Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, Harvard Law Review, Vol. 96, No. 7, May 1983, pp.1497-1528

³⁶ J. Oloka-Onyango and Sylvia Tamale, "The Personal Is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism, *Human Rights Quarterly*, Vol. 17, No. 4 (Nov., 1995), pp. 691-731, The Johns Hopkins University Press
Stable URL: <http://www.jstor.org/stable/762486>, p. 710

³⁷ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000

³⁸ The United Nations Fourth World Conference on Women - Beijing, China September 1995, Platform for Action, Human Rights of Women Diagnosis, para 220 at <http://www.un.org/womenwatch/daw/beijing/platform/human.htm>

³⁹ J. Oloka-Onyango and Sylvia Tamale, "The Personal Is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism, *Human Rights Quarterly*, Vol. 17, No. 4 (Nov., 1995), pp. 691-731, The Johns Hopkins University Press
Stable URL: <http://www.jstor.org/stable/762486>, p. 712

⁴⁰ K. Vasak, *For the Third Generation of Human Rights: The Right of Solidarity*, International Institute of Human Rights, July 1979, p. 3

determination, use of natural resources, development is significant. This work is to examine primarily the human rights problems of women related to armed conflict.⁴¹ Such methodology not only expands the target of research beyond the state, but also extends to encompass a variety of non-state actors including *inter alia* guerrilla movements, religious orders and the family. These institutions confront women on a daily and dominantly obtrusive basis.⁴²

‘Culturally sensitive universalism’, the new formula introduced with the Beijing Declaration, manifests the success of third world feminist assertions of cultural difference. Gradually, economic concerns attract the attention. Poverty is identified to be the locus of women’s oppression. Economy clashes culture.⁴³

1.1.3. The Female Subjects of Human Rights Law

The feminist author Dianne Otto’s “female subjectivities” are an eloquent illustration of the way International law perceives the woman. As a ‘wife and mother’ (particularly well exemplified by International Humanitarian Law) she needs protection in both war and peace and is more an object than a subject of the law. In the realm of public life (i.e. international law) as a ‘woman’ she is only formally equal with men. As a ‘victim’ (as seen by international criminal law) she reproduces the notions of women’s sexual vulnerability and colonial narratives of gender.⁴⁴

⁴¹ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000

⁴² J. Oloka-Onyango and Sylvia Tamale, "The Personal Is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism, *Human Rights Quarterly*, Vol. 17, No. 4 (Nov., 1995), pp. 691-731, The Johns Hopkins University Press
Stable URL: <http://www.jstor.org/stable/762486>, p. 712

⁴³ Karen Engle, *International Human Rights and Feminism: When Discourses Keep Meeting*, pp. 47-67 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005

⁴⁴ Dianne Otto, *Disconcerting ‘Masculinities’: Reinventing the Gendered Subject(s) of International Human Rights Law*, pp. 105-131 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 106

Each of these female personas in international law produces and is dependent upon a binary male representation: the protected subject constitutes her ‘protector’ in the form of the head of the household and, in times of war, the warrior or combatant; the formally equal subject reproduces the masculine standard of ‘equality’ against which her claims to equality are assessed; and the victim subject affirms the need for the masculine bearer of ‘civilisation’ and saviour of ‘good’ women from ‘bad’ often ‘native’ men.⁴⁵ Imagery of women can be manipulated to make conflict seem inevitable, for example, the idea of the vulnerable woman who must be protected.⁴⁶

Protective representations conceive of women as the property, extension or dependants of men, as primarily mothers and wives, and as innocents, who lack agency or cannot be trusted with it. International law relegates women to a special category, often co-terminus with children. The masculine is produced as the marker of full humanity, who has no special needs for his protection.⁴⁷

The Universal Declaration of Human Rights (UDHR) is considered to be the hallmark of human rights protection. But seen from the feminist angle it might look differently. For the first time, during the drafting of the UDHR attempts were made to “ensure that explicit reference was made to rights that were specific to women’s experience, but within the framework of women’s equality with men rather than as protective measures”.⁴⁸ However,

⁴⁵ Dianne Otto, *Disconcerting ‘Masculinities’: Reinventing the Gendered Subject(s) of International Human Rights Law*, pp. 105-131 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 106

⁴⁶ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, Chapter 8 *The Use of Force in International Law*, p. 254

⁴⁷ Dianne Otto, *Disconcerting ‘Masculinities’: Reinventing the Gendered Subject(s) of International Human Rights Law*, pp. 105-131 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 110

⁴⁸ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000; Dianne Otto, *Disconcerting ‘Masculinities’: Reinventing the Gendered Subject(s) of International Human Rights Law*, pp.

this move from formal to substantive equality was not realised and “formal non-discrimination remained the predominant approach of the UDHR”⁴⁹.

Similarly to the UDHR and the international level almost all at the domestic level emerges from male-defined value systems.⁵⁰ Governments tend to view enforcement of women’s rights as an issue of lower social and political priority or not one upon which an election would turn.⁵¹

1.2. ‘Women’s Rights are Human Rights’ – Analysis of the Existing Norms and Gaps

The “Women’s rights are human rights” slogan features both in the 1993 Vienna Declaration and Programme of Action⁵² and the Beijing Declaration⁵³. Regrettably, the mere fact that such an assertion is needed demonstrates the shadows cast over the human quality of women’s rights. Women are systematically marginalised or excluded by the dominant masculine standards of the International Law regime and therefore not constituted as fully human for the purposes of guaranteeing their enjoyment of human rights.⁵⁴ Such

105-131 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 112

⁴⁹ Dianne Otto, *Disconcerting ‘Masculinities’: Reinventing the Gendered Subject(s) of International Human Rights Law*, pp. 105-131 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 113

⁵⁰ Kathleen Suneja, *The Empowerment of Women Through International Law*, pp. 31-46 in *Women in Developing Countries: Assessing Strategies for Empowerment*, ed. by Rekha Datta and Judith Kornberg, Lynne Rienner Publishers, 2002, p. 41

⁵¹ Kathleen Suneja, *The Empowerment of Women Through International Law*, pp. 31-46 in *Women in Developing Countries: Assessing Strategies for Empowerment*, ed. by Rekha Datta and Judith Kornberg, Lynne Rienner Publishers, 2002, p. 40

⁵² Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993; A/CONF.157/23 12 July 1993 at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)

⁵³ Beijing Declaration, as adopted by the Fourth World Conference on Women, September 1995 at <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm>

⁵⁴ Dianne Otto, *Disconcerting ‘Masculinities’: Reinventing the Gendered Subject(s) of International Human Rights Law*, pp. 105-131 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 105

marginalisation by the discourse of universal human rights meant that women's enjoyment of human rights was seldom addressed by UN human rights bodies in the early years of their operation.⁵⁵

The abovementioned slogan originally was endowed with a dual goal: to claim a place for women's specific rights' violations in the universal register of human rights; and to mainstream women's human rights in the work of all the human rights treaty committees.⁵⁶

1.2.1. The Critique of the CEDAW

The first human rights instrument specifically devoted to women's rights – the CEDAW – has born a lot of critiques, *inter alia*, that it does nothing but employ the male standard. It urges states parties to ensure that all discrimination against women is prohibited and that women enjoy 'equal rights with men', or rights 'on equal terms with men' or 'the same rights' as men.⁵⁷ On the other side, one of the most significant positives to it is that the Convention clearly covers discrimination in the private sphere.⁵⁸

The CEDAW marks an unprecedented number of reservations and declarations.⁵⁹ The plethora of reservations impedes the establishment of a consensus as to the interpretation of the Convention by the CEDAW Committee.⁶⁰ More than 160 states have ratified the CEDAW

⁵⁵ Dianne Otto, Disconcerting 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law, pp. 105-131 in International Law: Modern Feminist Approaches, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 117

⁵⁶ Dianne Otto, Disconcerting 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law, pp. 105-131 in International Law: Modern Feminist Approaches, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 107

⁵⁷ Convention on the Elimination of All Forms of Discrimination against Women, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981 (hereinafter CEDAW), Arts. 8, 9, 10, 15

⁵⁸ CEDAW, Art.2 (e)

⁵⁹ <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>

⁶⁰ CEDAW, Art.16

but at least 105 reservation and declarations have been inserted to its application.⁶¹ This number substantially diminishes the *prima facie* case for commitment to the obligations in the Convention.⁶²

As is the case with the majority of the human rights instruments most states have not met their annual reporting requirements to the CEDAW Committee.⁶³ At best measures like heightening awareness, ensuring that states bring their domestic laws into compliance with the CEDAW and recommendations on increased reporting constitute a promise of a greater articulation of women's rights as human rights at the international level.⁶⁴

Some observers have argued that these limitations and disabilities have effectively neutralised the CEDAW. While it successfully highlighted women's human rights issues simultaneously it ghettoised them since the other UN treaty bodies and the UN system in general limited their action in this regard.⁶⁵

The primary oversight organ in the United Nations to enforce CEDAW - the Committee on Women – has also been largely under fierce critique. Undoubtedly, various kinds of

⁶¹ See generally Kathleen Suneja, *The Empowerment of Women Through International Law*, pp. 31-46 in *Women in Developing Countries: Assessing Strategies for Empowerment*, ed. by Rekha Datta and Judith Kornberg, Lynne Rienner Publishers, 2002

⁶² J. Oloka-Onyango and Sylvia Tamale, "The Personal Is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism, *Human Rights Quarterly*, Vol. 17, No. 4 (Nov., 1995), pp. 691-731, The Johns Hopkins University Press
Stable URL: <http://www.jstor.org/stable/762486>, p. 714

⁶³ Kathleen Suneja, *The Empowerment of Women Through International Law*, pp. 31-46 in *Women in Developing Countries: Assessing Strategies for Empowerment*, ed. by Rekha Datta and Judith Kornberg, Lynne Rienner Publishers, 2002, p.41

⁶⁴ J. Oloka-Onyango and Sylvia Tamale, "The Personal Is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism, *Human Rights Quarterly*, Vol. 17, No. 4 (Nov., 1995), pp. 691-731, The Johns Hopkins University Press
Stable URL: <http://www.jstor.org/stable/762486>, p. 715

⁶⁵ For more information on the work of the CEDAW Committee see Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000; J. Oloka-Onyango and Sylvia Tamale, "The Personal Is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism, *Human Rights Quarterly*, Vol. 17, No. 4 (Nov., 1995), pp. 691-731, The Johns Hopkins University Press
Stable URL: <http://www.jstor.org/stable/762486>, p. 717

administrative reforms could improve oversight.⁶⁶ The Committee was strengthened by the adoption of the 1999 Optional Protocol allowing for the right to petition.⁶⁷ To date, the lack of relevant CEDAW Committee jurisprudence (it has had only few cases so far) prevents the progressive development of the Convention norms and turns it into a static document.

1.2.2. The Regional Mechanisms – the African Women’s Rights Protocol

The 2005 Protocol on the Rights of Women in Africa (African Protocol) which operates in a specific and culturally sensitive context and thus could provide unique contributions is supplied with only weak implementation mechanisms.

Seemingly, the Organisation for African Unity/the former African Union (OAU/AU) has paid increasing attention to women’s participation and the role of women in decision-making. However, the African human rights documents appear not to have involved wider society and women in general in their formation. Even the African Charter on Human and People’s Rights (the Banjul Charter) “is a reflection of the patriarchal nature of the African society that encourages little or no female participation in its evolution”.⁶⁸

A potential enforcement mechanism under the Banjul Charter could be the resolutions of the African Commission⁶⁹ if they interpret the provisions of the Charter from the perspective of women. Secondly, the individual and group claims under the communications

⁶⁶ J. Oloka-Onyango and Sylvia Tamale, "The Personal Is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism, *Human Rights Quarterly*, Vol. 17, No. 4 (Nov., 1995), pp. 691-731, The Johns Hopkins University Press
Stable URL: <http://www.jstor.org/stable/762486>, p. 715

⁶⁷ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, adopted at the 54th session, General Assembly resolution A/RES/54/4 of 15 October 1999, Art.1; for more comments on the content of the Optional Protocol see *The Boundaries of International Law: A Feminist Analysis*, Hillary Charlesworth and Christine Chinkin, Manchester University Press, 2000, p. 245

⁶⁸ Rachel Murray, *Women’s Rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa*, pp. 253-273 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2000, p. 258

⁶⁹ African [Banjul] Charter on Human and Peoples’ Rights, Art.30

procedure⁷⁰ could open the way for the emergence of influential African jurisprudence in the field of women's rights. So far no cases specifically relating to women's rights have been decided and in only very few the violation of women's rights has been a secondary or indirect issue.⁷¹ Thirdly, the provisional measures mechanism from the African Commission's Rules of Procedure could be a useful tool if applied to the benefit of women.⁷²

African NGOs recognised the inadequacy of the Banjul Charter for women and started to drive a process for greater recognition. "Since an amendment to the Charter would be too difficult to realise, and the optional protocol would lack strength because it would not require states to adopt it, [...] an additional protocol requiring state ratification was preferable."⁷³ Alas, the Protocol now in place is little known among NGOs, governments or the population of Africa.

The Protocol's weak enforcement prevents the accomplishment of its two main goals: first, to compel the African Commission to be attentive to women's rights and second, to give African women a sense of ownership over rights at this level.⁷⁴ The numerous aims identified for the Protocol pulled it in different directions and damaged its overall vision. One of its pivotal aims is improving the protection accorded to women under the Banjul Charter, with the African Commission itself noting that the Charter does not offer enough neither specific

⁷⁰ African [Banjul] Charter on Human and Peoples' Rights, Art.55

⁷¹ Rachel Murray, Women's Rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa, pp. 253-273 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2000, p. 259

⁷² Rules of procedure of the African Commission on Human and Peoples' Rights, Rule 109

⁷³ Rachel Murray, Women's Rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa, pp. 253-273 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2000, p. 261

⁷⁴ Rachel Murray, Women's Rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa, pp. 253-273 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2000, p. 254

guarantees as regards women rights in Africa.⁷⁵ Another rationale behind the creation of the Protocol is consolidating existing international standards (though not a comprehensive collection) for African states allowing them to fulfil their international commitments.⁷⁶

The Protocol lacks consistency as to the choice made in incorporating or rejecting provisions from international and African documents.⁷⁷ Economic and social rights in the Protocol are harmonised with the African Child Charter to fall in line with it. Art.10 incorporates the right to peace but the right to property is omitted.⁷⁸

On one side, the Protocol adds to existing international standards, for example with its provisions on protection of women in armed conflict. Its violence definition⁷⁹ is broader than the one in CEDAW.⁸⁰

Elsewhere the Protocol falls clearly below existing international standards, for example by its failure to include express reference to the right of women to vote or to participate in private life as well as at the international level. The question of reservations is left unclear.⁸¹

⁷⁵ Mashood A. Baderin, *Recent Developments in the African Regional Human Rights System*, *Human Rights Law Review*, 5:1, Oxford University Press, 2005, pp. 117-149

⁷⁶ Rachel Murray, *Women's Rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa*, pp. 253-273 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2000, p. 263

⁷⁷ Rachel Murray, *Women's Rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa*, pp. 253-273 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2000, p. 265

⁷⁸ Compare Art.13 (c) CEDAW with Art.17 from the Protocol. Look at Art.18 (2) (c) and Art.24 (a). Art.26: monitoring; Rachel Murray, *Women's Rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa*, pp. 253-273 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2000, p. 266

⁷⁹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Art.1 (j)

⁸⁰ Note Art.11 and Art.1 (j), CEDAW Committee General Recommendation No 24 and Art.14 (1) (d) and (e) from the Protocol

⁸¹ Rachel Murray, *Women's Rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa*, pp. 253-273 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2000, p. 269

The African Commission and Court are to enforce the Protocol. It does not add novel mechanisms for enforcement.⁸²

The Protocol requires 15 ratifications to come into force.⁸³ This may leave the African Commission and Court in a difficult position (for those states which refuse to ratify the Protocol) regarding how to interpret the Banjul Charter in respect of women. The communication mechanism is not mentioned in the Protocol as a possible means of enforcement. Nor are OAU/AU mechanisms, sub-regional mechanisms or national courts or constitutions mentioned. The only addition to the enforcement mechanisms is the requirement for states to provide an appropriate remedy for violations of the Protocol.⁸⁴

Overall, the catalogue of rights though ostensibly resembling the one in the CEDAW leaves serious omissions and its consistency with the UN standards is disputable. There is a rather ad hoc approach to the Protocol and women's rights within OAU/AU. The least, the protocol serves as a promotional tool. Lamentably, just as both Africans and women were largely neglected from the drafting process of the UN human rights mechanisms, so African women felt neglected in the drafting of the African Charter and the other developments at the OAU/AU.⁸⁵

⁸² Rachel Murray, *Women's Rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa*, pp. 253-273 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2000, p. 270

⁸³ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Art.29 (1)

⁸⁴ Contained in Art.25 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa; Rachel Murray, *Women's Rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa*, pp. 253-273 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2000, p. 271

⁸⁵ Rachel Murray, *Women's Rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa*, pp. 253-273 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2000, p. 272

1.2.3. The Gaps in Implementation and the United Nations' New Approaches

The gap between the existence of rights and their effective enjoyment derives from a lack of commitment by Governments in promoting and protecting those rights and their failure to inform women and men alike about them.⁸⁶ Unless the human rights of women, as defined by international human rights instruments, are fully recognised and effectively protected, applied, implemented and enforced in national laws as well as in national practice in family, civil, penal, labour and commercial codes and administrative rules and regulations, they will exist in name only.⁸⁷

Beijing understood gender mainstreaming⁸⁸ as 'the global strategy for promoting gender equality'.⁸⁹ Promotion of equality between the sexes should be the shared responsibility of the UN woman-centred institutions and the overall UN system. Beijing's dual strategy consists of combining targeted intervention with integrative mainstreaming initiatives.⁹⁰ This emphasis on gender mainstreaming, especially the mainstreaming of women's human rights, has both positive and negative aspects. It helps counter the ghettoisation of the CEDAW.⁹¹

⁸⁶ The United Nations Fourth World Conference on Women - Beijing, China September 1995, Platform for Action, Human Rights of Women Diagnosis, para 217 at <http://www.un.org/womenwatch/daw/beijing/platform/human.htm>

⁸⁷ The United Nations Fourth World Conference on Women - Beijing, China September 1995, Platform for Action, Human Rights of Women Diagnosis, para 218 at <http://www.un.org/womenwatch/daw/beijing/platform/human.htm>

⁸⁸ A term which first appeared during the World Conference on Human Rights in Vienna in 1993

⁸⁹ Sari Kouvo, The United Nations and Gender Mainstreaming: Limits and Possibilities, pp. 237-253 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 237

⁹⁰ Sari Kouvo, The United Nations and Gender Mainstreaming: Limits and Possibilities, pp. 237-253 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 241

⁹¹ Dianne Otto, Disconcerting 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law, pp. 105-131 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 120; look also

The second goal of the “women rights are human rights” agenda is to refocus the attention back to the general human rights instruments by promoting the mainstreaming of women human rights. A working definition of mainstreaming could be the one used by the United Nations Office of the Special Adviser on Gender Issues and Advancement of Women: “consciously considering and taking into account women’s, as well as men’s concerns and experiences in every aspect of every plan, action, policy, programme or legislative measure”.⁹²

Based on these new developments within the UN system, the implementation of international human rights law should turn from gender analysis (understanding the respective socio-cultural roles of men and women) to gender policy (aiming at changing the roles with a view to attaining equality).⁹³

1.3. Women in Conflict

Conflict puts the otherwise fragile protection of women to the ultimate test. The proliferation of ethnic cleansing and genocidal type of conflicts exposes women to systematic sexual violence (above all systematic rape of women during war) as a self-standing tool of warfare. Sexual violence is used as a tool of war for a variety of purposes, including terrorising individuals and communities, destroying a group’s ability to reproduce, and forcibly impregnating an enemy population in order to vilify the victim and her community, to affect their morale, or to achieve any other political objective.⁹⁴

at Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000 on gender mainstreaming

⁹² Dianne Otto, Disconcerting ‘Masculinities’: Reinventing the Gendered Subject(s) of International Human Rights Law, pp. 105-131 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 122

⁹³ See generally Second International Policy Conference on the African Child: Violence Against Girls in Africa, Addis Ababa, 11-12 May 2006, *Violence against Girls in Africa during Armed Conflict and Crises*, ICRC

⁹⁴ International Criminal Justice and Children, *No Peace Without Justice*, UNICEF Innocenti Research Centre, September 2002, p. 77

The extent to which international law meets the needs of women in conflict has been characterised by the International Committee of the Red Cross as problematic. This statement proves to be true particularly when placed against the backdrop of international impotence and neglect in the face of the genocidal rape in Rwanda, the former Yugoslavia, Chechnya, and Somalia and now most ostensibly on the Democratic Republic of Congo and Northern Uganda.⁹⁵ Sexual violence is also a consequence of war, because armed conflict strips away many of the protections of women and girls and leaves them particularly vulnerable to attack.⁹⁶

In the case of Haiti the Inter-American Commission on Human Rights has recognised that “rape as a weapon of terror was used to punish women for their militancy” and qualifies as torture.⁹⁷

The acknowledgment that rape can constitute both a war crime and crime against humanity⁹⁸ in International Criminal Law is a noteworthy success but the procedures and jurisprudence of international tribunals and commissions need to become even more gender sensitive.⁹⁹ Art. 7 (3) of the ICC Statute defines gender as referring “to the two sexes, male and female, within the context of society”. The term gender “does not indicate any meaning

⁹⁵ J. Oloka-Onyango and Sylvia Tamale, "The Personal Is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism, *Human Rights Quarterly*, Vol. 17, No. 4 (Nov., 1995), pp. 691-731, The Johns Hopkins University Press
Stable URL: <http://www.jstor.org/stable/762486>, p. 694

⁹⁶ *International Criminal Justice and Children, No Peace Without Justice*, UNICEF Innocenti Research Centre, September 2002, p. 77

⁹⁷ Kathleen Suneja, *The Empowerment of Women Through International Law*, pp. 31-46 in *Women in Developing Countries: Assessing Strategies for Empowerment*, ed. by Rekha Datta and Judith Kornberg, Lynne Rienner Publishers, 2002

⁹⁸ Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, *American Journal of International Law* (1993) 87: 424 at 426-7

⁹⁹ Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict*, Oxford: Oxford University Press, 1994, pp. 187-208; see also *International Criminal Justice and Children, No Peace Without Justice*, UNICEF Innocenti Research Centre, September 2002

different from the above”. This definition favours an interpretation of gender as synonymous with sex.¹⁰⁰ Art. 8 (2) (b) (xxii) of the ICC Statute includes, as war crimes, “committing rape, sexual slavery, enforced prostitution, forced pregnancy, [...] enforced sterilisation, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.

Vigorously prosecuting crimes against women and the interpretation of International Humanitarian Law to include sexual violence against women as a grave breach of the Geneva Conventions are of crucial importance. The ICTY and the ICTR have included crimes against women as war crimes and have successfully prosecuted the perpetrators of these crimes.¹⁰¹ Gradual progress has been achieved before the SCSL, ICTY, ICTR and ICC with regard to witness protection, procedural support and evidence requirements.¹⁰² However, rape, enforced prostitution and sexual assault are not explicitly designated grave breaches of the Geneva Conventions.¹⁰³

International humanitarian law is systematically ignored and human rights are often violated in connection with situations of armed conflict, affecting the civilian population, especially women, children, the elderly and the disabled. Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of

¹⁰⁰ Sari Kouvo, *The United Nations and Gender Mainstreaming: Limits and Possibilities*, pp. 237-253 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 243

¹⁰¹ *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998; *The Prosecutor v. Zajnir Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* IT-96-21-T; also Kathleen Suneja, *The Empowerment of Women Through International Law*, pp. 31-46 in *Women in Developing Countries: Assessing Strategies for Empowerment*, ed. by Rekha Datta and Judith Kornberg, Lynne Rienner Publishers, 2002

¹⁰² An Michels, ‘As If It Was Happening Again’: Supporting Especially Vulnerable Witnesses, in *Particular Women and Children*, at the Special Court for Sierra Leone, pp. 133-147; Luis Moreno-Ocampo, *The Rights of Children and the International Criminal Court*, pp. 111-119; David Tolbert, *Children and International Criminal Law: The Practice of the International Tribunal for the Former Yugoslavia (ICTY)*, pp.147-155 in *International Criminal Accountability and the Rights of Children*, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006

¹⁰³ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, p. 315

international human rights and humanitarian law.¹⁰⁴ The Geneva Convention relative to the Protection of Civilian Persons in time of War of 1949 (GC IV), and the two Additional Protocols of 1977 provide that women shall especially be protected against any attack on their honour, in particular against humiliating and degrading treatment, rape, enforced prostitution or any form of indecent assault.¹⁰⁵

The distinction between international and non-international armed conflict in humanitarian law has a gendered dimension.¹⁰⁶ Civilian victims, mostly women and children often outnumber casualties among combatants.¹⁰⁷ In addition, women often become caregivers for injured combatants and find themselves, as a result of conflict, unexpectedly cast as sole managers of households, sole parents, and caretakers of elderly relatives.¹⁰⁸ There have always been women who have been family bread-winners and who have engaged in fighting wars (often disguised as men).¹⁰⁹

During times of armed or other conflict and the collapse of communities, the role of women is crucial. They often work to preserve social order in the midst of armed and other

¹⁰⁴ The United Nations Fourth World Conference on Women - Beijing, China September 1995, Platform for Action, Women and Armed Conflict, para 131 at <http://www.un.org/womenwatch/daw/beijing/platform/armed.htm> see also Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993; A/CONF.157/23 12 July 1993 at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)

¹⁰⁵ The United Nations Fourth World Conference on Women - Beijing, China September 1995, Platform for Action, Women and Armed Conflict, para 132

¹⁰⁶ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, pp. 317-318; see the decision of the International Court of Justice on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*)

¹⁰⁷ Second International Policy Conference on the African Child: Violence Against Girls in Africa, Addis Ababa, 11-12 May 2006, Violence against Girls in Africa during Armed Conflict and Crises, ICRC

¹⁰⁸ The United Nations Fourth World Conference on Women - Beijing, China September 1995, Platform for Action, Women and Armed Conflict, paras 133 and 134

¹⁰⁹ Dianne Otto, Disconcerting 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law, pp. 105-131 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 111

conflicts. Women make an important but often unrecognised contribution as peace educators both in their families and societies.¹¹⁰

Judith Gardam, one of the authors criticising the supposed gender neutrality of international humanitarian law, also claims that civilians, especially women, suffer disproportionately. She calls humanitarian law gendered because she believes that the distinction between combatants and non-combatants is inherently gendered.¹¹¹ She alleges that *ius in bello* is biased against women conceptually, in substance, in interpretation, and in enforcement. This claim has been echoed and amplified by others.

Christine Chinkin also marshals convincing evidence that women civilians do suffer disproportionately in armed conflicts. States have tended to construe the distinction and proportionality requirements¹¹² of *ius in bello* narrowly to serve their ends of minimising the loss of military lives, even at an increased cost in civilian lives.¹¹³

1.4. Instead of Conclusion a Look at Women in Post-conflict Reconstruction, Transition and Development

For the first time, throughout the processes of creation and operation of the two ad hoc international criminal tribunals and the drafting of the ICC Statute, the interests of women have been accorded comparatively serious attention.¹¹⁴

¹¹⁰ The United Nations Fourth World Conference on Women - Beijing, China September 1995, Platform for Action, Women and Armed Conflict, para 139

¹¹¹ See generally Judith Gardam, Women and the Law of Armed Conflict: Why the Silence?, The International and Comparative Law Quarterly, Vol. 46, No. 1 (Jan., 1997), pp. 55- 80, Cambridge University Press on behalf of the British Institute of International and Comparative Law Stable URL: <http://www.jstor.org/stable/760514>

¹¹² Dietrich Schindler, International Humanitarian Law: Its Remarkable Development and its Persistent Violation, Journal of the History of International Law 5: 165–188, 2003, Koninklijke Brill NV, the Netherlands

¹¹³ Aaron Xavier Fellmeth, Feminism and International Law: Theory, Methodology, and Substantive Reform Human Rights Quarterly, Vol. 22, No. 3 (Aug., 2000), pp. 658-733, The Johns Hopkins University Press Stable URL: <http://www.jstor.org/stable/4489298>, p. 716

¹¹⁴ Hillary Charlesworth and Christine Chinkin, The Boundaries of International Law: A Feminist Analysis, Manchester University Press, 2000, p. 310

Still, women's concerns and experiences are often neglected in the post-conflict stage. During conflict, the burden to provide for the basic needs of their families is placed on women. Usually, post-conflict recuperation brings women back to their marginalised position that sometimes had been drastically altered during the conflict itself. Issues of return, housing, title to land and the position of women within the local communities arise.¹¹⁵

Post-conflict conditions and the reconstruction of the social fabric, as well as processes of nation building, reconciliation and development provide a unique opportunity for a fundamental change of gender hierarchies. The chances for a significant expansion of the recognition and implementation of women's rights are better in the circumstances of social change and international presence that surround post-conflict situations nowadays.

The solutions to the situation of women and the girl-child in post-conflict settings will be developed in Chapter Three, Part 4. (See *infra*)

¹¹⁵ Christine Chinkin, Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women, EGM/PEACE/2003/BP.1 31 October 2003 United Nations Division for the Advancement of Women (DAW) Expert Group Meeting on "Peace agreements as a means for promoting gender equality and ensuring participation of women – A framework of model provisions" 10-13 November 2003 Ottawa, Canada

2. Children's Rights in Armed Conflict

“War violates every right of the child.”

In its dissenting opinion in the seminal case *Prosecutor v. Norman*, Judge Geoffrey Robertson states “Children are a very recent subject of human rights law, omitted from the 18th Century declarations on the rights of man because they were then regarded as the property of their parents”.¹¹⁶

2.1. The Impact of Armed Conflict on Children and the Implications of the Phenomenon of Child-soldiering

Two million children died during armed conflicts from 1986 to 1996. Six million children were seriously injured or permanently disabled and millions have been separated from their families, physically and psychologically abused, and abducted into the military.¹¹⁷ The girl-child has been particularly traumatised by sexual violence and rape but between the years 1990 and 2004 girls have increasingly become part of fighting forces in 56 countries and have been involved in armed conflicts in 38 of these countries.¹¹⁸

Owing to the widespread availability of lightweight weapons, many children over 10 years of age participate regularly in combat.¹¹⁹ The chronic stresses associated with armed conflict lead to problems such as aggression, depression, truncated moral development, etc.¹²⁰

¹¹⁶ *Prosecutor v. Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction, (Child Recruitment), Case No. SCSL-2000-14-AR72(E); Judge Geoffrey Robertson dissenting opinion, 31 May 2004 cited by William Schabas, *The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases*, pp. 19-37 in *International Criminal Accountability and the Rights of Children*, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006, p. 20

¹¹⁷ See generally Graca Machel, *Impact of Armed Conflict on Children*, Report of the expert of the Secretary-General submitted pursuant to General Assembly Resolution 48/157

¹¹⁸ Dyan Mazurana, *Where are the girls?*, *The Woman's Review of Books*, Vol. XXI, No. 12, September 2004, p. 21

¹¹⁹ Michael G. Wessells, *Children, Armed Conflict, and Peace*, 1998 *Journal of Peace Research*, vol. 35, no. 5, 1998, pp. 635-646, Sage Publications, p. 639

¹²⁰ Michael G. Wessells, *Children, Armed Conflict, and Peace*, 1998 *Journal of Peace Research*, vol. 35, no. 5, 1998, pp. 635-646, Sage Publications, p. 639

In Graça Machel's first fundamental study submitted to the United Nations in 1996, a special emphasis is put on the need for "psychosocial recovery" of war-affected children.¹²¹ Many such children are at risk of continuing cycles of violence, and they may find it difficult to participate fully in education or in wider tasks of development.¹²²

It is estimated that some 300,000 children under 18 years of age are serving as regular soldiers, spies, porters, cooks, and sexual slaves in conflicts in over 50 countries across the globe. Paramilitary organisations, guerrilla groups, and civil militias conscripted about another 500,000 children in more than 85 countries.¹²³ Of the five countries singled out by the United Nations Secretary General's Report on Children and Armed Conflict submitted to the Security Council in November 2002 four were from Africa: Burundi, DRC, Liberia and Somalia.¹²⁴

Children comprise half the population of war-torn countries.¹²⁵ Fighting in contemporary intrastate wars occurs in and around communities and often involves personalised acts of violence. As a result the civilian death toll has risen sharply and by the end of the 1990s, civilians comprised nearly 90% of war-related casualties. In contemporary ethno-political conflicts, children are increasingly political actors.¹²⁶ In view of the urgency of protecting children, the United Nations General Assembly took the unprecedented step of

¹²¹ Graça Machel, Impact of Armed Conflict on Children, Report of the expert of the Secretary-General submitted pursuant to General Assembly Resolution 48/157

¹²² Michael G. Wessells, Children, Armed Conflict, and Peace, 1998 Journal of Peace Research, vol. 35, no. 5, 1998, pp. 635-646, Sage Publications, p. 642

¹²³ Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, p. 61

¹²⁴ Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, p. 62

¹²⁵ Michael G. Wessells, Children, Armed Conflict, and Peace, 1998 Journal of Peace Research, vol. 35, no. 5, 1998, pp. 635-646, Sage Publications, p. 635

¹²⁶ Michael G. Wessells, Children, Armed Conflict, and Peace, 1998 Journal of Peace Research, vol. 35, no. 5, 1998, pp. 635-646, Sage Publications, pp. 635-636

commissioning a global study on children and armed conflict. One of the eight key areas documented by the study is the phenomenon of child-soldiering.¹²⁷ This extensive study conducted by Graça Machel belies all recent scholarly work on the human rights abuses children face in armed conflict.

Regrettably, children's rights are under serious challenge even in peacetime.¹²⁸ The main human rights instrument providing for the rights of the child – the United Nations Convention on the Rights of the Child (CRC) - is endowed with scarce implementation mechanisms.¹²⁹

Art.3 of the CRC, although open to a range of subjective interpretations, should be regarded as including guiding or core rights underpinning the CRC, as it is a fundamental principle of the Convention.¹³⁰ The concept of the 'best interest of the child' is applicable in armed conflict.¹³¹ However, its proper content has to be determined. What is clear is that the prohibition of recruitment into the armed forces of children under the age of 18 as well as the

¹²⁷ Michael G. Wessells, Children, Armed Conflict, and Peace, 1998 Journal of Peace Research, vol. 35, no. 5, 1998, pp. 635-646, Sage Publications, p. 637

¹²⁸ Prosecutor v. Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction, (Child Recruitment), Case No. SCSL-2000-14-AR72(E); Judge Geoffrey Robertson dissenting opinion, 31 May 2004 at [http://www.sc-sl.org/Documents/SCSL-04-14-AR72\(E\)-131-7383.pdf](http://www.sc-sl.org/Documents/SCSL-04-14-AR72(E)-131-7383.pdf); [http://www.sc-sl.org/Documents/SCSL-04-14-AR72\(E\)-131-7398.pdf](http://www.sc-sl.org/Documents/SCSL-04-14-AR72(E)-131-7398.pdf); [http://www.sc-sl.org/Documents/SCSL-04-14-AR72\(E\)-131-7413.pdf](http://www.sc-sl.org/Documents/SCSL-04-14-AR72(E)-131-7413.pdf); [http://www.sc-sl.org/Documents/SCSL-04-14-AR72\(E\)-131-7430.pdf](http://www.sc-sl.org/Documents/SCSL-04-14-AR72(E)-131-7430.pdf) (hereinafter *Prosecutor v. Norman*)

¹²⁹ Convention on the Rights of the Child, General Assembly Resolution 44/25 of November 1989, entry into force September 1990, Arts. 43-45

¹³⁰ Jenny Kuper, International Human Rights Treaty Law and Related Instruments Relevant to Child Civilians in Armed Conflict, in International Law Concerning Child Civilians in Armed Conflict, Oxford University Press, 1997, p. 48

¹³¹ Ya'ir Ronen and Jeremy Rosen On the Child's Right to Protection of national Identity during Political Conflict: Lessons from the Case of Mubarak Awad in Charles W. Greenbaum, Philip Veerman, Naomi Bacon-Shnoor Protection of Children During Armed Political Conflict: A Multidisciplinary Perspective, Intersentia Antwerpen 2006, p. 104, Michael Freeman, Children's Rights: A Comparative Perspective, 1996, Dartmouth, Aldershot, p. 47, Jane Fortin Children's Rights and the Developing Law, Law in Context, Butterworths, London, 1998, p. 340, Michael Freeman, Children's Rights: A Comparative Perspective, 1996, Dartmouth, Aldershot, p. 47

non-prosecution of persons for crimes committed when below the age of 18, serve, or at least need not be in contradiction with, the best interest of the child. In principle participation in an armed group is against the best interests of children.¹³²

As already indicated, significant numbers of children see military activity either as combatants or in other roles. Many have been victims of forced recruitment and attack, and many participated in killing.¹³³ Faced with troop shortfalls, opposition groups or governments often use methods of forced recruitment such as “press ganging” in which youths are abducted at gunpoint under threats to harm either them or their families if they do not join the military group.¹³⁴

Other children are driven by strong ideological commitment, which although an encouragement for soldiering, is associated with reduced anxiety and depression. This pattern of evidence shows that children are not passive victims but are active in the face of adversity. Nevertheless, the term “voluntary” is ill-suited to most recruitment situations.¹³⁵ Children who have lost their parents may go with the military as a means of survival; impoverished children may view soldiering as a path to material gain; and children who have experienced attack, loss, and community destruction may seek protection or revenge or try to achieve power amidst living conditions suffused with powerlessness and despair.¹³⁶

¹³² Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict*, Oxford: Oxford University Press, 1994, p. 79 and 123; Karin Arts, General Introduction: A Child-Based Approach to International Criminal Accountability, pp. 3-19 in *International Criminal Accountability and the Rights of Children*, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006, p.13

¹³³ Michael G. Wessells, *Children, Armed Conflict, and Peace*, 1998 *Journal of Peace Research*, vol. 35, no. 5, 1998, pp. 635-646, Sage Publications, p. 637

¹³⁴ Michael G. Wessells, *Children, Armed Conflict, and Peace*, 1998 *Journal of Peace Research*, vol. 35, no. 5, 1998, pp. 635-646, Sage Publications, p. 637

¹³⁵ See Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict*, Oxford: Oxford University Press, 1994 and *International Criminal Justice and Children, No Peace Without Justice*, UNICEF Innocenti Research Centre, September 2002

¹³⁶ Michael G. Wessells, *Children, Armed Conflict, and Peace*, 1998 *Journal of Peace Research*, vol. 35, no. 5, 1998, pp. 635-646, Sage Publications, p. 639

A working definition of child soldiering is crucial for the present work. A child soldier is any child – boy or girl – under the age of 18, who is compulsorily, forcibly or voluntarily recruited or used in hostilities by armed forces, paramilitaries, civil defence units or other armed forces. Child soldiers are used for forced sexual services, as combatants, messengers, porters and cooks.¹³⁷

Graca Machel's report is a groundbreaking work. Based on her recommendations a new position of the Special Representative of the Secretary-General on Children in Armed Conflict was established.¹³⁸

The age at which a child incurs legal responsibility for his or her acts under domestic law varies widely, from 7 to 18 years, depending on the history and culture of a country, and in many cases also on the nature of the crime. Most frequently, the age limit for criminal responsibility is set somewhere between 14 and 16 years. International law does not specify a minimum age at which a child can be held criminally responsible for his or her actions. The CRC only provides that States must fix a specific age below which children cannot be held legally responsible.¹³⁹ The aim of restorative justice is to have the offender understand and take responsibility for his or her actions, including reparations that involve the victims and the community, thereby achieving long-term reconciliation. This minimises the possibility that the victim will be rejected or ostracised, since the community itself is involved in the accountability process.¹⁴⁰

¹³⁷ Graca Machel, *The Impact of War on Children: A Review of Progress*, Hurst&Co. 2001, p.7; Cape Town Principles, adopted on the 30th of April 1997 at a joint UNICEF/NGO symposium

¹³⁸ *International Criminal Justice and Children, No Peace Without Justice*, UNICEF Innocenti Research Centre, September 2002, p. 48

¹³⁹ CRC, Art.40 (3) (a); *International Criminal Justice and Children, No Peace Without Justice*, UNICEF Innocenti Research Centre, September 2002, p. 54

¹⁴⁰ Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict*, Oxford: Oxford University Press, 1994, p. 59; also *International Criminal Justice*

2.2. The Definition of a Child and Their Protection under Human Rights and Humanitarian Law

A serious definitional problem concerns the term ‘child’. In contrast to Western nations, many cultures define individuals as adults if they have participated in the culturally appropriate rites of passage, which often occur around the age of puberty. ‘The child’ is a socially constructed idealisation that reflects the values and agendas of particular cultures and traditions. Very much at issue is who defines childhood. Although this question has scientific dimensions, it is also about power and values.¹⁴¹

One writer observes that “the concept that children can and should have rights is often seen as such an alien and radical notion that endorsement of the concept by the international community, in the form of a legally binding multilateral treaty” (i.e. the CRC), has provided a much needed legitimisation of the concept.¹⁴²

The Four Geneva Conventions of 1949, the CRC, its 2000 Optional Protocol on the Involvement of Children in Armed Conflict, the 1990 African Child Charter, the 1999 ILO Convention No. 182, the Rome Statute for the International Criminal Court (ICC), the Statute of the Special Court for Sierra Leone (SCSL) are all concerned with the question “who is a child” but for different purposes. However, all of these instruments support the prohibition of child recruitment. Unfortunately, these instruments introduce different standards – some set the prohibited age at 15 years and others at 18 years. It will be examined below whether this conflict has to be solved in favour of a prohibition of recruitment below the age of 18 years.

and Children, No Peace Without Justice, UNICEF Innocenti Research Centre, September 2002

¹⁴¹ Michael G. Wessells, Children, Armed Conflict, and Peace, 1998 Journal of Peace Research, vol. 35, no. 5, 1998, pp. 635-646, Sage Publications, p. 640

¹⁴² Jenny Kuper, International Human Rights Treaty Law and Related Instruments Relevant to Child Civilians in Armed Conflict, in International Law Concerning Child Civilians in Armed Conflict, Oxford University Press, 1997, p. 45, fn. 112

The CRC remains, to date, the most universally accepted human rights instrument in history.¹⁴³ Some judicial authorities insist that “the CRC became international customary law almost at the time of [its] entry into force”.¹⁴⁴ Some commentators, however, have questioned whether “such widespread ratification [of agreements like the CRC have] any real significance, especially when countries enter sweeping reservations that render their ratification of it almost meaningless”.¹⁴⁵ In practice children continue to suffer heinous human rights abuses and remain the principal victims during armed conflicts, despite the adoption of such documents.

Art.1 of the CRC provides a definition of the child which ultimately refers to “the law applicable to the child’. Thus, the 18-years standard is turned into more of an upper limit that States may manipulate. While it is true that the age of 18 years is “not necessarily consonant with the age of maturity in various countries”, assertions that “the application of rights recognised in the CRC to a person who is no longer a minor could be incompatible with his or her legal status” simply allow States parties to evade fulfilling their obligations under the CRC.¹⁴⁶

For the purposes of this research, it has to be noted that such a slippery norm provides little relief to the girl-child. Her newly acquired adult legal status will most rarely involve inheritance rights or rights of political participation but rather manifest the impunity of child marriage and betrothal.

¹⁴³ Signatories: 140. Parties: 193 at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=133&chapter=4&lang=en>

¹⁴⁴ Nsongurua J. Udombana, War is Not Child’s Play! International Law and the Prohibition of Children’s Involvement in Armed Conflict, Temple Int’l & Comp. L.J. [20.1.2006], pp. 57-109, p. 58

¹⁴⁵ Jenny Kuper, Monitoring, Implementation and Enforcement of International Law Concerning Child Civilians, in International Law Concerning Child Civilians in Armed Conflict, Oxford University Press, 1997, p. 132

¹⁴⁶ Fn 214 in Nsongurua J. Udombana, War is Not Child’s Play! International Law and the Prohibition of Children’s Involvement in Armed Conflict, Temple Int’l & Comp. L.J. [20.1.2006], pp. 57-109, p. 80

Another key element of taking a child rights-based approach that has a straightforward connection with issues of agency and capacities of children is that of participation in CRC's Art.12.¹⁴⁷ Implementing the participation requirements of the CRC is a major challenge for many actors claiming to work under a child rights-based mandate and, for most, requires fundamental changes of attitudes towards children.¹⁴⁸

2.2.1. Universal human rights standards on the rights of the child in armed conflict

Especially relevant to armed conflict, Art.38 of the CRC represents the lowest common denominator in the international community's quest to protect children in armed conflict through human rights law.¹⁴⁹ It is an innovative incorporation of International Humanitarian Law (IHL) into International Human Rights Law which reinforces obligations already assumed by states under IHL relating to the child.¹⁵⁰

This creates the possibility that the CRC Committee will examine States parties' compliance with their obligations under IHL relating to the rights of the child.¹⁵¹ Art.38 prohibits the use of children less than 15 years of age in armed conflict, regardless of whether

¹⁴⁷ (1). States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (2). For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

¹⁴⁸ Karin Arts, General Introduction: A Child-Based Approach to International Criminal Accountability, pp. 3-19 in *International Criminal Accountability and the Rights of Children*, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006, p. 14

¹⁴⁹ Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, *Temple Int'l & Comp. L.J.* [20.1.2006], pp. 57-109, p. 81; Jenny Kuper, *International Human Rights Treaty Law and Related Instruments Relevant to Child Civilians in Armed Conflict*, p. 107

¹⁵⁰ Hanz-Joachim Heintze, On the Relationship Between International Human Rights Law Protection and International Humanitarian Law, *IRRC* December 2004, vol. 86, pp. 789-814, p. 792

¹⁵¹ Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, *Temple Int'l & Comp. L.J.* [20.1.2006], pp. 57-109, p. 82

the child volunteered or was conscripted, or whether the recruiting party is a government or an opposition army. No ratifying state has made any reservations regarding Art.38 but numerous states have made declarations that they opt for the higher standard of 18 years¹⁵²

Art.38 does not distinguish between international and non-international armed conflict, except inasmuch as it incorporates these categories by referring to existing rules of IHL. It therefore applies to any armed conflict. However, by using the term ‘armed conflict’ and referring to existing IHL, Art.38 does not appear to extend to internal disturbances. Further, the CRC applies only to States Parties, and non-governmental entities engaged in armed conflict are not bound by its provisions.¹⁵³

There is an apparent contradiction between CRC’s general definition of a child (Art.1) and the protection of Art.38 extended only to children below the age of 15. The foundations of the Art.1 definition find their limits in differing standards under domestic law. An uncertainty as to the applicable age standards permeates the entire CRC.

However, Art.38 is significant in constituting a mixture of the two Additional Protocols of 1977. Since they have not yet enjoyed universal ratification, the CRC remains the context within which states can decide to abide by those standards. The CRC permits no derogation of the rights in times of emergency. Unfortunately, neither does it contain any enforcement mechanisms, which makes its enforceability entirely dependent upon domestic laws.¹⁵⁴

The practice of the CRC Committee in monitoring state reports from countries involved in armed conflict has been under critique. The criticism focuses on the committee’s apparent

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<http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=133&chapter=4&lang=en>

¹⁵³ Jenny Kuper, *International Human Rights Treaty Law and Related Instruments Relevant to Child Civilians in Armed Conflict*, in *International Law Concerning Child Civilians in Armed Conflict*, Oxford University Press, 1997, p. 100

¹⁵⁴ Nsongurua J. Udombana, *War is Not Child’s Play! International Law and the Prohibition of Children’s Involvement in Armed Conflict*, *Temple Int’l & Comp. L.J.* [20.1.2006], pp. 57-109 at pp. 82-83

failure, when examining state reports from some such countries, to question the government representatives on their adherence to the international law applicable in situations of armed conflict.¹⁵⁵

CRC's lack of any complaints mechanism will limit its capacity to strengthen state observance of its norms.¹⁵⁶ Everything short of proper scrutiny by the Committee of country reports, particularly when grave violations of human rights and/or humanitarian law are taking place, will seriously undermine the purpose and impact of the reporting process in improving the implementation of the relevant standards. However, the Committee is to be commended for its sustained efforts as regards, for example, initiating the study on children described in Part One.¹⁵⁷

Another constructive development is the decision of the CRC Committee to undertake "Urgent Action" in relation to complaints received about serious violations of Convention rights.¹⁵⁸ Ultimately, Art.41 of the CRC could be invoked to raise the unsatisfactory standard set in Art.38.¹⁵⁹

¹⁵⁵ Jenny Kuper, *Monitoring, Implementation and Enforcement of International Law Concerning Child Civilians*, in *International Law Concerning Child Civilians in Armed Conflict*, Oxford University Press, 1997, p. 137

¹⁵⁶ CRC, Arts.43-45; Jenny Kuper, *Monitoring, Implementation and Enforcement of International Law Concerning Child Civilians*, in *International Law Concerning Child Civilians in Armed Conflict*, Oxford University Press, 1997, p. 137

¹⁵⁷ Jenny Kuper, *Monitoring, Implementation and Enforcement of International Law Concerning Child Civilians*, in *International Law Concerning Child Civilians in Armed Conflict*, Oxford University Press, 1997, p. 138

¹⁵⁸ Vesselin Popovski, *Children in Armed Conflict: Law and Practice of the United Nations*, pp. 37-53 in *International Criminal Accountability and the Rights of Children*, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006

¹⁵⁹ Jenny Kuper, *International Human Rights Treaty Law and Related Instruments Relevant to Child Civilians in Armed Conflict*, in *International Law Concerning Child Civilians in Armed Conflict*, Oxford University Press, 1997, p. 50

2.2.2. Regional Human Rights Standards - The African Child Charter

The African Child Charter is the first potentially binding regional convention which concerns children exclusively. It is specifically oriented to the African context.¹⁶⁰ The Preamble, for example asserts that “the situation of most African children remains critical owing to certain unique factors”, specifically including armed conflict.¹⁶¹

The African Child Charter defines a ‘child’ uniformly.¹⁶² Like the CRC, it limits its prohibition of recruitment of children to direct participation in hostilities, but unlike the CRC, the prohibition is absolute and the applicable age set is 18. Thus, Art.22 of the African Child Charter is stronger than CRC’s Art.38 applicable age of 15 years. Most importantly, the African Child Charter protects children in situations of “tension and strife” (Art.22 (3)). This fills in a serious gap (the so called ‘gray zones’ of IHL) given that global humanitarian and human rights instruments do not regulate internal disturbances and tensions, such as riots and isolated and sporadic acts of violence and apply only in high-intensity situations.¹⁶³

Again in contrast to the CRC, the African Child Charter contains a provision for the submission, to the Committee established thereunder, of communications “from any person, group or non-governmental organisation” relating to matters covered by it.¹⁶⁴ The African Charter is therefore a good example of the difference in emphasis between a global and a

¹⁶⁰ Jenny Kuper, *International Human Rights Treaty Law and Related Instruments Relevant to Child Civilians in Armed Conflict*, in *International Law Concerning Child Civilians in Armed Conflict*, Oxford University Press, 1997, p. 52

¹⁶¹ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force November 29, 1999, Preamble, para 3

¹⁶² African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force November 29, 1999, Art.2

¹⁶³ Nsongurua J. Udombana, *War is Not Child’s Play! International Law and the Prohibition of Children’s Involvement in Armed Conflict*, Temple Int’l & Comp. L.J. [20.1.2006], pp. 57-109, p.83

¹⁶⁴ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force November 29, 1999, Art.44 (1)

regional treaty concerning children. It illustrates the potential of the latter to address issues of particular regional concern, and to raise international standards.¹⁶⁵

2.2.3. International Humanitarian Law Standards for Non-International Conflicts

IHL grants special protection to women and children by addressing the risks to which both groups are particularly vulnerable, and treats children as inherently vulnerable persons.¹⁶⁶ Nevertheless, very few warring parties comply with the international armed conflict standards which are arguably applicable also to internal conflicts – the focus of this research.

In general, neither GC IV nor the 1977 Additional Protocols provide a precise definition of a ‘child’. Rather, they adopt six different age categories for specifying particular entitlements of children in armed conflict.¹⁶⁷

Common Article 3 to the Four Geneva Conventions of 1949 is to be applied as a minimum yardstick in armed conflicts of non-international character.¹⁶⁸ Further on, Additional Protocol II pertains to all non-international armed conflicts taking place in the territory of a State-party between its armed forces and dissident armed forces.¹⁶⁹ The principle of children’s entitlement to special treatment is articulated in Article 4(3) of Additional Protocol II.

¹⁶⁵ Jenny Kuper, *International Human Rights Treaty Law and Related Instruments Relevant to Child Civilians in Armed Conflict*, in *International Law Concerning Child Civilians in Armed Conflict*, Oxford University Press, 1997, p. 53

¹⁶⁶ See generally Second International Policy Conference on the African Child: Violence Against Girls in Africa, Addis Ababa, 11-12 May 2006, *Violence against Girls in Africa during Armed Conflict and Crises*, ICRC

¹⁶⁷ Jenny Kuper, *Treaty Law of Armed Conflict and Related Instruments Specifically Regarding Child Civilians*, in *International Law Concerning Child Civilians in Armed Conflict*, Oxford University Press, 1997, p. 78

¹⁶⁸ International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgement, p. 114, para 218

¹⁶⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Art.1

With regard to the particular position of girl-soldiers, another definitional matter – the distinction between “direct participation in hostilities” and indirect participation – is of great importance since they often acquire roles bordering what one would call direct involvement in hostilities. In IHL in general, there is a considerable lack of clarity in determining when civilians, including children, have participated in hostilities. The ICRC’s commentaries state that “taking direct part in hostilities” means “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces”. Such participation includes hostile acts without a weapon.¹⁷⁰ Children engaged in acts harmful to the enemy can be said to have taken direct part in hostilities.

Even though Additional Protocol II contains only two articles pertinent to the situation of children, it offers increased protection, stipulating that “children who have not attained the age of 15 years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities”.¹⁷¹ It does not permit exceptions to the proscribed conduct, and even extends the recruitment restrictions to groups other than the armed forces of the state. The word ‘recruitment’ covers any means, formal or *de facto*, by which a person becomes a member of the armed forces or of an armed group. This implies that parties must refrain from enrolling children under 15 years of age even if they volunteer to join the armed forces.¹⁷²

Art.6 (4) from Additional Protocol II reiterates the prohibition on the death penalty in relation to those aged under 18 at the time of committing an offence related to the armed conflict. The Additional Protocol therefore explicitly allows children from the age of 15 to

¹⁷⁰ Nsongurua J. Udombana, War is Not Child’s Play! International Law and the Prohibition of Children’s Involvement in Armed Conflict, Temple Int’l & Comp. L.J. [20.1.2006], pp. 57-109, p. 77

¹⁷¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Art.4(3) (c)

¹⁷² Nsongurua J. Udombana, War is Not Child’s Play! International Law and the Prohibition of Children’s Involvement in Armed Conflict, Temple Int’l & Comp. L.J. [20.1.2006], pp. 57-109, p. 78

risk death by participating as combatants in hostilities, while forbidding their execution for certain offences committed while under 18.¹⁷³ Art.6 (4) sets a higher standard than the one found in Additional Protocol I in stating that the death sentence should not be ‘pronounced’ on children under 18 at the time of the offence as opposed to ‘executed’.¹⁷⁴

On the issue of the legal force of Additional Protocol II, the Appeals Chamber of the SCSL has concluded that “many of the provisions of the Protocol, including the fundamental guarantees, are widely accepted as customary international law”.¹⁷⁵

2.3. Progressive Jurisprudence of Accountability – A Look to the Future

Children constitute the largest proportion of victims and survivors of armed conflicts but among them there are also former combatants and perpetrators of atrocities. The duality of child-violators (being both a culprit and a victim) has to be emphasised – one should bear in mind that child-soldiers are always victims of the armed conflict circumstances as well.¹⁷⁶

Individual complaints procedures before human rights treaty bodies and criminal proceeding before international tribunals can pave the way to strengthening the protection of children and solving the contentious issues of juvenile justice. The CRC Committee has taken only limited action to respond to the plight of children in armed conflict so far.

The significant contribution of the SCSL case law could help other future international tribunals, and most notably the future work of the permanent criminal court in The Hague (the

¹⁷³ Jenny Kuper, *Treaty Law of Armed Conflict and Related Instruments Specifically Regarding Child Civilians*, in *International Law Concerning Child Civilians in Armed Conflict*, Oxford University Press, 1997, p. 96

¹⁷⁴ Jenny Kuper, *Treaty Law of Armed Conflict and Related Instruments Specifically Regarding Child Civilians*, in *International Law Concerning Child Civilians in Armed Conflict*, Oxford University Press, 1997, p. 97

¹⁷⁵ See *Prosecutor v. Norman*

¹⁷⁶ Karin Arts, General Introduction: A Child-Based Approach to International Criminal Accountability, pp. 3-19 in *International Criminal Accountability and the Rights of Children*, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006, p. 8

ICC), to develop progressive approaches towards the rights of children and juvenile justice. Of course, international criminal tribunals focus on breaches of children's rights that fall within the realm of criminal law proper. This leaves many other children's rights violations uncovered. However, it is important to compare the developments in international criminal law and accountability mechanisms with the ways human rights law can be put into action against infringements of children's rights and to identify lessons learned and even 'best practices'.¹⁷⁷

Both for the SCSL and the ICC, children are also a crucial group of witnesses, especially in cases relating to the recruitment of child soldiers, abduction and other crimes that explicitly target children.¹⁷⁸ These two fora are true pioneers in the effort to give due attention to the role and rights of children.¹⁷⁹

2.3.1. The Rome Statute of the International Criminal Court

International criminal law's prohibition of children's involvement in armed conflict has evolved rapidly during the past 15 years. The Rome Statute and the Statute of the SCSL are of particular importance within this process. The ICC Statute permits the prosecution of international and, to some extent, internal criminal atrocities. It expressly states that "conscripting or enlisting children under the age of 15 years into the national armed forces or

¹⁷⁷ Karin Arts, General Introduction: A Child-Based Approach to International Criminal Accountability, pp. 3-19 in *International Criminal Accountability and the Rights of Children*, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006, p. 9

¹⁷⁸ Karin Arts, General Introduction: A Child-Based Approach to International Criminal Accountability, pp. 3-19 in *International Criminal Accountability and the Rights of Children*, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006, p. 6

¹⁷⁹ Karin Arts, General Introduction: A Child-Based Approach to International Criminal Accountability, pp. 3-19 in *International Criminal Accountability and the Rights of Children*, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006, p. 12

using them to participate actively in hostilities”¹⁸⁰ is a war crime in both inter-state and intra-state armed conflicts.

The words ‘using’ and ‘participate’ cover both direct participation in combat and also active participation in military activities linked to combat such as spying and sabotage and the use of children as couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.¹⁸¹

This offence does not require any element of force and, as is the case with war crimes, the consent of the child is no defence to enlistment or conscription.¹⁸² Moreover, evidence of the accused’s wilful blindness of the child’s age should be sufficient to establish liability under the ICC Statute. This means that “the *mens rea* requirement would be met if the accused does not provide for safeguards and inquire the age of the child even though the child’s age appears to be close to the protected minimum age.”¹⁸³

At present, four cases at the ICC include the count of recruitment of child-soldiers. In the situation in Uganda, the case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* is currently being heard before Pre-Trial Chamber II. In this

¹⁸⁰ Rome Statute of the International Criminal Court, (Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.) Art. 8(2) (b) (xxvi); (e) (vii)

¹⁸¹ Nsongurua J. Udombana, War is Not Child’s Play! International Law and the Prohibition of Children’s Involvement in Armed Conflict, Temple Int’l & Comp. L.J. [20.1.2006], pp. 57-109, p. 87

¹⁸² Nsongurua J. Udombana, War is Not Child’s Play! International Law and the Prohibition of Children’s Involvement in Armed Conflict, Temple Int’l & Comp. L.J. [20.1.2006], pp. 57-109, p. 85

¹⁸³ Nsongurua J. Udombana, War is Not Child’s Play! International Law and the Prohibition of Children’s Involvement in Armed Conflict, Temple Int’l & Comp. L.J. [20.1.2006], pp. 57-109, p. 86

case, five warrants of arrest have been issued against [the] five top members of the Lord's Resistance Army (LRA).¹⁸⁴

In the situation in the Democratic Republic of the Congo, three cases are being heard before the relevant Chambers: *The Prosecutor v. Thomas Lubanga Dyilo*; *The Prosecutor v. Bosco Ntaganda*; and *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*. Two cases are at the pre-trial stage, while the proceedings against Thomas Lubanga Dyilo are at the trial stage. The accused Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui are currently in the custody of the ICC. The suspect Bosco Ntaganda remains at large.¹⁸⁵

2.3.2. The Statute of the Special Court for Sierra Leone's War Crimes

The Statute of the SCSL's War Crimes is unique in its attention to child soldiers, though it sets 15 years of age as the threshold *vis-a-vis* the powers of the Special Court. The SCSL Statute empowers the Special Court to prosecute persons who conscripted or enlisted children under the age of 15 into armed forces or groups or used them to participate actively in hostilities.¹⁸⁶

The SCSL Statute also gives the Special Court the power to prosecute persons who committed certain crimes under Sierra Leonean law, in particular, offences relating to the abuse of girls. These provisions reflect the extensive recruitment of child soldiers and the conditions of their exploitation during the long-drawn civil war in Sierra Leone. The total number of children who have been officially disarmed in Sierra Leone is 6,904.¹⁸⁷

¹⁸⁴ <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>

¹⁸⁵ <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>

¹⁸⁶ Statute of the Special Court for Sierra Leone, (pursuant to Security Council Resolution 1315 (2000) of 14 August 2000), Art.4 (c)

¹⁸⁷ Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, p. 88

In the influential case *Prosecutor v. Norman*, the Appeals Chamber of the Special Court upheld the legality and specificity of the Statute's provisions relating to child enlistment. It ruled that the recruitment of children under 15 into armed forces or using them to participate actively in hostilities was prohibited by customary international law and, moreover, subject to individual criminal responsibility.¹⁸⁸

In this case the Chamber was addressing a challenge to the indictment of Sam Hinga Norman, who had participated in the civil war in Sierra Leone as the national coordinator of a pro-government paramilitary group called the Civil Defence Forces.¹⁸⁹ It held that all parties to the conflict were bound by the customary law prohibition of child recruitment that existed before the date that determined the temporary jurisdiction of the Special Court.¹⁹⁰ This prohibition was referred to as a "rule protecting fundamental values". The majority pointed to several authorities indicating the progressive establishment of a norm prohibiting the conscription and enlistment of child soldiers.¹⁹¹

Moreover, the SLSC does not have jurisdiction over any perpetrator who was under the age of 15 when committing the crime.¹⁹² Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and sense of worth, taking into account his or her young age

¹⁸⁸ See *Prosecutor v. Norman*

¹⁸⁹ William Schabas, *The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases*, pp. 19-37 in *International Criminal Accountability and the Rights of Children*, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006, p. 30

¹⁹⁰ *Prosecutor v. Norman*; see also Nsongurua J. Udombana, *War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict*, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, p.89

¹⁹¹ William Schabas, *The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases*, pp. 19-37 in *International Criminal Accountability and the Rights of Children*, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006, p. 33

¹⁹² Statute of the Special Court for Sierra Leone, Art.7

[...] and in accordance with international human rights standards, in particular the rights of the child.¹⁹³ In the disposition of a case against a juvenile offender, the Special Court can resort to any specific orders for inter alia care, guidance, community service, counselling, correctional training. When involved in cases of child perpetrators, the Prosecutor is directed to make use of alternative truth and reconciliation mechanisms. It may also order entry into programmes of disarmament, demobilisation and reintegration, or programmes with child protection agencies.¹⁹⁴

2.3.3. The 2000 CRC Armed Conflict Protocol and the CRC Committee

A significant step forward in the process of raising the standard of the prohibition of children's involvement in armed conflict was taken in June 1999 when ILO Convention No. 182 (Prohibition and Immediate Action for the Elimination of the Worst forms of Child Labour)¹⁹⁵ defined the compulsory recruitment of children for use in armed conflict as one of the 'worst forms' of child labour and prohibited it.¹⁹⁶

The African Child Charter and ILO Convention No. 182 were instrumental in advocating increasing the minimum age for recruitment into armed forces from 15 to 18 in the CRC Protocol which entered into force in 2002.¹⁹⁷ In adopting the CRC Protocol, the international community has acknowledged that the pre-existing 15-years-of-age standard

¹⁹³ Statute of the Special Court for Sierra Leone, Art.7

¹⁹⁴ Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, p.89

¹⁹⁵ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour Adopted by the Conference at its 87th Session, Geneva, 17 June 1999

¹⁹⁶ Vesselin Popovski, Children in Armed Conflict: Law and Practice of the United Nations, pp. 37-53 in International Criminal Accountability and the Rights of Children, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006, p. 39

¹⁹⁷ Vesselin Popovski, Children in Armed Conflict: Law and Practice of the United Nations, pp. 37-53 in International Criminal Accountability and the Rights of Children, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006, p. 39

does not adequately protect children.¹⁹⁸ The speedy entry into force of the CRC Protocol closely follows the precedent set by its parent treaty. 127 states have ratified the CRC Protocol, while 124 states are signatories.¹⁹⁹

The ICRC and the CRC Committee played significant roles in the process leading to the drafting of the CRC Protocol. It was necessary to amend the CRC, since it constituted a weakening of the IHL protection accorded to children in armed conflict.²⁰⁰ The CRC Protocol's most important function is to set a new standard.²⁰¹ However, regrettably, the language of this article falls short of the protection provided by Art.4 (3) (c) of Additional Protocol II, which prohibits any participation in hostilities.

By limiting its prohibition to taking 'a direct part in hostilities' the CRC Protocol appears to be a compromise. A broader prohibition should have been included to protect children not only from indirect participation but also from pressures that, in practice, compel them to participate directly in armed conflict.²⁰² Children often start out in support functions but become combatants over time or when the armed forces are under pressure.²⁰³

¹⁹⁸ Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, p. 90

¹⁹⁹

<http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=135&chapter=4&lang=en>

²⁰⁰ Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, p. 94

²⁰¹ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 12 February 2002, Art.1

²⁰² Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, p. 94

²⁰³ Graca Machel, Impact of Armed Conflict on Children, Report of the expert of the Secretary-General submitted pursuant to General Assembly Resolution 48/157

The CRC Protocol implies a double standard with regard to child recruitment distinguishing between state armed forces and non-state armed groups. While the governments are allowed to recruit under the age of 18 they should not employ the underage soldiers in direct hostilities. Non-state armed groups are strictly prohibited from recruiting or using in hostilities, regardless directly or indirectly, persons under the age of 18 years.²⁰⁴ Since States are obliged to criminalise such activities²⁰⁵ it appears they have bound potential opponents with stronger obligations than they are prepared to accept for themselves.²⁰⁶

Questions of whether a situation amounts to an armed conflict are irrelevant and the protection covers recruitment also prior to the start of a conflict. On becoming party to the Protocol, a state must set forth a binding declaration establishing its minimum voluntary recruitment age and safeguards adopted to comply with the Protocol.²⁰⁷

States are not obliged to become parties to the Protocol if they do not want or if their existing laws or practices are not in conformity with it.²⁰⁸ What is important is that it pays tribute to state practice with 70 out of 99 countries' laws setting a minimum age for military service, requiring 18 years or above.²⁰⁹ Many states also set the age of criminal responsibility at 18 years and above, in times of both war and peace. Those under 18 are generally presumed not to fully appreciate the nature of their actions, or the extent of their own responsibilities.²¹⁰

²⁰⁴ Optional Protocol to the CRC, Arts.1, 2, 3 and 4

²⁰⁵ Optional Protocol to the CRC, Art.4 (2)

²⁰⁶ Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, p. 95

²⁰⁷ Optional Protocol to the CRC, Art.3 (2)

²⁰⁸ Optional Protocol to the CRC, Art.3

²⁰⁹ Ilene Cohn and Guy S. Goodwin-Gill, Child Soldiers: The Role of Children in Armed Conflict, Oxford: Oxford University Press, 1994, pp. 187-208

²¹⁰ Ilene Cohn and Guy S. Goodwin-Gill, Child Soldiers: The Role of Children in Armed Conflict, Oxford: Oxford University Press, 1994, pp. 187-208

The CRC Protocol is weak in its language regarding state obligations.²¹¹ Some states could take advantage of the Protocol's vagueness to enter declarations interpreting the word 'feasible' in its Art.1 in ways that weaken their obligations under the Protocol.²¹² States have the primary and fundamental responsibility to ensure that all domestic legislation is fully compatible with the CRC Protocol and that the provisions of the Protocol can be directly applied and appropriately enforced.²¹³

The CRC Protocol does not provide for an individual or inter-state complaint procedure nor does it vest the CRC Committee which is responsible for monitoring its implementation, with the power to initiate an inquiry into an alleged violation. This absence weakens the Protocol since generally such procedures enhance the development of human rights jurisprudence and provide remedies for breaches.²¹⁴

A procedure for the initiation of an inquiry would similarly have been relevant and effective. It would have provided a valuable complement to the reporting procedure, enabling the CRC Committee to address issues of children's recruitment and use in conflict by non-governmental militias, particularly because they do not come within the reporting procedure. The inquiry procedure addresses systematic violations. Reporting mechanisms are valuable

²¹¹ Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, p. 98

²¹² Jenny Kuper, Monitoring, Implementation and Enforcement of International Law Concerning Child Civilians, in International Law Concerning Child Civilians in Armed Conflict, Oxford University Press, 1997

²¹³ Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, p. 99

²¹⁴ Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, p. 99

but alone cannot guarantee the full implementation of human rights, and the CRC Protocol is no exception to that rule.²¹⁵

2.3.4. Conclusion

In the field of children's rights wide gaps persist between rhetoric and reality.²¹⁶ Many children are still being enlisted and subjected to the brutalities of war. Three years after the CRC Armed Conflict Protocol entered into force, the United Nations Security Council expressed deep concern over "the lack of overall progress on the ground". Prosecuting and punishing crimes against children is one of the main solutions. For example, human rights violations committed by both sides in the Angolan conflict and the international community's disregard of such violations played a major factor in the failure of the Angolan peace process.²¹⁷

Children under 18 have not been indicted or prosecuted by either the ICTY or the ICTR. No child has been called to testify before either Tribunal. While a statement by a witness who was a child at the time of the alleged commission of the offences was admitted into evidence before the ICTY²¹⁸ pursuant to Rule 92bis of the Rules of Procedure and Evidence, the witness was not called to testify in court.²¹⁹ Regrettably, neither Tribunal is statutorily required to have staff with expertise in child rights and child protection; the ICTY Statute, for example, simply refers to "qualified staff". While there has been no case focusing specifically on crimes committed against children, both Tribunals have handled cases that involve crimes

²¹⁵ Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, p. 100

²¹⁶ Security Council Resolution 1612 (2005), 26 July 2005, para 2

²¹⁷ Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, p. 102

²¹⁸ The Prosecutor v. Slobodan Milošević, IT-02-54-T, 16 December 2003

²¹⁹ International Criminal Justice and Children, No Peace Without Justice, UNICEF Innocenti Research Centre, September 2002, pp. 109-110

against children. The case law of both the ICTY and the ICTR has recognised rape as crime against humanity, as genocide and as a war crime.²²⁰

The ICC Statute is capable of addressing gross violations of children's rights. States must cooperate in the arrest, detention, and, if need be, extradition of suspected war criminals especially as the ICC has no police force.²²¹ The referral of the LRA leaders to the ICC by the Ugandan government is an example to that. About 12,000 abductions of children have occurred since July 2002.²²² Uganda is a party to the ICC Statute and though many of the activities of the LRA occurred before the ICC Statute entered into force, this does not seriously impair the temporary jurisdiction of the ICC.

Two types of child related provisions in the ICC Statute are particularly relevant: crimes against children within the jurisdiction of the ICC (child specific crimes) and special measures to protect children during the investigation and prosecution of cases and. Child specific crimes by definition can only be committed against children. Examples are the genocidal transfer of children from one group to another, the recruitment of children under 15, crimes of sexual violence against children, the genocidal prevention of births, the use of starvation as a method of warfare.²²³

²²⁰ The Prosecutor v. Anto Furundzija (Trial Judgement) IT-95-17/1-T, 10 December 1998, The Prosecutor v. Zajnir Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo IT-96-21-T, 20 February 2001, The Prosecutor v. Jean-Paul Akayesu ICTR-96-4-T, 2 September 1998; International Criminal Justice and Children, No Peace Without Justice, UNICEF Innocenti Research Centre, September 2002, p. 111

²²¹ Luis Moreno-Ocampo, The Rights of Children and the International Criminal Court, pp. 111-119 in International Criminal Accountability and the Rights of Children, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006

²²² Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, p. 103

²²³ International Criminal Justice and Children, No Peace Without Justice, UNICEF Innocenti Research Centre, September 2002, p. 71

3. Girls to the front

Traditionally it is considered that a war allows boys to look like men. This chapter is seeking to answer the question what war could make girls look like.

3.1. Lessons from the real world

3.1.1. The Child-led Wars

In the Philippines child soldiers were used for propaganda purposes. Just like with exploiting women's suffering to stimulate militarism, the sides to the conflict used the death of child soldiers to mobilise outrage against the enemy. They even point to youth volunteerism to encourage adult participation.²²⁴ Alternative measures such as drawing children away from armed groups by offering educational opportunities are not always enough, for in Liberia keeping children in school in the conflict zone merely helped to facilitate recruitment by armed opposition groups.²²⁵

In Africa, conflicts are usually long-running, as has been the case in Angola, Sudan, Somalia, Liberia, Ethiopia, Eritrea, Uganda and Burundi. There is clear evidence of the use of children in these conflicts. Children were recruited throughout the entire Angolan conflict, which lasted for over 30 years. Between 8,000 and 10,000 children in Mozambique participated in the conflict as soldiers, most fighting with RENAMO. The government in the face of FRELIMO also recruited children through co-option.²²⁶ As many as 1 million children

²²⁴ Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict*, Clarendon Press Oxford 1997, p.80

²²⁵ Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict*, Clarendon Press Oxford 1997, p.81

²²⁶ Angela McIntyre, *Children as Conflict Stakeholders: Toward New Discourse on Young Combatants in Vanguard or Vandals: Youth, Politics and Conflict in Africa*, ed. by J. Abbink, Ineke Van Kessel, Leiden; Boston: Brill, 2005, p. 329

were directly exposed to war as civilians and combatants.²²⁷ A significant number of child soldiers in some countries are girls.

The term child-soldier is an oxymoron that manifests the violence that this position does to established social categories. Soldiers in this type of civil wars are often not regular soldiers of the sort who serve in state-sponsored, centrally controlled, and well-disciplined armed forces. Rather, the term refers to the type of fighters who often fill the ranks of guerrilla and rebel groups, inadequately trained and outfitted, often operating under the influence of drugs.²²⁸

In many societies within and beyond Africa, children are portrayed as strong, resilient, and active persons who grow even under difficult conditions. Children are synonymous with wealth because of the contribution they make to the productive work of the family and as a source of security for the future. Thus, children are social actors with an active presence of their own. The definition of childhood in African cultures has little to do with age, although people sometimes refer to age limits.²²⁹ In Mozambique, girls as young as 13 or 14 years of age become wives and mothers soon after. Marriage and motherhood introduce them to the roles and responsibilities of adult womanhood. In such a societal context, emphasis is placed on roles rather than on age. As girls mature, adults tailor their expectations to each girl's particular pattern of growth.²³⁰

²²⁷ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, pp. 11-14

²²⁸ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 51

²²⁹ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 52

²³⁰ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 53

3.1.2. The Discrimination against the Girl-child

The non-discrimination fundamental principle belaying Art.2 of the CRC, among others prescribes gender sensitivity. In relation to child soldiers this is still a major challenge in many settings. Up to 40% of the estimated 300,000 children worldwide associated with armed groups are girls.²³¹ Nevertheless, they remain largely invisible and most people see the image of a boy when being confronted with the term ‘child-soldier’. To the contrary of popular imagery, the generic term “child soldier” includes girls recruited for sexual purposes and forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.²³²

Nevertheless, according to Save the Children, research from the Democratic Republic of Congo (DRC) shows that

“it is a misconception that girls do not take part in combat. In 2002, nearly half the girls associated with armed groups described their primary role as ‘fighting’. The large majority of girl-soldiers are exposed to severe sexual violence. The trauma and stigma attached to such violence often make it very difficult for them to come out in the open with their experiences once the conflict has calmed down or is over. For, “girls returning home are often marginalised and excluded from their communities. They are viewed as violent, unruly, dirty, or as promiscuous troublemakers.”²³³

If post-conflict measures, such as Disarmament, Demobilisation and Reintegration (DDR) or educational programmes, or refugee camp management, fail to recognise these realities of girls’ lives, as has happened so far, the result will be that the girls involved will be discriminated against as the programmes or facilities offered will, in practice, not, or hardly, be accessible and even relevant for them. In practice girls do not manage to use DDR

²³¹ Coalition to Stop the Use of Child Soldiers, Child Soldiers Global Report June 2001 at http://www.child-soldiers.org/report2001/global_report_contents.html

²³² International Criminal Justice and Children, No Peace Without Justice, UNICEF Innocenti Research Centre, September 2002, p. 72

²³³ Dyan Mazurana, Where Are the Girls?, The Women’s Review of Books, Vol. XXI, No. 12, September 2004

programmes in numbers which are proportionate to their association with armed groups.²³⁴ In the case of Save the Children reintegration programmes, for example, less than 2 per cent of the children participating in the DRC programme were girls. Just 4.2 per cent of the girls known to have been in fighting forces went through the formal DDR process.²³⁵

In Northern Uganda, the rebel commanders of the Lord's Resistance Army impregnate many girls and force them to strap their babies on their backs and take up arms against the Ugandan security forces. The girl-child is raised in most parts of the world to follow instructions and this greatly facilitates their recruitment and subsequent use as soldiers. In Liberia, many girls have known no other way of life but violence, which has led to a serious erosion of local value systems.²³⁶ This is why the immediate aftermath of conflict is the moment to assert a positive and constructive place in the society for former girl-combatants.

Today child- and even girl-led conflicts are an everyday reality. Two of the longest and bloodiest ongoing conflicts – the ones in the Northern part of Uganda and the Democratic Republic of Congo are marked by the overwhelming participation of children and especially girls. The Lord's Resistance Army (LRA) has operated in Uganda since 1987, with a vast majority of its fighting forces composed of abducted or conscripted children from villages. These children range in age from 11 to 15, though the LRA has frequently taken children as

²³⁴ Dyan Mazurana, *Where Are the Girls?*, *The Women's Review of Books*, Vol. XXI, No. 12, September 2004

²³⁵ Karin Arts, General Introduction: A Child-Based Approach to International Criminal Accountability, pp. 3-19 in *International Criminal Accountability and the Rights of Children*, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006, pp. 15-16

²³⁶ Nsongurua J. Udombana, *War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict*, *Temple Int'l & Comp. L.J.* [20.1.2006], pp. 57-109, p. 71

young as six.²³⁷ The LRA had, by 2001, abducted 26,615 children; indeed, the International Criminal Court estimates that over 85% of the LRA's forces are made up of children.²³⁸

The major difference between the present conflicts in Northern Uganda and the DRC and those in Mozambique and Angola 15 years ago is that few of the girls in Mozambique and Angola took part in direct combat on the front lines. But this does not mean that they were non-combatants; rather, it shows that within the military institution, the notion that direct combat is a man's business was still prevalent not long ago. In all the cases girls were trained and armed, and used to guard the camps.²³⁹

Labour and sexual exploitation, coupled with deprivation, impaired the girls' physical development. Violence, terror and abuse left emotional scars. Other consequences of the wars in Mozambique and Angola were the widespread incidence of sexually transmitted diseases and especially HIV/AIDS. 'Old rules' moral customs and notions did not stay intact after all this bouleversement caused by war. They changed drastically. When girls, presumably raped by or 'married to' a soldier in the past, were ready to settle down they came to discover that they were perceived as cheap, devalued and an easy prey for abuse and deception. Children fathered by unknown soldiers were sometimes accepted by the families and communities of their mothers, named and taken care of. Other times such children were rejected as "bush bastards".²⁴⁰ Years after the wars in Mozambique and Angola some of these young women work with NGOs implementing vocational and educational opportunities, helping girls with a

²³⁷ Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, at pp. 64-65

²³⁸ Nsongurua J. Udombana, War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict, Temple Int'l & Comp. L.J. [20.1.2006], pp. 57-109, at pp. 64-65

²³⁹ Alcinda Honwana, Child Soldiers in Africa, University of Pennsylvania Press, Philadelphia 2006, p. 102

²⁴⁰ Vivek Maru, Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide, 432 The Yale Journal of International Law, Vol. 31: 427

similar fate.²⁴¹ Some others never escaped the vicious circle of violence and abuse, and became prostitutes or live on the streets of the big cities.

As Dyan Mazurana points out in the seminal study “Where are the girls?” “Girls have become indispensable members of many armies, in Africa and around the world. Their recruitment is [...] brutal and their reintegration into the community difficult.” An overview of the experience of girl participation in conflict in several African countries discloses the gravity of the phenomenon. Particular examples of war-torn societies (such as Mozambique, Angola, Sierra Leone, Northern Uganda, etc.) and previous attempts in the field of rehabilitation and reintegration of girl-soldiers require critical examination.

3.1.3. Lessons learned

War-affected populations have to start from scratch to try to rebuild their lives, make sense of their present, and regain their dignity. There are many perspectives on healing war trauma and facilitating post-war reconciliation. Local understandings of war trauma, healing, and community cohesion are vital when dealing with populations affected by conflict and political violence. Research undertaken in Mozambique and Angola suggests that, at the local level, families as well as traditional chiefs and healers have taken responsibility for healing the social wounds of war.²⁴² Girl-soldiers’ relatives and co-villagers have recognised that young people who had been changed into instruments of death must be transformed in order to return to family and community life. Otherwise, they face risks and pose dangers to themselves and others.²⁴³

²⁴¹ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 102

²⁴² Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 133

²⁴³ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 51

Different kinds of ritual healing and purifying performances are quite frequent in rural areas in Africa as people try to deal with the social wounds of war and reconstitute their lives. Those individuals who have been exposed to war are not easily accepted back into society. Those who have been exposed to war, who killed or saw people being killed, are regarded as polluted. This pollution is believed to arise from contact with death and bloodshed. People who were caught up in war are contaminated by the spirits of the dead and are potential contaminators of the social body. African societies have long-established rituals for treating the disturbances that arise from participation in war.²⁴⁴

The ways of addressing the consequences of involvement of girls in war are also ways of preventing the problem. Evaluating the effectiveness of international humanitarian law designed to prevent the participation of children in armed conflicts is important. However, the essential step is to find and explore the relation of international conventions to the norms and value systems of African societies. Ways should be found to understand the causes of behavioural patterns such as some parents' inclination to encourage their daughters to become soldiers if their marriage prospects are poor.

3.2. The double invisibility of girls

3.2.1. What Does Being a Girl Really Mean?

While entire communities suffer the consequences of armed conflict, women and girls are particularly affected because of their status and their sex. This is compounded by the life-long social, economic and psychologically traumatic consequences of armed conflict.²⁴⁵ The construction of social sex and gender roles, combined with the generally subordinate social and economic position of females, mean that women suffer in particular ways during and after

²⁴⁴ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 105

²⁴⁵ Beijing Declaration, as adopted by the Fourth World Conference on Women, September 1995; <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm>, Women and Armed Conflict, para 135

conflict.²⁴⁶ For example, female sexuality is often used as a reward and prop for male military action.²⁴⁷

Even in peacetime girls are often treated as inferior and are socialised to put themselves last, thus undermining their self-esteem. Discrimination and neglect in childhood can initiate a lifelong downward spiral of deprivation and exclusion from the social mainstream.²⁴⁸ Girls' powerlessness and dispossession in most societies is so vast that it could be presumed that recruitment into the armed forces is always involuntary.

The knowledge of the disadvantaged situation of the girl-child among policy-makers, planners, administrators and implementators at all levels, as well as within households and communities is very limited.²⁴⁹ Discrimination against the girl-child starts even before she is born. Son preference, which results in harmful and unethical practices such as female infanticide and prenatal sex selection, do not allow the girl-child to appear in this world. In the developed countries, this is often compounded by the increasing use of technologies to determine foetal sex, resulting in abortion of female foetuses.²⁵⁰ In the developing world, early marriage, including child marriage, violence against girls, sexual exploitation, sexual abuse, discrimination in food allocation, nutrition, access to health services and other practices related to health and well-being follow the girl-child as she grows up.

²⁴⁶ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, p. 251

²⁴⁷ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, p. 253

²⁴⁸ Beijing Declaration, as adopted by the Fourth World Conference on Women, September 1995; <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm>, The Girl-child, para 260

²⁴⁹ Beijing Declaration, as adopted by the Fourth World Conference on Women, September 1995; <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm>, The Girl-child, para 278 a

²⁵⁰ Beijing Declaration, as adopted by the Fourth World Conference on Women, September 1995; <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm>, The Girl-child, para 277 c

In 1990, 130 million children had no access to primary school; of these 81 million were girls.²⁵¹ An estimated 450 million adult women in developing countries are stunted as a result of childhood protein-energy malnutrition.²⁵² More than 15 million girls aged 15-19 give birth each year.²⁵³

Public awareness of the impact of armed conflict on children focuses almost entirely on boys and young men, as do governments, non-governmental and international programmes to demobilise and reintegrate former combatants into society. Girls and young women usually appear in news stories about civil wars as civilians who are victimised by irregular soldiers. Otherwise, girls are subsumed within the civilian populations who are displaced from their homes or injured by landmines. They are lumped into aggregate categories and included in statistical reports along with the adults of both sexes.²⁵⁴

Girls are more vulnerable than boys to the consequences of unprotected and premature, especially coercive, sexual relations.²⁵⁵ Girls in areas of conflict are particularly vulnerable.²⁵⁶ Caring for physically and psychologically injured fighters, the elderly and traumatised

²⁵¹ Beijing Declaration, as adopted by the Fourth World Conference on Women, September 1995; <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm>, The Girl-child, para 263

²⁵² Beijing Declaration, as adopted by the Fourth World Conference on Women, September 1995; <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm>, The Girl-child, para 266

²⁵³ Beijing Declaration, as adopted by the Fourth World Conference on Women, September 1995; <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm>, The Girl-child, para 268

²⁵⁴ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 75

²⁵⁵ Beijing Declaration, as adopted by the Fourth World Conference on Women, September 1995; <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm>, The Girl-child, para 269

²⁵⁶ Beijing Declaration, as adopted by the Fourth World Conference on Women, September 1995; <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm>, The Girl-child, para 271

children, falls most heavily upon young women.²⁵⁷ Young women whose families are torn apart, whose means of education and livelihood are destroyed, and whose home places are riddled with landmines, have some distinctive characteristics related to both their youth and their gender.²⁵⁸

First, international humanitarian law agreements have been entirely ineffective in protecting girls in situations of armed conflict. The restrictions on military actions that are stipulated by these conventions are very difficult to enforce during civil wars with irregular military forces and attenuated state structures.²⁵⁹ The defining features of militias in postcolonial conflicts fit uneasily into IHL paradigms. The violations of international law committed by the militias are part of the violence which blurs the distinction between combatants and non-combatants and turns civilians into primary targets of military action.

Second, the definition of childhood used in these treaties is inappropriate to the social and economic conditions of African societies, even in peacetime. Just like with gender roles, notions of childhood and the processes that mark the transition from childhood into adulthood are socially constructed. They vary from one society to another and are based on the specific social and economic conditions.²⁶⁰ Extreme social crises of protracted civil war compel a displacement of responsibilities from adults to children. Many children assume roles that in normal circumstances would be filled by adults.²⁶¹ Many girls undertake tasks originally thought appropriate only for boys – and not solely by participating in armed conflict.

²⁵⁷ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, p. 255

²⁵⁸ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 75

²⁵⁹ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 157

²⁶⁰ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 157

²⁶¹ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 157

3.2.2. What is the Double Negative of Girls' Rights?

More and more often girls are specifically targeted in armed conflict and become victims of innumerable acts of violence because of both their sex and age. Armed conflict threatens their physical and mental integrity and individual development. The younger they are, the more vulnerable they are.²⁶² They have to fulfil new duties incumbent on them due to the occurrence of the conflict – to take care of younger siblings, old parents and often give birth to children of their own as a consequence of abduction, captivity, rape, forced marriages and joining the armed groups.²⁶³

The reaction of the international legal system to the effect of armed conflict on the girl-child and young women can be described as lame and at best ambiguous. International law has responded more readily to the harms typically sustained by men and boys than those directed against females. To take a simple example, the Working Group on Disappearances (which typically affect males disproportionately as compared to females) was formed in 1980 by the UN Commission on Human Rights, while the mandate of the Special Rapporteur of Violence against Women was not established until 1994. Further, the consequences for female family members of disappeared men are not always acknowledged.²⁶⁴

Girls are females. Their legal, cultural and social position in many countries is already precarious enough in peacetime. Conflict cuts their access to the most basic of rights such as the access to health care, water, food and shelter. Girls are also children. Their stage of

²⁶² Second International Policy Conference on the African Child: Violence Against Girls in Africa, Addis Ababa, 11-12 May 2006, Violence against Girls in Africa during Armed Conflict and Crises, ICRC

²⁶³ Second International Policy Conference on the African Child: Violence Against Girls in Africa, Addis Ababa, 11-12 May 2006, Violence against Girls in Africa during Armed Conflict and Crises, ICRC

²⁶⁴ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, p. 251

development and dependence on others for their well-being contributes to their vulnerability. Conflict destroys their natural surroundings, the family and the community.

In her analysis of South Africa's 'twilight war' in the 1980s, Cock has shown how women of different class and race were affected in quite separate ways. Different age changes female experiences of war in a similar vain. Cock has described females as becoming 'protectors', 'protected', 'resisters', 'militarists' and 'victims'. In each case sex and gender was a defining factor in experiencing the conflict. Cock has also argued that: War is a gendering activity [...] thus enhancing gender relations is one of the essential tasks for reducing the risks of war in the future.²⁶⁵

The so called "continuum of discrimination" and harmful practices against women and girls explain some of the forms of violence perpetrated against girls in armed conflict.²⁶⁶ Peacetime facially neutral treatment of females with disparate impact, all types of hidden, masked and invisible structural discrimination²⁶⁷ and culturally determined preference for male members of society are fast to shine through the decomposing social fabric during armed conflict. Armed struggle and political violence enhance and exacerbate the gendered social tensions which consequently surface in the ugliest of forms (mass rapes, mutilation, sexual slavery, etc.).

Thus discrimination and harmful practices not only continue during war but magnify, perpetuating the cycle of female subordination and gender-based abuse. At the end young women and girls are left with one single means of gaining respect – holding a gun in their

²⁶⁵ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, p. 252

²⁶⁶ Second International Policy Conference on the African Child: Violence Against Girls in Africa, Addis Ababa, 11-12 May 2006, Violence against Girls in Africa during Armed Conflict and Crises, ICRC

²⁶⁷ Ruth Ben-Israel, *Equality and the Prohibition of Discrimination in Employment*, Chapter 12 in *Comparative Labour Law and Industrial Relations in Industrialised Market Economies*, Kluwer Law International, VIth edition, 1998, pp. 239-275

hands. In Ethiopia, the Ethiopian People's Democratic Front (EPRDF) was composed of approximately 1/3 female fighters. Their stories are accounts of desperation rather than political awareness: "I became a fighter because my best friend went to the fighters. I went with her because it was better than staying." "I joined the fighters to escape marriage. I was married when I was 12 and the only option to escape was to join the fighters."²⁶⁸

3.2.3. What Comes Next?

The post-war reintegration process for girls and young women is marked by sexually transmitted diseases, HIV, child bearing and child rearing, worsened or non-existent marriage prospects and unemployment.²⁶⁹ Even more importantly, conflict interferes with the identity formation of the girl. Among girl combatants the gravest problems they face upon return lie in reconciling to a civilian identity.²⁷⁰ Abuses perpetrated by girl-soldiers always require rehabilitative responses rather than retributive measures.²⁷¹ The actual recruitment of young females or their participation in conflict may not fit easily within traditional descriptions or interpretations of rights. The fundamental weakness of both human rights and international humanitarian law mechanisms is their inability to reach non-governmental entities and their lack of an effective fact-finding capacity, a feature of international adjudication that reflects traditional conceptions of sovereignty and non-intervention²⁷². This maintains the protected spheres of female oppression - the family and the state. It is important to know just who the

²⁶⁸ Angela McIntyre, *Children as Conflict Stakeholders: Toward New Discourse on Young Combatants in Vanguard or Vandals: Youth, Politics and Conflict in Africa*, ed. by J. Abbink, Ineke Van Kessel, Leiden; Boston: Brill, 2005, pp. 338-339

²⁶⁹ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 146

²⁷⁰ Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict*, Clarendon Press Oxford 1997, p. 133

²⁷¹ Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict*, Clarendon Press Oxford 1997, p. 137

²⁷² Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict*, Clarendon Press Oxford 1997, p. 160

girl-soldier is in a given conflict and to what extent she has exercised any agency. Only with that knowledge base can we begin to deal with the factors producing voluntary involvement.²⁷³

3.3. Conflict and gender: prosecution of gender-based violence

3.3.1. The Gender of War

The transition from civilian into soldier constitutes a carefully designed process of reconfiguring identities. This passage is especially dramatic in situations of armed combat, when children move from being protected to risking their own lives to protect others. Military conscripts submit to a training regimen that encourages and rewards competitiveness, insensitivity, and aggression. This transition is supposedly particularly acute with girl-soldiers given the traditional perception of women as cooperative, unselfish, and mild as opposed to the characteristics enumerated above.²⁷⁴

Dominance is encouraged, but only over the enemy; obedience to superiors is inculcated. The physical condition of soldiers is enhanced to suggest power and strength. The military institution is a locus for the creation of a specific form of masculinity. Cock posits a direct connection between masculinity and militarism:

“The army is an institutional sphere for the cultivation of masculinity; war provides the social space for its validation. Women generally occupy marginal positions because military discourse and ideology are heavily drawn from gender definitions that cast women as weak, prohibited from aggressive behaviour, and subordinated to men”.²⁷⁵

²⁷³ Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict*, Clarendon Press Oxford 1997, p.168

²⁷⁴ Martha Albertson Fineman, *What Place for Family Privacy?*, *George Washington Law Review* June-August 1999, *Privacy and the Law: A Symposium Privacy and the Family*, pp. 1207-1224

²⁷⁵ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 53

These gendered paradigms suffice to explain the prevalence of gender-based violence during war. Nevertheless, the motives for using sexual violence as a tool of war are much more intricate. It is used for a variety of reasons ranging from the belief that raping a virgin cures HIV/AIDS or gives additional power to the warrior to the exploit of widespread rape to achieve the military objectives of the parties to the conflict. Sexual abuse of young women was rife, for example, in the conflicts in the Former Yugoslavia and Rwanda, and indeed is commonplace in almost all situations of armed conflict.²⁷⁶

The impact of war on young women forcibly recruited from their homes to live in military camps, the change of their civilian status, as they learned to live as soldiers, and their daily life became conditioned by war placed them in a twilight position between civilian and military life.²⁷⁷ The phrase girl soldier itself is an oxymoron. Military activities and militarisation of girls are parallel to the use of their domestic work skills and labour exploitation, as well as their sexual objectification. Thus, girls' agency is clearly different from boy-soldiers' agency during conflict.

The basis for official exclusion of women from combat positions seems to be that women are intrinsically unsuited for such activity. Western demobilisation programmes often also leave out soldiers under the legal age for military recruitment. They are focused primarily on males, leaving out girls and young women who had been held captive in the service of military forces.²⁷⁸

A number of states have, for example, made reservations to the CEDAW which stipulates equality in public life, on the basis that the principle of equality cannot be extended

²⁷⁶ Jenny Kuper, *International Human Rights Treaty Law and Related Instruments Relevant to Child Civilians in Armed Conflict*, Oxford University Press, 1997, p. 49

²⁷⁷ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 78

²⁷⁸ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 136

to combat and combat related duties.²⁷⁹ War is a field normally conceptualised in terms of male discourse and characteristics. Men are seen as the principal protagonists. Women are usually featured as victims or as loyal supporters who keep the home fires burning and nurse the wounded. Yet, women's roles in war go far beyond these. War must be reinterpreted in the light of women's involvement.²⁸⁰

3.3.2. The "Prosecution of Gender"

Young girls are most often targeted for sexual abuse because they are less capable of defending themselves and because they are perceived as being less likely to have sexually transmitted diseases and HIV/AIDS.²⁸¹ Of particular relevance to girls, according to the Rome Statute of the ICC, to constitute rape, an act must have been committed against a person incapable of giving genuine consent, which includes age-related incapacity. Consent cannot be inferred from the words or conduct of a person incapable of giving genuine consent. The same considerations with regard to genuine consent and age-related incapacity, apply to the crime of enforced prostitution. While the Rome Statute does not explicitly consider sexual violence as genocide, recent jurisprudence by the ad hoc tribunals for Former Yugoslavia and Rwanda has created precedents according to which sexual violence had been found to constitute genocide.²⁸²

A special focus on crimes against women and children in International Criminal Law can contribute not only to the development of case law in this domain but can give the

²⁷⁹ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, p. 258

²⁸⁰ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 77

²⁸¹ International Criminal Justice and Children, *No Peace Without Justice*, UNICEF Innocenti Research Centre, September 2002, p. 77

²⁸² *The Prosecutor v. Jean-Paul Akayesu* ICTR-96-4-T, 2 September 1998; International Criminal Justice and Children, *No Peace Without Justice*, UNICEF Innocenti Research Centre, September 2002, p. 79

necessary recognition to women and children, two of the most vulnerable groups in war. According to An Michels, the Special Court on Sierra Leone, for example, can play a role as a catalyst for efforts to reshape society. The introduction of “forced marriage” – a crime that had never been previously addressed by an international tribunal - is an example of the beneficial impact of the SCSL jurisprudence.²⁸³

The CRC addresses a major issue for children, and especially the girl-child, in situations of armed conflict, and that is their entitlement to protection from all forms of physical or mental violence, including sexual abuse and exploitation (Art. 19 and 34). In addition to that, according to CRC’s Art.13 the courts, international justice and truth-seeking mechanisms need to be adapted to facilitate children’s participation. This is an imperative when it comes to the girl-child. Such institutions ought to establish procedures that fulfil the right enshrined in Art.13 by creating safe and comfortable environment, providing adequate assistance for the child in the form of child supporting personnel and shielding the child-witness from visual contact with the accused and, of course, by consulting with each child.²⁸⁴

Rethinking procedures before international tribunals, including the methods by which evidence can be presented and the examination in chief and cross-examination of victims can be conducted, might help to make international justice mechanisms more “girl-friendly”.²⁸⁵ Justice and truth-seeking processes in the aftermath of conflict should also systematically pay attention to the “full range of children’s wartime experiences, the circumstances that allowed

²⁸³ An Michels, ‘As If It Was Happening Again’: Supporting Especially Vulnerable Witnesses, in *Particular Women and Children, at the Special Court for Sierra Leone*, pp. 133-147 in *International Criminal Accountability and the Rights of Children*, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006

²⁸⁴ *International Criminal Justice and Children, No Peace Without Justice*, UNICEF Innocenti Research Centre, September 2002, p. 39

²⁸⁵ An Michels, ‘As If It Was Happening Again’: Supporting Especially Vulnerable Witnesses, in *Particular Women and Children, at the Special Court for Sierra Leone*, pp. 133-147 in *International Criminal Accountability and the Rights of Children*, Karin Arts and Vesselin Popovski, Hague Academic Press, 2006

such abuses to occur and the long-term interventions required to ensure rehabilitation and reintegration”.²⁸⁶

3.4. Change of gender roles in conflict: feminism revisited

3.4.1. The Gender and Generational Transgressions

War forces girls into unfamiliar roles in the family, the community and the public sphere which often challenge and redefine their cultural and social identities. Girls mature more quickly and acquire new levels of responsibility and independence. Still, in many societies, women and girls only gain status through marriage and thus their incapability of getting married (due to enforced pregnancies, rape, or their status as captive “wives”) dims any prospects for them. Or alternatively, they are forced into early marriages to “protect them” from abduction by the warring factions.²⁸⁷

Direct involvement of girls and young women with the military forces commences with kidnapping and continues with captivity and sexual exploitation. Girl soldiers’ stories are accounts of beatings, fighting, looting, and serving the military. Girls are fighters, domestic labourers, looters, both participants and witnesses of violence and terror.²⁸⁸ While sexual violence is an important feature of their experiences of war – and this intimate violation of their dignity and sense of self often initiates them into other forms of violence – exclusive focus on the sexual dimension of violence has often obscured the complexity of girls’ roles and experiences in armed conflict.²⁸⁹

²⁸⁶ International Criminal Justice and Children, No Peace Without Justice, UNICEF Innocenti Research Centre, September 2002, p. 47

²⁸⁷ Second International Policy Conference on the African Child: Violence Against Girls in Africa, Addis Ababa, 11-12 May 2006, Violence against Girls in Africa during Armed Conflict and Crises, ICRC

²⁸⁸ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 76

²⁸⁹ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 76

The conditions of civil war generate a distorted, destructive, and problematic form of masculinity not aligned with civil society in peacetime. In a striking reversal of normal generational relationships, adults sometimes surrendered to the power of guns wielded by very young soldiers. This situation represents a drastic inversion of ordinary relations between the generations.²⁹⁰

A feature of the new warlike persona of child soldiers is their severed ties with the home and the community. Communal complicity in recruitment points to the fact that responsibility for participation of children in wars should be carried not only by the sides to the conflict. The parties to the conflict are associated with commission of war crimes and all types of atrocities but also the people who under normal circumstances are expected to be carers and protectors of children have their share in child-recruitment.²⁹¹

Nevertheless, the position of women during armed conflict is not always entirely negative. Women change a lot during war; expand in all kinds of ways, whereas men over the same period shrink into a smaller and smaller space. Some wars have presented some women with the opportunity to gain freedoms and to enjoy new status.²⁹² Women's active participation in nationalist and revolutionary struggles has sometimes facilitated their subsequent assertion of political and social rights. However, it has been very difficult for women to retain social and political advancement after the conflict is over, because of being required to give up power and responsibility by government policies designed to return men to employment and to restore traditional sex and gender roles.²⁹³

²⁹⁰ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 53

²⁹¹ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 53

²⁹² Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, p. 256

²⁹³ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, p. 257

3.4.2. The Female Face of Use of Force, Self-determination and Economic and Social Rights

Women are rarely involved in decisions about the use of armed conflict and its process. Nationally, government bodies dealing with defence and international relations have few women representatives. This exclusion is replicated internationally. Women seldom sit as members of delegations on the United Nations Security Council and are inadequately represented in security and conflict resolution committees.²⁹⁴

The gendered dimensions of the right to self-determination are also worth being taken into account. A successful outcome to a group claim to self-determination can have an adverse impact upon women within the group. Denial of the right to self-determination to the Saharawi people, on the other side, has provided women with the space to assert their own interests within the group. Saharawi women recognise that if self-determination is achieved they will have to confront the problem of maintaining the legal and social status they have acquired.²⁹⁵

Cases of assertion of the right to self-determination in countries like Western Sahara and Afghanistan illustrate the various ways by which women are factored out of the scope of international law decisions relating to the use of force. In the case of Western Sahara no attention is paid to the preservation of the advances of women in the international monitoring of the process of self-determination. The support offered by the United States for the right to use force to achieve self-determination in Afghanistan took no account of its implications for

²⁹⁴ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, p. 257

²⁹⁵ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, p. 265

women and no guarantees for women's rights were included in the 1988 Geneva Peace Agreements.²⁹⁶

The issues of economic and social rights as well as humanitarian intervention are pertinent to the situation of women and girls in conflict. Fernando Teson has argued that foreign intervention to protect socio-economic rights in states where civil and political rights are observed is an unjustifiable intrusion into their territorial and political sovereignty because such decisions are matters of government policy, not of human rights. This limited approach is especially problematic for women. In many instances violations of women's economic and social rights may be as life-threatening as denial of civil and political rights. However, even considerable denial of women's civil and political rights has not led to forceful intervention, for example in Kuwait, Saudi Arabia or Afghanistan.²⁹⁷

Discrimination against women and girls can have serious repercussions on the success of international relief and reconstruction programmes. The solution lies in discontinuing aid whenever such discrimination occurs and the Security Council imposing sanctions, something which has not happened so far.²⁹⁸

3.4.3. The Social Construction

According to Giddens all human action is framed by social structures (be they gender or age-structures) that shape relations of power, conceiving power as presuming regularised relations of both autonomy and dependence between actors in contexts of social interaction.²⁹⁹ Armies of child soldiers and now even armies of girl soldiers exist not simply because of a

²⁹⁶ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, p. 267

²⁹⁷ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, p. 269

²⁹⁸ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, p. 269

²⁹⁹ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 70

shortage of manpower but through the concerted actions of local leaders responding to the global forces described above. Recruitment is a carefully orchestrated process of identity reconfiguration aimed at cutting links with society and transforming children into merciless killers.³⁰⁰ Non-intervention here equals preserving existing power structures and shielding abuses of human rights. Such an approach of non-intervention in the domestic affairs of a state would amount to the principle of protection traditionally accorded in national legal systems to the family unit against state intrusion which perpetuates patterns of domestic violence.

3.5. In Quest of Solutions

The process through which young women associated with armed forces try to reconstitute themselves and their lives in the aftermath of conflict is another struggle to which they return after the war is over.

The last part of this thesis will discuss the solutions of the problems of the human rights of girl-soldiers. Most of these solutions lie naturally in the realm of post-conflict development, nonetheless due to the *a posteriori* character of most of the remedial mechanisms (i.e. the international tribunals and quasi-judicial bodies) and the limited possibility of intervention during conflict while the girls are still on the battlefield. The solutions offered are mainly connected to the re-establishment of the fabric of society and the potential it holds for a reformulation of gender roles.

3.5.1. The Social Transformation Within

Post-war reconstruction can benefit from the strategies disruptive of gender hierarchies which evolved during the conflict. Undocumented histories of women's local resistances to

³⁰⁰ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 73

dominating and controlling forms of power abound during war.³⁰¹ In the process of reinventing strategies to achieve women's full humanity through the discourse of universal human rights, the stories of girl-soldiers occupy an important place.

Alternative gender dualities which emancipate women can be produced in contrast to the existing paternalistic dualities thanks to the new fields of female expansion during war. One option may be to reverse the existing gender scripts so that, for example, men are produced as nurturers and carers and women as breadwinners³⁰² after war. A second conceivable method of disrupting the hierarchies of gender after the conflict might be to particularise the masculine universal³⁰³ in much the same way as the feminine has been made specific in human rights law. This would involve re-imagining men as injured by the hierarchies of gender. Conscription into the armed services is one example of enforcing forms of masculinity which many men find coercive and oppressive. Thus the militarised man could be the injured subject.³⁰⁴

The enormity of the violation of social norms that civil war entails is revealed in the profound contradiction between the ways in which children normally relate to the adults and the ways in which they come in contact with death in wartime.³⁰⁵

Cultural and social expectations regarding gender roles and responsibilities put enormous pressure on demobilised girls. Some of the former girl-combatants are reluctant to

³⁰¹ Dianne Otto, Disconcerting 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law, pp. 105-131 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 125

³⁰² Dianne Otto, Disconcerting 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law, pp. 105-131 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 125

³⁰³ See *supra* Chapter One, Part One, 1.1.1

³⁰⁴ Dianne Otto, Disconcerting 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law, pp. 105-131 in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena Manji, Hart Publishing, 2005, p. 126

³⁰⁵ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 107

return for fear of ostracism, reprisals, rejection and the stigma associated with the participation in the belligerency as part of gender hierarchies. Most of the girls have broken down the traditional barriers and enmeshed with the gender of conflict. Their transgression is difficult to clue especially when they bear or have already given birth to children.

3.5.2. The International Lane

3.5.2.1. The Assistance Approach

The first question remains whether evading or manipulating the law is better than engaging the law in vindicating violated girls' rights. Foreign governments that fuel armed groups and opposition entities should be put under political strain to sever their support or exercise their political and economic influence to pressure such groups to respect the pertinent international norms.³⁰⁶

A population or group that blames its government for abuses or rights violations is unlikely to request or accept responsive efforts that do not redress the original violation. Local and international NGOs thus have a major responsibility to address the needs of populations and girl-soldiers in zones under NGE control.³⁰⁷ Institutions, such as the UNICEF should meet with NGOs and experts and those concerned with the improvement of health services, education, employment, and social services with the aim of rehabilitating girl soldiers.³⁰⁸

The UN should consult with, and supply technical assistance to, those governments and NGOs that seek to better understand and apply current norms regarding the recruitment of

³⁰⁶ Claire Breen, The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict, Human Rights Quarterly Vol. 25, No. 2 (May 2003), pp.453-481, The Johns Hopkins University Press, Stable URL: <http://www.jstor.org/stable/20069672> at pp. 462-463

³⁰⁷ Ilene Cohn and Guy S. Goodwin-Gill, Child Soldiers: The Role of Children in Armed Conflict, Clarendon Press Oxford 1997, p. 125

³⁰⁸ Claire Breen, The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict, Human Rights Quarterly Vol. 25, No. 2 (May 2003), pp.453-481, The Johns Hopkins University Press, Stable URL: <http://www.jstor.org/stable/20069672> at pp. 462-463

children and their participation in hostilities. Taking into account the difficulty of enforcing compliance with human rights and humanitarian law in situations of non-international armed conflict and the problem of establishing and implementing legal measures for the protection of girls in internal disturbances, combined approaches on all levels seem to have the brightest prospects.

Both the UN and NGOs should supply the necessary help to children suffering from physical and psychological problems as a consequence of their participation in armed conflict.³⁰⁹ Special attention should be paid to combating gender stereotyping within the UN and the NGOs' organisational cultures.

And if we have answered the first question to the negative³¹⁰ we must then ask a further question of great significance. It is whether the girls who have suffered so much can be turned into subjects who have agency to struggle for their rights. Even if this is the case, the traditional use of international criminal tribunals and individual complaints mechanisms still depends on many factors. These include the victim's awareness of the applicable international legal regimes (if indeed there are any in the particular case) and the availability of adequate evidence. Since all these ingredients tend to be in short supply, the pertinent procedures have not generally been invoked in relation to girls in conflict situations.³¹¹

It is to be hoped that after an activation and improvement of the existing humanitarian law and human rights jurisdictions a greater use will increasingly be made of such procedures and girls' rights violations will be addressed in various fora. But it should be noted that unless

³⁰⁹ Claire Breen, *The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict*, *Human Rights Quarterly* Vol. 25, No. 2 (May 2003), pp.453-481, The Johns Hopkins University Press, Stable URL: <http://www.jstor.org/stable/20069672> at pp. 462-463

³¹⁰ Whether evading or manipulating the law is better than engaging the law in vindicating violated girls' rights

³¹¹ Jenny Kuper, *International Human Rights Treaty Law and Related Instruments Relevant to Child Civilians in Armed Conflict*, Oxford University Press, 1997, p. 40

the practice of recruitment or use of girls to participate in hostilities attains a significant magnitude, it will not reach the level of seriousness necessary for prosecution by an international judicial body. Support and advocacy for better and more reliable birth registration mechanisms (especially for girls) are needed in order to enhance the protection of children.

3.5.2.2. The Empowerment Option

According to the positions of various NGOs both the Committee on the Rights of the Child and the Human Rights Committee should question states parties about their recruitment of those under the age of 18 years into the armed forces. States should make unilateral declarations in which they would pledge not to recruit persons under 18 years into their armed forces. States parties to the Geneva Conventions should raise the age of recruitment into the armed forces to 18 years.³¹² The role of such regulation mechanisms is only modest but the set an example and action should be pursued on all fronts and levels.

The inclusion of the recruitment of children under the age of 15 as a war crime reflected customary international law at the time of the adoption of the Rome Statute (based on Art.38/CRC, Art.4(3) c/Additional Protocol II, Art.77(2) and (3)/Additional Protocol I).³¹³ However, the Optional Protocol to the CRC's entry into force signifies the gradual emergence of a new standard. This might be among the first amendments proposed for the Rome Statute. Such a strengthening of the Statute should be advocated and lobbied for as one of the possible solutions to the plight of girl soldiers.³¹⁴ All solutions need to aim at improving the girl-

³¹² Claire Breen, The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict, Human Rights Quarterly Vol. 25, No. 2 (May 2003), pp.453-481, The Johns Hopkins University Press, Stable URL: <http://www.jstor.org/stable/20069672> at pp. 462-463

³¹³ Ilene Cohn and Guy S. Goodwin-Gill, Child Soldiers: The Role of Children in Armed Conflict, Clarendon Press Oxford 1997, p. 163

³¹⁴ International Criminal Justice and Children, No Peace Without Justice, UNICEF Innocenti Research Centre, September 2002, p. 76

child's security or capacity to effect change without a gun. Nevertheless, neither treaties nor laws alone are enough to bring child recruitment to an end.³¹⁵

Further, apart from the crime of underage recruitment, it is important that sexual crimes committed against girls are carefully reviewed in all indictments and deliberations before the ICC. Crimes involving sexual violence against children should form specific and separate indictments, on the basis of an overall pattern of sexual violence committed against the civilian population.³¹⁶

While prevention is the principal objective, the recommendations on the protection of girl soldiers must be sufficiently flexible and extensive also to deal with the consequences.³¹⁷ Thus, an important aspect of the ICC is its ability to order reparations for victims of crimes within the jurisdiction of the Court, including child victims. The Court may make orders for convicted persons to pay reparations to victims for damage, loss or injury (rules 94-98). Awards for reparations can also be made through the Trust Fund established pursuant to the Rome Statute (Art.79).³¹⁸

The CRC Committee should undertake a study of the recruitment of children into the armed forces and, consequently, their participation in hostilities. The Committee should draw up a General Comment on Art.38 that would clarify the obligations incumbent upon states parties by that article.³¹⁹

³¹⁵ Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict*, Clarendon Press Oxford 1997, p. 169

³¹⁶ International Criminal Justice and Children, *No Peace Without Justice*, UNICEF Innocenti Research Centre, September 2002, p. 80

³¹⁷ Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict*, Clarendon Press Oxford 1997, p. 175

³¹⁸ International Criminal Justice and Children, *No Peace Without Justice*, UNICEF Innocenti Research Centre, September 2002, p. 86

³¹⁹ Claire Breen, *The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict*, *Human Rights Quarterly* Vol. 25, No. 2 (May 2003), pp.453-481, The Johns Hopkins University Press, Stable URL: <http://www.jstor.org/stable/20069672> at pp. 462-463

The institutions set up in Sierra Leone are likely to provide useful precedents for policies and practices for children's involvement in future judicial and non-judicial mechanisms. Such examples include counselling, foster care, training programmes, disarmament, demobilisation and reintegration opportunities, alternative and non-custodial sentences. Within the crimes under Sierra Leone law, prosecutions can be brought against persons accused of abusing girls under the age of 14 or abducting girls "for immoral purposes". The Sierra Leone Truth and Reconciliation Commission reports on the ways in which children were recruited and used, the Special Court prosecutes those responsible for recruiting and using children as soldiers.³²⁰

3.5.3. The African Way

3.5.3.1. The Community Rituals

After a war, when soldiers and refugees return home, cleansing or purification rituals are a fundamental condition for individual and collective healing and protection. They are also important means of conflict resolution, reconciliation, and social reintegration of war-affected persons.³²¹ Children's participation in war is a grave, dangerous, and ongoing violation of their society's most fundamental distinctions between the worlds of life and death and the boundaries between young persons and the spirits of the dead. Former child soldiers expressed fear, guilt, anxiety, and depression, although many showed enormous resilience.³²²

Traditional African forms of healing emanate from a holistic approach to health. These forms of healing are also indigenous and pluralistic – they are popular among rural communities and include several forms of healing. Children may be asked about their

³²⁰ International Criminal Justice and Children, No Peace Without Justice, UNICEF Innocenti Research Centre, September 2002, p. 86

³²¹ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 106

³²² Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 108

experiences as part of the treatment, but verbalisation is not a fundamental condition for healing. The ritual complexes for greeting and cleansing returning girl soldiers resemble traditional rites of passage or transitions because they represent a symbolic change of status.³²³ Sometimes returned young combatants are not comfortable immersing themselves in these cultural and religious traditions. However, they are often confronted with the need to be pardoned and accepted back in order to belong, especially in light of their participation in the war. Social stigma and intolerance might drive them to conform to local practices.³²⁴

Cleansing and purification rituals for girls and young women are the same as the ones for former boy-soldiers. Most often they are performed by elderly women, traditional healers, and priests from local churches. In certain cases of girls, because their bodies had been violated through rape and other forms of sexual abuse, they have to drink some herbal remedies to purge their body.³²⁵ These rituals do not focus exclusively on the physical body; they are also intended to deal with the emotional and psychological problems that affect the young women. These protective rituals do not involve verbal exteriorisation of the traumatic experience. Viewed from this perspective, the well-meaning attempts of Western psychotherapists to help local people deal with war trauma may, in fact, cause more harm than help.³²⁶

³²³ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 112

³²⁴ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 119

³²⁵ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 120

³²⁶ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 121

3.5.3.2. The National Solutions

Indigenous community structures and social relationships should be mobilised to play an active role in the protection of children from participation in armed conflict.³²⁷ A number of solutions on the national level can be implemented – public education campaigns designated for children and girls more specifically, gathering testimony and conducting opinion polls among children, alternatives to deprivation of liberty, civil action involving the entire community in the process. These are the stepping stones towards community reconciliation and rebuilding.³²⁸ Cases that specifically focus on crimes against girls have to be brought before national courts under the principle of universal jurisdiction.

Some of the good practices of the Sierra Leone and the South Africa Truth and Reconciliation Commissions prove that children are in fact the key to the reconstruction of the community. These practices include separate hearings for children to come forward and ‘tell their stories’.³²⁹ This happened and should always happen at regional locations – as close to the affected communities as possible. Children were allowed to participate in a number of ways. They were either giving their statements or were involved in games, art and group work according to their age which brought about self-expression. All of this was accompanied by ongoing psychosocial support. The aim is to foster the child’s respect for the rights of others.³³⁰

During specially designated social-pedagogic workshops children can share difficult experiences in a secure environment but only if they wish to do so. Any international

³²⁷ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 162

³²⁸ International Criminal Justice and Children, *No Peace Without Justice*, UNICEF Innocenti Research Centre, September 2002, p. 124

³²⁹ International Criminal Justice and Children, *No Peace Without Justice*, UNICEF Innocenti Research Centre, September 2002, p. 127

³³⁰ International Criminal Justice and Children, *No Peace Without Justice*, UNICEF Innocenti Research Centre, September 2002, p. 129

interventions must be compatible with and supportive of local knowledge about trauma and healing.³³¹ The assumptions that underlie Western approaches to childhood and the protection of children from armed conflict are most often inapplicable to the social structures and cultural patterns that define the positions of young people in Africa in peacetime, let alone amid armed conflict.³³²

The mandates of child protection agencies should include an explicit focus on girl soldiers and their experiences during the armed conflict. International expert meetings can issue recommendations that promote a reform of national institutions and systems which facilitated violence against girls. Two parallel approaches could be employed – equal treatment of all children, including those who perpetrated atrocities themselves, and special attention to the girl child and gender-based violence.³³³ Underage combatants should be given the same packages of benefits as regular soldiers during demobilisation, and girls should be provided the same services as boys and men.³³⁴

Methods of legitimising child protection and assistance processes in the eyes of the community are also crucial. Child protection does not operate in a vacuum. The return of girl-soldiers is plagued by many questions for the community as well as for the girls who are coming home. The traditional purification and healing ceremonies should not be frowned upon but accepted as a valuable aspect of girl protection. These procedures may vary from

³³¹ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 153

³³² Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 136

³³³ International Criminal Justice and Children, *No Peace Without Justice*, UNICEF Innocenti Research Centre, September 2002

³³⁴ Alcinda Honwana, *Child Soldiers in Africa*, University of Pennsylvania Press, Philadelphia 2006, p. 137

village to village but essentially represent a symbolic gesture without which the child cannot be forgiven and accepted back into the community.³³⁵

3.5.3.3. The African Commission and Court

Procedures available in the present international legal system may not be adequate or appropriate for the problems particular to Africa. Professor Nguema considers that in order to resolve the crises in Africa new institutional structures should be established.³³⁶ It may be more profitable to see the African Court as merely one, albeit important, part of a negotiation process, which aims to reconcile the parties to conflicts, preventing further violations from occurring.³³⁷

Some might regard this as preventing the African Court from playing any meaningful role in the maintenance of peace. Nonetheless, recourse to the Court allows for an authoritative and more palatable vindication of the position of one side over the other. The Court can often play a role within the negotiation process, either to support negotiations or to inspire the parties to negotiate.³³⁸

Central to the applicability of the present structure of international law is the notion of the state. This has been largely criticised by feminist scholars. It has also been argued that African states represent a mixture of traditional African structures, emphasising the notion of community, and Western arrangements, where the individual is separated from the state. As a result, the strict divide between opposing dichotomies, for example, the public and private,

³³⁵ International Criminal Justice and Children, No Peace Without Justice, UNICEF Innocenti Research Centre, September 2002

³³⁶ Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law*, Oxford: Hart Publishing, 2000, p. 192

³³⁷ The single court is being established now through the Protocol on the Statute of the African Court of Justice and Human Rights

³³⁸ Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law*, Oxford: Hart Publishing, 2000, p. 195

may not hold. This conclusion potentially undermines the sanctity of other traditional principles of international law where the state is central.³³⁹

Further, the dichotomy between war and peace, in terms of the separate laws applicable to each, is neither theoretically necessary nor practically appropriate as humanitarian and human rights law have been shown to be based on similar aims.³⁴⁰ The African Commission has stated that the protection offered by human rights law should apply at all times: by not permitting derogations from any of the rights in the African Charter during war or other public emergencies, and by refusing to interpret reservations and clawback clauses to limit rights during times of peace.³⁴¹

The African Commission can become more effective in vindicating girl-soldiers' rights through an enhancement of the respect and recognition of its work, increased publicity (in the form of public awareness campaigns) and more reference to its jurisprudence by national African courts.³⁴² Thus its jurisprudence could pave the way for the newly established Court's first steps.

³³⁹ Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law*, Oxford: Hart Publishing, 2000, p. 199

³⁴⁰ See in general Theodor Meron, *The Humanisation of International Law*, Leiden: Martinus Nijhoff, 2006

³⁴¹ Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law*, Oxford: Hart Publishing, 2000, p. 200

³⁴² Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law*, Oxford: Hart Publishing, 2000, p. 201

4. Conclusion

This work starts with the presumption that human rights protection is not a panacea but could be a solution to real life problems. Nevertheless, it does not turn a blind eye, but rather rigorously embraces numerous critiques of the contemporary international discourse of human rights.

The research follows through the main strands of feminist critique of public international law, international humanitarian law and human rights. It establishes a connection between the contemporary debates on women's rights and children's rights. It focuses on the circumstances of internal armed conflicts by pointing to the legal void in the regulation of non-international conflicts. It reinvents the "girl-child diagnosis" through an analysis of the "double negative" that the multiple discrimination against girls creates during war. It assumes an interdisciplinary approach in identifying solutions to the violations of the human rights of girl-soldiers during such conflicts. The work settles for a social transformation approach where the inversion of gender roles in war is taken advantage of in the reconstruction process in order to re-structure gender hierarchies in the aftermath of conflict.

The thesis is that the transgression of gender roles caused by the inevitable destruction of the social fabric during the conflict is the most opportune to initiate the "positive of girls' human rights". The period of post-conflict social reconstruction can in practice bring about an improvement of the position of former girl-soldiers. However, the work offers a plenty of examples for the limitations to empowering women through acquiring self-determination, humanitarian intervention and the traditional toolbox of human rights. Based on the large number of obstacles identified during the research, it can be deducted that the solutions to girl-soldiers' rights' violations do not lie in the nearest future.

Future research needs to be dedicated to the right to peace for all human beings. The right to peace is itself, of course, a disputed concept. The African Charter, the United Nations

Charter and several General Assembly resolutions answer the question whether there is such a right to the positive. But one problem with defining peace is that in reality there is no clear dichotomy between war and peace.³⁴³

Conflicts in African countries will become more and more difficult to fit within the traditional categories of humanitarian law. As the distinctions between combatants and non-combatants get more and more blurred, the relevant law will need to evolve and politics and law will have to establish a *sui generis* syncretism system to deal with the politics of war and gender.

Similarly to the way racism and apartheid are specified as impediments to peace, sexism and misogyny will have to be.³⁴⁴ The Beijing Conference in 1995 recognised that women's empowerment and full participation on the basis of equality in all spheres of life are essential components of peace. The next step is the proliferation of projects, initiated by international and regional NGOs but gradually transferring responsibility to the community level, dedicated to the legal empowerment of young women and girls in Africa.

A practical recommendation to NGOs which will develop such valuable projects is to take the powerful tool of grassroots education and apply it to this new area - post-war rehabilitation and reconstruction settings. Avoiding strictly legal approaches and introducing cross-disciplinary insights from the fields of education, pedagogy, sociology, gender studies and humanitarian aid will be key for the success of such initiatives. Grassroots human rights education is essential for the restoration of dignity and human worth of girls which have participated in the armed forces. The present thesis can serve as a means of attracting the attention of international donors to the issue and pave the way for a humanitarian on-site project.

³⁴³ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, p. 271

³⁴⁴ General Assembly Declaration GAR 33/73 15 Dec 1978

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