

**THE APPLICATION OF THE BEST INTERESTS OF THE CHILD PRINCIPLE TO
PROTECT THE INTERESTS OF CHILDREN IN ARMED CONFLICT SITUATIONS**

by

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the degree of

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at the

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JUNE 2015

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DEDICATION

This thesis is dedicated to the following beloved people:

To the love of my life and my best friend Job,

Thank you for standing by me and encouraging me to expand my horizons. I treasure your love more than you will ever know.

To our children Mathew, Neema and Michael,

I pray that the sacrifices we made together in this journey will be worth it. Thank you for bringing so much joy to my life.

To my beloved mama Leah,

Thank you mama for teaching me to be a woman of all seasons, thank you mama for teaching me to revere God!

To my beloved dad John,

Thank you for your persistent probing on the progress in my studies, I felt that I owed it to you to finish what I had started.

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International Criminal Tribunal for Rwanda
International Criminal Tribunal for Former Yugoslavia
Special Court for Sierra Leone
African Commission on Human & People's Rights
Inter-American Commission on Human Rights
European Court of Justice
European Commission of Human Rights
International Court of Justice
Other jurisdictions

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ABSTRACT

This study aims at testing the applicability of the universal standard for protection of children, “the best interests of the child principle”, to children caught up in armed conflict situations.

The study introduces the effects of armed conflict on children by discussing two case studies of conflicts situations, namely Somalia’s situation under the Al Shabaab and the LRA as it formerly operated in Northern Uganda. Heart-breaking narrations of child victims are given prominence to show the invalidity of “best interests” principle in conflict situations.

It acknowledges that the “best interests” principle is a good tool for enforcement of children rights. It analyses the theory of rights in general so as to explain the origin and importance of rights. Since children’s rights are part and parcel of human rights, the study also looks at the international human rights and the regional and international enforcement mechanisms, though not in details.

This study looks at the various theories justifying the existence of children’s rights, and the dichotomy between rights and interests. It also addresses the protection of children rights and the various discourses advocating for or negating children’s rights. It explores the age question with regard to enforcement of children’s rights based on the fact that childhood is a dynamic period.

It also critically analyses the “best interests” principle and the various alternative standards that have been advanced. It concludes that despite the various criticisms, the “best interests” principle still obtains the better standard for protection of children’s rights in peace times subject to being complemented by other rules. The study also focuses on protection of children under the International Humanitarian Law with specific focus on civilian protection during armed conflict. It also focuses on the progress made in international efforts to protect children from the effects of armed conflict.

Finally, reasons are advanced as to why the Best Interests Principle is not applicable in armed conflict situations, and an alternative standard proposed.

ABBREVIATIONS

AAJ	AMERICAN ASSOCIATION JOURNAL
AC	APPEALS COURT
AFLR	AIR FORCE LAW REVIEW
ACHPR	AFRICAM COMMISSION ON HUMAN AND PEOPLE'S RIGHTS
AJIL	AMERICAN JOURNAL OF INTERNATIONAL LAW
AJOP	AMERICAN JOURNAL OF ORTHOPSYCHIATRY
AmJLH	AMERICAN JOURNAL OF LEGAL HISTORY
ANSA	ARMED NON-STATE ACTORS
AP I	ADDITIONAL PROTOCOL I TO THE GENEVA CONVENTIONS
AP II	ADDITIONAL PROTOCOL II TO THE GENEVA CONVENTIONS
APB	AFRICAN POLICY BRIEF
APSR	AMERICAN POLITICAL SCIENCE REVIEW
ASIL	AMERICAN SOCIETY OF INTERNATIONAL LAW
AWSD	AID WORKERS SECURITY DATABASE
BAAAS	BULLETIN OF THE AMERICAN ACADEMY OF ARTS AND SCIENCES
BJWA	BROWN JOURNAL OF WORLD AFFAIRS
Brit. YB Int'l L	BRITISH YEARBOOK OF INTERNATIONAL LAW
BYIL	BRITISH YEARBOOK OF INTERNATIONAL LAW
CLR	CALIFORNIA LAW REPORT
Ca LR	CALIFORNIA LAW REPORTS
CAT	COMMISSION AGAINST TORTURE
CERD	COMMITTEE ON ELIMINATION OF RACIAL DISCRIMINATION
CEDAW	CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN
CLR	COMMONWEALTH LAW REPORTS
Conn JIL	CONNECTICUT JOURNAL OF INTERNATIONAL LAW
CRPV	CURRENT RESEARCH ON PEACE AND VIOLENCE
ECHR	EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN

	RIGHTS AND FUNDAMENTAL FREEDOMS 1950
ECJ	EUROPEAN COURT OF JUSTICE
EECRJ	EUROPEAN EARLY CHILDHOOD RESEARCH JOURNAL
EJIL	EUROPEAN JOURNAL OF INTERNATIONAL LAW
ENG.REP	ENGLISH REPORTS
FAM	FAMILY LAW REPORTS
Fla.J.Int'l.L	FLORIDA JOURNAL OF INTERNATIONAL LAW
FLR	FLORIDA LAW REVIEW
Fam LQ	FAMILY LAW QUARTERLY
HCNM	HIGH COMMISSION OF NATIONAL MINORITIES
HRW	HUMAN RIGHTS WATCH
HRQ	HUMAN RIGHTS QUARTERLY
ICC	INTERNATIONAL CRIMINAL COURT
ICCPR	INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
ICJ	INTERNATIONAL COURT OF JUSTICE
ICTR	INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA
ICTY	INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA
IHL	INTERNATIONAL HUMANITARIAN LAW
IHRL	INTERNATIONAL HUMAN RIGHTS LAW
IJCR	INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS
IJLPF	INTERNATIONAL LAW JOURNAL OF LAW, POLICY AND THE FAMILY
ILR	INTERNATIONAL LAW REPORT
ILM	INTERNATIONAL LEGAL MATERIALS
Int & Comp L.	
Quart	INTERNATIONAL AND COMPARATIVE LAW QUARTERLY
Inter-Am CHR	INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
IRRC	INTERNATIONAL REVIEW OF THE RED CROSS
ISS	INSTITUTE FOR SECURITY STUDIES
ISQ	INTERNATIONAL STUDIES QUARTERLY

JCSL	JOURNAL OF CONFLICT AND SECURITY LAW
JEAS	JOURNAL OF EAST AFRICAN STUDIES
JIRS	JOURNAL OF IMMIGRATION AND REFUGEE STUDIES
JHRP	JOURNAL OF HUMAN RIGHTS PRACTICE
JPP	JOURNAL OF PEACE AND PSYCHOLOGY
JSLW	JOURNAL OF SECOND LANGUAGE WRITING
KHRC	KENYA HUMAN RIGHTS COMMISSION
KLR	KENYA LAW REPORTS
KNCHR	KENYA NATIONAL COMMISSION ON HUMAN RIGHTS
MED QUAT	MEDITERRANEAN QUARTERLY
MEQ	MIDDLE EAST QUARTERLY
MICH JIL	MICHIGAN JOURNAL OF INTERNATIONAL LAW
MIL L REV	MILITARY LAW REVIEW
Mo Ct App	Missouri Court of Appeals
NE 2D	North Eastern reports New York
NethQHum Rts	NETHERLANDS QUARTERLY OF HUMAN RIGHTS
N.Y.L. Sch. J.	NEW YORK LAW SCHOOL JOURNAL
Hum. Rts.	NEW YORK LAW SCHOOL JOURNAL OF HUMAN RIGHTS
NYIL	NETHERLANDS YEARBOOK OF INTERNATIONAL LAW
NY2d	NEW YORK REPORTS
OAU	ORGANISATION OF AFRICAN UNITY
OHCHR	OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
OJLS	OXFORD JOURNAL OF LEGAL STUDIES
Pediatr Surg Int	PEDIATRIC SURGICAL INTERNATIONAL JOURNAL
PRPP	PASTORALISM: RESEARCH, POLICY AND PRACTICE
QB	QUEENS BENCH
SA	SOUTH AFRICAN LAW REPORTS
SAJHR	SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS
SALJ	SOUTH AFRICAN LAW JOURNAL
S.C. Eq	SOUTH CAROLINA REPORTS
SE 2d	SOUTH EASTERN REPORTS, VIRGINIA

SSM	SCIENCE AND SOCIAL MEDICINE
SOC INDIC RES	SOCIAL INDICATORS RESEARCH
STELL	STELLENBOSCH LAW REPORTS
SWI	SMALL WARS AND INSURGENCIES
T Int & Comp LJ	TEMPLE INTERNATIONAL AND CONTEMPORARY LAW JOURNAL
TWQ	THIRD WORLD QUARTERLY
UCDLR	UNIVERSITY COLLEGE OF DUBLIN LAW REVIEW
U Chi L Rev	UNIVERSITY OF CHICAGO LAW REVIEW
UDHR	UNIVERSAL DECLARATION OF HUMAN RIGHTS
UK	UNITED KINGDOM
UN	UNITED NATIONS ORGANISATION
UNCRC	UN CONVENTION ON THE RIGHTS OF THE CHILD
USA	UNITED STATES OF AMERICA
WLR	WEEKLY LAW REPORTS
YIHL	YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW

CHAPTER ONE

INTRODUCTION

1.1 RESEARCH PROBLEM

It is a universal principle of jurisprudence that all human beings have certain inalienable rights, regardless of the debates surrounding the origin and justification of these rights. It is also a fact that children are human beings and it logically follows that they too have rights. However, there are still raging arguments as to whether children have the capacity to exercise, waive or forfeit their rights.¹

Children are seen as pre-logical, pure and natural beings, innocent of the ways of the world and incompetent in it. As such, childhood is supposedly a phase of innocence, a period without the troubles associated with adult life, a period of freedom, joy and play.² The reality is that this assertion cannot be applied across the board, because this idealism does not exist in a world full of hunger, poverty, disease and war. There are many conflicts going on in our world today. People fight for a myriad of reasons, especially over sharing of political power and natural resources. Children suffer the blunt of the effects of these conflicts; they are killed, maimed, displaced and orphaned. Others are used as child soldiers to fight a war they do not understand, only to join the statistics of child-soldiering.

Children's welfare has been a matter of international concern for a long time. The principle of the "paramountcy of the best interests of the child" has gained global recognition and acceptance as arguably one of the best tools to ensure respect and

¹ Wald "Children's rights - A framework for analysis" 1979 *UCDLR* 256.

² Freeman *The Rights and Wrongs of Children* 7.

adherence to the rights of the child. While this principle generally derived from the Anglo-American law, it has been codified in international and national positive law. Both the League of Nations in 1924 and the United Nations in 1959 endorsed standards for children's rights. Children were also included under general guidelines for protection of civilians especially during war.³ In 1989, the United Nations adopted the Convention on the Rights of the Child. This instrument provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.⁴ This article has been incorporated into various laws around the world. Section 28(2) of the Constitution of the Republic of South Africa, 1996 provides that a child's best interests are of paramount importance in every matter concerning the child.

The best interests principle has been criticised by many scholars and practitioners as being too elastic and leaving a lot of discretion to judges.⁵ Indeed, some proponents of fathers' rights movements argue that it has been used to discriminate against fathers, especially in divorce and custody proceedings. The same argument has been used by fathers of children born of unmarried parents who are desirous of having contact with their children. At the same time, feminists argue that this principle has created a climate in which ideological reforms based on faulty science and a myth of gender equality undercut women's ability to retain custody at divorce by devaluing their contribution.⁶ Other critics have felt that it has given too much discretion to the judges, while others argue that it has elevated the interests of one family member, the child, over other family members, thus being detrimental to the well-being of the collective family unit.⁷

³ The Fourth Geneva Convention.

⁴ Art 3 (1).

⁵ Heaton "Some general remarks on the concept 'best interests of the child'" 1990 *THRHR* 95.

⁶ Wardle & Nolan *Fundamental Principles of Family Law* 858–89.

⁷ Bennett *Parental Alienation* 52.

In addition, the best interests principle was born out of divorce and child custody adjudications, where the interests of the parents were part and parcel of the proceedings. Inevitably, the outcome of the proceedings were likely to be seen as a win for one parent and a loss for the other, and this obscured the interests of the child or children caught up in the web.⁸ Luckily, with the shift towards children rights, the courts leaned more and more towards prioritisation of the interests of the children.⁹

The application of the best interests principle is largely dependent on the enforcement by courts and government administrative bodies, which use the fear of sanctions to ensure compliance. However, the enforcement is achievable only when these institutions are functioning properly, which is not usually the case during armed conflict. If indeed the best interests principle is so challenged in normal circumstances, one wonders whether it even applies to children in conflict situations. Parties to a conflict are concerned with winning the war on their own terms, using all means possible. These means are defined by the laws of war¹⁰ but practically not all parties to a conflict obey the laws of war. Most non-state actors, as will be seen in chapter two, have no regard for these laws.

Some of the basic rules of international humanitarian law state that parties to a conflict shall at all times distinguish between the civilian population and combatants.¹¹ Indeed, the principle of civilian protection is part of customary international law. As early as 1899, international law prohibited attacks directed towards undefended or unfortified towns.¹² Belligerents were also obligated to spare unoffending non-combatants.¹³

⁸ Wright “*De Manneville v. De Manneville*: Rethinking the birth of custody law under patriarchy” 1999 *HRJ* 18.

⁹ Exemplified in *Re Gault* 387 U.S. 1 (1967).

¹⁰ See ch 6 para 6.1.

¹¹ Art 3 of the Fourth Geneva Convention.

¹² The 1899 Hague Convention No. II.

¹³ Roach “The law of naval warfare at the turn of two centuries” 2000 *AJIL* 66.

Unfortunately, the existence of these rules of international humanitarian law has not stopped the deliberate and collateral targeting of civilians over the years. Battlefields were once the domain of warriors whose almost universal code of conduct was to protect civilians, especially women and children. Modern warfare has changed the rules. Many wars ignite between ethnic and religious factions, often within one country where practically no codes of conduct are applied. In the asymmetrical wars which have become a more common feature in the world today, especially those fought between belligerents and conventional state armies, rules of engagement are often disregarded. Children who are part of the civilian population bear the effect of this disregard, and with no one to enforce the best interests principle, they endure enormous suffering and abuse. The horrific images of children staggering under the weight of automatic weapons have become common news in Africa's troubled nations.¹⁴ Tragically, the phenomenon of child soldiering has become so common that even in the ongoing conflict in South Sudan, there are reports of the use of child soldiers.¹⁵ In addition, the onset of the era of unmanned planes, especially in the war against terrorism, has led to indiscriminate killing of civilians caught up in the same locality as the most sought-after terror fugitives.¹⁶

There appears to be a general conviction that childhood should involve being brought up in a safe environment and secluded from the dangers of the adult world. If this is true, then children in conflict situations are in totally different paradigms. Children are least able to protect themselves when the social networks, which normally assure them of care and well-being, are destroyed in armed conflict. At the same time, there is a lot of impunity amongst the combatants, especially because the child protection institutions will have collapsed in such circumstances.

¹⁴ Dallaré *They Fight Like Soldiers They Die Like Children* 8.

¹⁵ The Telegraph "Child soldiers fighting in South Sudan, says UN" www.telegraph.co.uk/news/worldnews/africaandindianocean/ (Date of use: 21 January 2014).

¹⁶ BBC News "Somali militants in key port 'attacked by US drones'" www.bbc.co.uk/news/world-Africa-15052484 (Date of use: 11 October 2013).

Some of the measures of dealing with children in conflict situations include taking them to refugee centres or placing them with families in peaceful areas. In so doing, usually the prime purpose is to save the lives of the children, and as such there is little regard for anything else, let alone thoughts of whether the action undertaken is in the best interests of the child. Sometimes because of the urgency of the placement, the normal procedures that would otherwise be followed, such as checking on the fitness or otherwise of the family willing to take in the child are ignored.¹⁷

During most conflicts, children are treated as passive victims, as opposed to competent survivors of the conflict. They are usually excluded from making decisions which involve them. At the same time, there is a tendency to generalise the effect of the conflict on the children, notwithstanding the fact that every conflict has its peculiarities. Biomedical explanations of the effects of conflict on children are usually taken wholesale and applied on different populations. Most of these explanations are based on studies conducted in different conflict situations.¹⁸

Moreover, children experience discrimination by their own surviving family members. Family survival strategies in war zones often single out children in particular categories as expendable whether through abandonment or sale. Such children are removed from the family unit mostly for economical purposes, such as to remove the economic dependency, to raise income or to create political affiliations for future survival.¹⁹

Yet, children must be protected from the society that brings them forth, because the same society has made them vulnerable by denying the existence of their rights and

¹⁷ Personen *et al* "Depressive symptoms in adults separated from their parents as children: A natural experiment during World War II" 2007 *Am. J. Epi.* 1134.

¹⁸ Boyden "Children's experience of conflict-related emergencies: Some implications for relief policy and practice" 1994 *Disasters* 258.

¹⁹ Boyden 1994 *Disasters* 260.

modifying them to suit certain circumstances. Some of the justifications for the protection of children in conflict situations include:²⁰

- Children growing up in violent areas are more likely to be violent themselves. The violence, grief and anxiety that they experience while in conflict situations affect them physically and psychologically.
- Children are the majority of civilians affected by armed conflict.
- The involvement of children in conflict is an attack on the most fundamental principle of the society; every society seeks to protect its young ones for posterity.
- Children are affected differently from adults by armed conflict. For instance, most of the already indifferent combatants may value the lives of the children less than those of adults, thus the abduction or killing. At the same time, children are still in the formative years and their view of the world is completely distorted by conflict.
- It is a responsibility, both legal and moral, of the international community to protect children and other civilians in armed conflict, vide the various conventions affording such protection.

In this thesis, I will show that the best interests of the child principle is a good tool for enforcing children's rights, though it has its shortcomings in normal circumstances and may need modification. However, it becomes inapplicable during armed conflict when other factors, some unpredictable, come into play. It thus becomes suspended by default until normalcy resumes. I will thus recommend an alternative standard, that of the least detrimental alternative, to be applied during armed conflict.

²⁰ Narayan "Children affected by armed conflict: Programming framework"
<http://reliefweb.int/sites/reliefweb.int/files/resources/639DCCC0F96D062DC1256D57003062BD-cida-childrenarmedconflict-jul02.pdf> (Date of use: 21 January 2014).

1.2 RESEARCH METHODOLOGY

The methodology used is comparative research, mostly micro-comparison. This means that the study is geared towards a specific problem; that of the adequacy (or inadequacy) of the best interests principle in protecting children in armed conflict situations, as opposed to focusing widely on the principle itself. Literature review is the main method used since the nature of the research problem entails historical research into the problem, in addition to research into the contemporary developments in this area internationally. A study of books, journals, legislation and case law has also been undertaken at length.

Two areas have been discussed as case studies for children in armed conflict situations, namely Northern Uganda and Somalia. These studies are based on reports of the various humanitarian groups operating or that have operated in the areas aforementioned. Specific attention has been given to studies carried out by the United Nations Office of the Special Representative of the Secretary-General for Children and Armed Conflict, United Nations Children's Fund, United Nations High Commission for Refugees, International Committee of the Red Cross and Red Crescent, International Crisis Group and Human Rights Watch.

1.3 OUTLINE OF THESIS

Given that this entire study focuses on protection of children in armed conflict situations, it is imperative that it demonstrates by way of case studies how children are affected by armed conflict. Chapter two therefore discusses experiences of children in conflict situations. The Lord's Resistance Army, formerly operating in Northern Uganda, has been discussed at length mainly because of the legendary atrocities it inflicted on the children of Northern Uganda, who bear the scars to date. Somalia has also been discussed as a demonstration of how state failure impacts on children who rely heavily

on proper government institutions for their protection. This chapter brings to life the extremely heart-breaking instances of breach of children's rights through narrations by child victims.

Children are human, and as such their rights cannot be discussed in isolation. They originate from the expansive field of human rights. Human rights are entrenched into the very fabric of the society, having gained international recognition and acceptance. It is generally agreed that there are rights from which no derogation is allowed, and these entail the most basic of rights that define the essence of a human being.²¹ However, global consensus lacks on what it means to have rights and enforce them, leading Deleat to conclude:²²

“Ultimately, human rights are not something concrete that we can simply define, identify and implement, although human rights activists and scholars certainly wish for such simplicity”

Chapter three addresses itself to the origin of rights all the way to the modern concept of human rights. It also discusses, albeit in brief, the enforcement mechanisms for these rights.

This study focuses on the protection of children rights and therefore it would not be complete without a discussion on the theory of children's rights. The concept of “rights” has been subjected to a lot of debate with no clear consensus, yet rights create opportunities for well-being. For children, their well being refers to the quality of their lives both economically and emotionally, their psychological status, material state, social and cultural environments as well as their capacity to realise their potential.²³

²¹ The Universal Declaration of Human Rights.

²² DeLaet *The Global Struggle for Human Rights*15.

²³ Ben-Arieh et al “Multifaceted concept of child well-being” 2014 *Handbook of Child Well-Being 2*.

Understanding the concept of rights and the various discourses explaining it is important in the context of children. This creates a necessity, for the purposes of this study, to delve into some detailed account of the concept and origin of rights. Chapter three addresses this necessity. Chapter four addresses the various discourses advocating for or negating children's rights. It also looks at the various theories justifying the existence of children's rights, and the dichotomy between rights and interests. It focuses on the substantive rights enshrined in the United Nations Convention on the Rights of the Child, which is the internationally recognised standard for children's rights. After concluding that children have enforceable rights regardless of the terminologies used to describe them, it then explores the age at which children should be allowed to enforce their rights, based on the fact that childhood is a dynamic period of growth. This chapter concludes by briefly addressing the question of autonomy, parental authority and state intervention.

Chapter five critically addresses the best interests principle and its application. Just like human rights, children's rights vis-à-vis their interests have been difficult to define. For children, the ambiguity has been worse and the debate has revolved around some basic issues such as whether indeed children have rights that can be enforced, and if not, what entitlements they have, if any. The debate is aggravated by the fact that children, in many communities, were largely seen as incomplete human beings. If there is debate about whether adults, who are complete human beings so to speak, have rights, then one can only imagine the grim reality for children's rights and their enforcement. Indeed, hypocrisy is the homage that adults' denial of children's rights has paid these same rights. To show the historical injustices meted on children by this ambiguity and double standards, chapter five dwells substantially on the historical underpinning of the principle of the best interests of children.

The adequacy or inadequacy of the principle in various circumstances is also discussed, with the various alternative standards that have been advanced also given a critical look. The chapter concludes that despite the various criticisms, the best

interests principle still obtains the better standard for the protection of children's rights in peace times subject to being complemented by other rules.²⁴

Chapters three, four and five are intertwined in nature because they describe a process of moving from the general to the specific; from the notion of rights, to human rights, narrowing down to children rights and finally to children interests and particularly to what amounts to the best interests of children.

Human rights advocates have acknowledged that wars are a reality in our world, and when wars are fought, human rights are trashed in equal measure. The rhetoric of rights notwithstanding, real human beings suffer when their rights are not protected, and the case is worse for children whose capacity to enforce the rights is still under development.²⁵ The situation worsens when the institutions which have the responsibility to enforce the rights are threatened, such as is the case in conflict situations, challenging the applicability of the best interests of children in armed conflict situations.

To safeguard rights even in the midst of raging conflicts, the community of nations came together and has over time codified rules that govern when and how wars are to be fought. Chapter six addresses itself to the protection of children under the international humanitarian law regime. It also brings out instances where human rights law has been incorporated into humanitarian law, concluding that though the two systems are different, they have been used together to guarantee protection of children in conflict situations. The chapter also looks at the application of the best interests principle in humanitarian law, and concludes that realistically, there are many interests at play during armed conflict, and thus the best interest of children are hardly paramount in those situations. It also seeks to build a case that in the harsh realities of a conflict

²⁴ See ch 5 para 5.7.2.

²⁵ Ben-Arieh et al 2014 *Handbook of Child Well-Being* 3.

environment, and with the breakdown of institutions meant to protect children, the “best interests” principle is stripped of any validity by these circumstances. It concludes with an exposition of the worrisome emerging trends of terrorism, whose clandestine actors have absolutely no regard for the laws of war.

The foregoing gloomy situation is not without a glimmer of hope, and chapter seven focuses on international implementation and enforcement mechanisms of humanitarian law for children. It exemplifies the victory of benevolent forces over the forces of evil by outlining how the international community has fought, with considerable success, the abuse of children’s rights in armed conflict situations. It focuses on United Nations mechanisms, international criminal responsibility and the watchdog role of the International Committee of the Red Cross. These international efforts have proven that it is possible to curb impunity even among belligerents, and the conviction of Thomas Lubanga²⁶ is a feather in the cap for those who ceaselessly fight for the rights of children caught up in conflict.

The concluding chapter eight advances reasons why the best interests principle is suspended in armed conflict situations. It also indicates that despite the gains in assuring rights for children, the struggle for protection of children rights in armed conflict is far from over. It concludes that the standard most applicable in armed conflict is the least detrimental alternative.

²⁶ *Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06 www.icc-cpi.int (Date of use: 9 December 2014).

CHAPTER TWO

CHILDREN IN ARMED CONFLICT SITUATIONS

2.1 INTRODUCTION

There are no real statistics as to how many children have been exposed to or affected by armed conflict, or participated in armed conflict, especially because every armed conflict affects children. For instance, the total number of child soldiers in each country is not just unknown, but due to the circumstances of war, it is unknowable. This is because children are mainly used in conflicts where information gathering is difficult, they are recruited without any regard for their age and the recruiters would want to hide the fact that they are engaging child soldiers.¹

Children are affected by pre-conflict, conflict and post-conflict situations. In pre-conflict situations, they are in real danger of being plunged into the conflict. During the conflict, they are directly affected by the myriad negative effects of war, and may also participate as child soldiers. In post-conflict situations, they may become refugees, internally displaced persons (IDPs) or discharged child soldiers.²

Pedersen and Sommerfelt define a child affected by conflict as “a child that lives in an area under occupation, where armed combat occurs or where the use of arms or the threat of use of arms disrupts normal provision of means of livelihood, health, security and/or other basic rights of the child.”³

¹ Brett & McCallin *Children: The Invisible Soldiers* 27.

² Pedersen & Sommerfelt “Studying children in armed conflict: data production, social indicators and analysis” 2007 *Soc Indic Res* 254.

³ Pedersen & Sommerfelt 2007 *Soc Indic Res* 256.

This chapter looks at some of the atrocities meted on children in armed conflict and the impact of armed conflict on children. Emphasis is placed on narratives by children who have experienced war first hand. Two case studies are highlighted discussing the effects of war in Northern Uganda and Somalia respectively. The Northern Uganda case is discussed because of the notoriety that the Lord's Resistance Army gained over their abduction and cruelty towards children. Somalia, on the other hand, has been a failed state without any proper structures for over two decades. However, much of what had been publicised is the refugee situation in Northern Kenya which is a direct result of the ensuing chaos. This chapter therefore brings to the fore specific instances of suffering of children inside Somalia, especially since the rise of the terrorist organisation, the Al Shabaab. Given that Mogadishu in particular and Somalia generally has been rated as one of the most dangerous places on earth,⁴ and with no proper institutions to protect children, the best interests principle remains suspended in the better part of Somalia. The LRA and the Al Shabaab have been known to recruit children as child soldiers, mostly through brute force.

2.1.1 Child soldiers

One of the most notorious instances of the involvement of children in armed conflict is child soldiering. Child soldiering has gained prominence especially among armed groups fighting in non-international armed conflicts. Singer opines that the use of child soldiers is so rampant globally that it is almost becoming a new doctrine of warfare. He goes to great lengths to demonstrate how every region of the world (except Antarctica) has had its fare share of the use of child soldiers. Even the mere fact that we have to define a child soldier, according to Singer, is a horrifying proof of how the nature of the warrior has changed.⁵

⁴ Fergusson *The World's Most Dangerous Places: Inside the Outlaw State of Somalia* 12.

⁵ Singer "Children at War" 7.

Breen says that children are recruited for their very qualities as children – they are cheap, expendable and easier to condition into fearless killing and unthinking obedience.⁶ Dallaire says the following:⁷

“Man has created the ultimate cheap, expendable, yet sophisticated human weapon, at the expense of humanity’s own future: its children.”

Pedersen and Sommerfelt define a child soldier as follows:⁸

“[A]ny child – boy or girl – under the age of 18 who is compulsorily, forcibly, voluntarily recruited or otherwise used in hostilities by armed forces, paramilitaries, civil defence units or other armed groups.”

This definition is all-inclusive and includes children serving in conventional armies. In Africa, it has been argued that child soldiers are nothing out of the ordinary since young men were traditionally the warriors that guarded society.⁹

For the insurgents, there is no better war machine than the child-soldier. This machine needs negligible technology, it is simple to sustain, is versatile and has a big capacity for barbarism. It is a readily-available, cost-effective and renewable weapon system. Besides, children make the best combatants since they can carry light weapons, they can detonate mines making it safe for adults and are good bait for ambushes.¹⁰

⁶ Breen “When a child is not a child: Child soldiers in international law” 2007 *HRR* 90.

⁷ Dallaire *They Fight Like Soldiers They Die Like Children* 3.

⁸ Pedersen & Sommerfelt 2007 *Soc Indic Res* 257.

⁹ Cheney “‘Our children have only known war’: Children’s experiences and the uses of childhood in Northern Uganda” 2005 *Children’s Geographies* 25.

¹⁰ Dallaire *They Fight Like Soldiers They Die Like Children* 3.

Children become child-soldiers by being abducted, forcefully conscripted or being forced by circumstances. Though the latter category are said to go into it “voluntarily”, most join the war so as to get food and security from the armed groups. They perceive soldiering as the least disadvantageous of many terrible options.¹¹ Unaccompanied children are at a greater risk of abduction, especially in the rural areas where the rebel groups roam. Conventional armies that recruit children below 18 years frown at any attempt to call their recruitment child-soldiering and consider it voluntary enlisting though the children must get the consent of their guardians.¹²

Child soldiers are given differential treatment from the other combatants. They must work their way up by first doing menial jobs such as cooking, spying and carrying weapons and supplies. This goes hand in hand with the training to kill. For children forcefully conscripted, the script is the same; the training involves untold brutality so that they may become meaner killing machines than the adults. In Mozambique, Uganda and Liberia, for example, children were forced to attack, kill or eat their fellow villagers or relatives.¹³ Children are also given the very dangerous jobs such as suicide bombing, disabling landmines and being used as the bait to test the proximity of the enemy. Children are even drugged to ensure they perform the killing rituals as zombies. In Sierra Leone, unit commanders injected the younger boys with cocaine or had them ingest gunpowder, which acts as a stimulant, before going into battle. Upon returning from the battlefield, children would be given “blue boats”, a powerful narcotic that would make them sleep for hours.¹⁴

The physical differences between children and adults are even more obvious in a military setting where children are unable to handle the rigorous training, the scarcity of food and the loads of equipment they must carry. Dallaire describes his encounter with Rwandese soldiers who looked like seasoned soldiers, although one could tell that they

¹¹ Kelly *The Disarmament Demobilization and Reintegration of Child Soldiers* 13.

¹² Breen “When a child is not a child: Child soldiers in international law” 2007 *HRR* 91.

¹³ Albertyn *et al* “The effects of war on children in Africa” 2003 *Pediatr Surg Int* 230.

¹⁴ Brett & McCallin *Children: The Invisible Soldiers* 123.

were younger than 18 years. Yet they had already been fighting for three years, making them about 14 years by the time they started fighting. They were veterans but not yet adults, they had been killed or had killed but were not yet men.¹⁵ The Machel report further outlines the perils children face at the battle front. Being young, they do not understand the risks, and some case studies report that when the shelling starts, children get excited and forget to take cover. This naivety has been exploited extensively by commanders in the battle front, and also in terrorism wars where children are sacrificed as suicide bombers with grandiose promises of a happy eternity which the adults do not seem keen to enjoy.¹⁶

Power struggles in the military increase children's susceptibility to bullying and intimidation. Breen notes that reports of bullying and humiliation of under-18 recruits in the British Army have included mock execution, forced simulation of sexual acts, "regimental baths" in vomit and urine, and the forced ingestion of mud.¹⁷

The first widespread use of child combatants in modern conflicts was by Nazi Germany's Third Reich. After this the practice spread and for some time it was unstoppable. Many children were recruited during the Vietnamese and Kampuchean hostilities to increase the military "manpower".¹⁸

The UN General Assembly addressed the question of child recruitment during the Gulf War of 1983 because the cost in children's lives during this conflict was alarming.¹⁹ An Iranian delegate caused a stir when he said that it was an honour for the children to serve their nation, and that their heroism and enthusiasm was based on a notion of

¹⁵ Dallaire *They Fight Like Soldiers They Die Like Children* 35.

¹⁶ Machel "Impact of armed conflict on children" www.unicef.org/graca para [57] (Date of use: 20 September 2013).

¹⁷ Breen 2007 *HRR* 74.

¹⁸ Maher "The protection of children in armed conflict: A human rights analysis of the protection afforded to children in warfare" 1989 *B. C. Third World L. J.* 303-304.

¹⁹ Mann "The international child soldier" 1987 *Int'l & Comp. L. Q.* 32, 34.

martyrdom which materialists could not comprehend.²⁰ The international community took issue with this situation and their debate resulted in the Declaration on the Protection of Women and Children in Emergency and Armed Conflict. This declaration, in addition to dedicating itself to protection of women and children as civilians, also realistically acknowledged that civilians may also participate in guerilla conflict.²¹

2.1.2 The changing nature of armed conflict

The metamorphic nature of armed conflict has seen an increase in internal armed conflicts fought within the boundaries of states. Most of the internal armed groups do not possess sophisticated weapons but use the easily available but lethal small arms. The widespread availability of these arms results in their availability to children and has contributed to the rise in child soldiering.²²

The art of armed conflict has now become very mobile, confined to house-to-house fights, but without much less atrocities. Violence has been domesticated, with atrocities such as rape and ethnic cleansing done in full view of children. The casualties are heavy, and most are civilians. The atrocities become a trauma etched in communal memories.²³ These wars have cultural origins and have become a cyclical thing since the cultural justifications of the conflict are passed down from generation to generation. Children are taught that it is their duty to protect their communities and avenge for past injustices committed against their communities. This victim mentality weaves into the minds of these children and becomes part of their social identity. Hate and an insatiable appetite for revenge become the driving force of the communal purpose.²⁴

²⁰ Maher 1989 *B. C. Third World L. J.* 315.

²¹ UN General Assembly Res. 3318 "Declaration on the Protection of Women and Children in Emergency and Armed Conflicts" www.un.org (Date of use: 24 September 2014).

²² Cohn & Goodwin-Gill *Child Soldiers: The Role of Children in Armed Conflicts* 20.

²³ Straker "The continuous traumatic stress syndrome: The single therapeutic interview" 1987 *Psychology and Sociology* 50.

²⁴ Cohn & Goodwin-Gill *Child Soldiers* 21.

Another tragedy of the contemporary armed conflict is that it has normalised violence to acceptable levels within communities.²⁵ Entire generations, such as the children of Somalia and Northern Uganda, have grown up with violence, death and social turmoil and these have become part of their identity. To them, killing is a normal thing. A friend once told me a story of how a person went to buy a gun in Mogadishu, Somalia, and when he doubted its efficiency, it was tested on an innocent passerby. The seller just aimed and shot the passerby, and gave the gun to the buyer and confirmed to him that it worked. Even if these stories are told in an attempt to bring some humor to a grave situation, they reflect the normalcy of violence in such communities, and the extent to which human life has been cheapened.

War increases poverty, and with such normalisation of violence, the children born in war, many of whom have been trained to kill and deprived of a normal childhood, find it all too natural to take up their arms and rob in search of food and other amenities. In Angola, and to some extent South Africa, the attainment of independence just meant that the paradigm shifted from political violence to criminal violence.²⁶

2.2 CASE STUDIES OF CHILDREN CAUGHT UP IN ARMED CONFLICT

2.2.1 “Children of war”: Northern Uganda

2.2.1.1 Background

The Lord’s Resistance Army (hereinafter “the LRA”) has earned notoriety for its recruitment and dehumanisation of children. Indeed, it has institutionalised physical and

²⁵ Kaimba *et al* “Effects of cattle rustling and household characteristics on migration decisions and herd size amongst pastoralists in Baringo District, Kenya” 2011 *PRPP* 25.

²⁶ Wessells “The changing nature of armed conflict and its implications for children: The Graca Machel / UN Study” 1998 *JPP* 325.

psychological violence.²⁷ It is important to note that the LRA no longer operates in Northern Uganda but in the vast territories of the Democratic Republic of Congo and the Central African Republic.²⁸ The reference to their atrocities in Northern Uganda in this chapter is therefore historical.

The Acholi of Uganda, who were both the component and target of the LRA, are a pastoralist community that occupies the northern region of Uganda. When the British colonised Uganda, they recruited the Acholi into the military, ostensibly due to their war-like nature. The southerners were recruited into other civil service jobs, and as a result were better educated. The northern part was also largely neglected as the rest of the country developed in infrastructure under the colonial rule. The Acholi dominated the military. When president Museveni's National Resistance Movement (hereinafter "the NRM") came to power in 1986 by defeating the Acholi General Tito Okello, many of the Acholi soldiers fled to the north. They later joined up with other groups defeated by Museveni to form the Ugandan People's Democratic Army (hereinafter "the UPDA"). At that time, there were several Acholi groups trying to fight Museveni's NRM. The Acholi feared that Museveni, if not overthrown, would destroy them for their role in the armies of the previous regimes.²⁹

An Acholi woman, Alice Auma, founded the Holy Spirit Movement (hereinafter "the HSM") in 1987 to fight the NRM. She claimed that she was possessed by the spirits of a World War I Italian nun called Lakwena, and she became known as Alice Lakwena. Since the Acholi largely believed in spirits ("the jogi"), she somehow acquired support. She recruited from the UPDA. Hers was a quasi-religious military outfit that had some rituals believed to make her members invincible; they believed they could turn stones

²⁷ Breen 2007 *HRR* 77.

²⁸ Invisible children "A critical look: Recent LRA attacks prove Kony is still a threat" www.invisiblechildren.com (Date of use: 4 December 2014).

²⁹ Vinci "The strategic use of fear by the Lord's Resistance Army" 2005 *SWI* 364.

into grenades and bees into allies against the enemy.³⁰ The HSM was later defeated by NRM in 1987, and Alice's father, Severino Likoya, tried to revive it. However, he used violence and even became known as "otong-tong" meaning "one who chops victims to pieces".³¹ He also started recruiting child soldiers.

In 1987, after the defeat of HSM, one Joseph Kony, a high school drop-out, took over one of the units of UPDA and began to attract volunteers from the defunct HSM. The soldiers who felt orphaned after the defeat of the HSM and the weakening of UPDA signed up with Kony; incidentally, these were the most violent soldiers. Kony first called his group the Holy Spirit Movement II (hereinafter "the HSM II") and he called himself "the bearer of an apocalyptic vision, a mouthpiece of a widely accepted view that the Acholi people [were] on the verge of genocide".³² He claimed to be possessed by spirits and had mystical powers. He could also, as he alleged, provide angels to guard over his followers. However, these "holy spirit" tactics were replaced by guerilla tactics. The HSM II also changed its name to the Lord's Salvation Army, and later to the United Democratic Christian Force (hereinafter "the UDCF") when they started engaging in guerilla warfare with less emphasis on the spiritual mysticism. Finally Kony changed it to the LRA in 1992. Even today, the LRA combines some spiritual elements with guerilla warfare.³³

Things took a drastic turn in the 1990s after the government of Uganda sought the help of the Acholi people to terminate the LRA. The government attempted to arm militias with bows and arrows to fight the LRA, and this angered Kony, who felt that his Acholi people were betraying him. At the same time, the LRA (who were operating from bases in Southern Sudan) started receiving arms from the Sudanese government, who were

³⁰ Vinci 2005 *SWI* 365.

³¹ Ruddy & Koen "Kony's message: A new Koine? The Lord's Resistance Army in Northern Uganda" 1999 *African Affairs* 7.

³² Ruddy & Koen 1999 *African Affairs* 22.

³³ Ruddy & Koen 1999 *African Affairs* 24.

revenge against Museveni for his support to the South Sudanese rebel movement, the Sudan People's Liberation Army (hereinafter "the SPLA").³⁴

The LRA directed its ire towards the civilians, and massacres took place in various villages of the North between 1995 and 1997. Kony also started child abductions on a regular basis. In 1996, the LRA invaded St Mary's College in Aboke in the Lira district of Uganda at night and abducted 139 girls. Through the intervention of headmistress Sr Rachel Fassera and teacher John Bosco, most were released. Others escaped after the abduction, but 20 went missing. These events attracted global ire towards the LRA.³⁵

In 2000, the government of Uganda issued an amnesty directed to all the LRA soldiers who wished to surrender. This made Kony feel more threatened, and his abductions became even crueler, aimed at ostracising the victims and ensuring that they would be afraid of returning to the society for fear of retaliation by the civilian population for the atrocities they had committed. Kony also lowered the age of his abductees to nine and ten-year-old children.³⁶

Kony established camps in Sudan and only made incursions into northern Uganda. His soldiers would leave their "wives" and children in these camps and carry out random and unpredictable attacks against the civilians in northern Uganda, and return with abductees and food.³⁷

³⁴ Vinci 2005 *SWI* 367.

³⁵ Majtenyi "Insecurity in Northern Uganda: Are people being given the protection they deserve?" 1998 *Refuge* 23.

³⁶ HRW "Uprooted and forgotten: Impunity and human rights abuses in Northern Uganda" 2005 www.hrw.org/reports/2005/09/19/uprooted-and-forgotten-0 (Date of use: 19 September 2013).

³⁷ Ehrenreich "The stories we must tell: Ugandan children and the atrocities of the Lord's Resistance Army" 1998 *Africa Today* 82.

The LRA's evolution was further enhanced by "operation Iron Fist I" in 2002 and "operation Iron Fist II" in 2004. During these operations, the government of Uganda agreed with the Sudanese government to track the rebels within the Southern Sudan territory, and this significantly weakened the LRA's fighting capability. They left their bases in Sudan but became even more mobile. This has contributed to their being very elusive; they are believed to oscillate between bases in the Central African Republic and the Democratic Republic of Congo forests.³⁸

2.2.1.2. *Atrocities meted on children by the LRA*

The LRA commanders captured children by targeting villages in Northern Uganda and forced them to commit macabre rituals so as to subjugate them. They would kill their conscience and make them accomplices in bizarre killings. When the LRA soldiers raided villages, they would first teach lessons to all those perceived to be informers. They would cut off their lips and ears and sew their eyes together to teach them a lesson by keeping their eyes, mouths and ears shut. The cyclists would have their legs chopped off since they were accused of being the communicants between the villages and the army bases. Other civilians would just be killed in the presence of their families.³⁹

The abducted children would be taken through a macabre initiation ritual. They were first beaten thoroughly and forced to carry heavy loads. Martin, who was abducted at the age of 12 years, told of the mass abductions as follows:⁴⁰

³⁸ Phuong *et al* "The Lord's Resistance Army and forced conscription in Northern Uganda" 2008 HRQ 407.

³⁹ Vinci 2005 SWI 375.

⁴⁰ HRW www.hrw.org/reports/2005/09/19/uprooted-and-forgotten-0 (Date of use: 19 September 2013).

“That night, the LRA came abducting people in our village, and some neighbors led them to our house. They abducted all five of us boys at the same time. I was the fifth one. ... We were told by the LRA not to think about home, about our mother or father. If we did, then they would kill us. Better to think now that I am a soldier fighting to liberate the country. There were twenty-eight abducted from our village that night. ... We were all tied up and attached to one another in a row. After we were tied up, they started to beat us randomly; they beat us up with sticks.”

Martin further explained that the LRA thought that he and his four brothers would not work well since they were all from the same family, so they killed two of the brothers while the others were made to watch. The youngest was nine years old when he was killed.⁴¹

Any of the children who attempted to resist and those who were too weak to move would be killed. The abductees would be forced to do the killing, usually the victim would be placed in the middle of a circle of abductees and they would be forced to kill him or her by beating him or her to death. A girl named Stella aged 15 years narrated how they were forced to kill a small girl who tried to escape:⁴²

“On the third day a little girl tried to escape, and they made us kill her. They went to collect some big pieces of firewood. Then they kicked her and jumped on her, and they made us each beat her at least once with the big pieces of wood. They said, ‘You must beat and beat and beat her.’ She was bleeding from the mouth. Then she died. Then they made us lie down and they beat us with fifteen strokes each, because they said we had known she would try to escape.”

⁴¹ HRW www.hrw.org/reports/2005/09/19/uprooted-and-forgotten-0 (Date of use: 19 September 2013).

⁴² Ehrenreich 1998 *Africa Today* 91.

Sometimes they would be forced to cut off the flesh of the dead and eat it, or smear their blood on their bodies. One of the boys narrated how they killed a boy who tried to escape:⁴³

“One boy tried to escape, but he was caught. They made him eat a mouthful of red pepper, and five people were beating him. His hands were tied, and then they made us, the other new captives, kill him with a stick. I felt sick. I knew this boy from before. We were from the same village. I refused to kill him and they told me they would shoot me. They pointed a gun at me, so I had to do it. The boy was asking me, ‘Why are you doing this?’ I said I had no choice. After we killed him, they made us smear his blood on our arms. I still dream about the boy ... I see him in my dreams, and he is talking to me and saying I killed him for nothing, and I am crying.”

If the dead had been killed by the soldiers, the abductees would be forced to beat the dead body repeatedly. Another child narrated how they were forced to kill a man as follows:⁴⁴

“In Sudan, some men were brought before us, and we were made to gather in a circle. We had to beat the man to death. The real killing was done by about ten people, and the rest were made to beat the person who was already dead.”

They would also be subjected to hard labour, denial of food and summary executions for disobedience. Yet another told of the long distances and the luggage they had to carry as follows:⁴⁵

⁴³ Ehrenreich 1998 *Africa Today* 94.

⁴⁴ HRW www.hrw.org/reports/2005/09/19/uprooted-and-forgotten-0 (Date of use: 19 September 2013).

⁴⁵ HRW www.hrw.org/reports/2005/09/19/uprooted-and-forgotten-0 (Date of use: 19 September 2013).

“They beat us, then they made me carry some radios and carry the commander's gun. It was heavy and at first I was afraid it would shoot off in my arms, but it was not filled with ammunition. We joined a big group and we walked very far, and my feet were very swollen. If you said that you were hurting they would say, ‘Shall we give this young boy a rest?’ But by a ‘rest’ they meant they would kill you, so that if you did not wish to die you had to say you did not need a rest.”

In addition, they would be smeared with butter and “holy” water before combat and brainwashed that the “holy spirit” would protect them against bullets, so there was no need to take cover while the bullets were flying.⁴⁶ Charles, aged 15 years, narrated how they were sent on the front line while the commanders crouched behind the children. The children were not supposed to crouch or take cover. Charles explained the brainwashing as follows:⁴⁷

“The order from the ‘Holy Spirit’ was not to take cover. You must have no fear, and stand up as you run into fire. This was because they said you would be protected by the ‘Holy Spirit’ if you stood tall and had no fear. But if you took cover, the ‘Holy Spirit’ would be angry and you would be shot dead by all the bullets. So many were killed.”

The girls were married off to the older commanders, who were polygamous. One girl, Sarah (aged 17 years) narrated how she was married off to a commander who already had five wives:⁴⁸

“After the military training, I was given to a man called Otim. There were five women given to one man. The man ... thought I wanted to leave him and

⁴⁶ Ehrenreich 1998 *Africa Today* 94.

⁴⁷ Ehrenreich 1998 *Africa Today* 94.

⁴⁸ Ehrenreich 1998 *Africa Today* 95.

escape. He beat me many times with sticks. Now I'm going to be a mother soon. I don't want to be a mother at this age. But it happened and I must accept this.”

The effect of this brutality is that it de-humanised the abductees, making them have no regard for human life. It also made them believe that they were so bad that they would not be accepted by the rest of society, their only place was among their equally bad peers. This created in them a siege mentality which made them even more brutal than their abductors. One man narrated how his fingers were chopped off by a teenager:⁴⁹

“It was at eight in the night. A group of LRA came to my house. I was living there with my wife and children. The rebels looted my household Then they put my hand down. They cut off my finger with a panga. The rebel who cut off my finger was a young boy in his early teens. I pleaded with them not to hurt my hand, but they said since they found me farming at home they would have to kill me if they didn't cut my fingers. Then they left with my children.”

UNICEF estimated that in 19 years of war, about 20 000 children were abducted by the LRA.⁵⁰ Abductions increased when the LRA were pushed out of Sudan during operation Iron Fist I in mid 2002. They declined towards 2004, but then surged again in February and March 2005. It is assessed that the later increase was a result of President Museveni's February 2005 remark that the LRA had been defeated and that those that remained could not carry out incursions. It was as if they were doing it to show him that they were not yet vanquished.⁵¹

What is most baffling about this conflict is that Kony, perhaps well aware that his rebellious activities would not bring down Museveni's government, continued to terrorise

⁴⁹ Ehrenreich 1998 *Africa Today* 96.

⁵⁰ Kun “Children bear the brunt of Uganda's 19-year conflict”
www.unicef.org/protection/uganda_25704.html (Date of use: 19 September 2013).

⁵¹ HRW www.hrw.org/reports/2005/09/19/uprooted-and-forgotten-0 (Date of use: 19 September 2013).

his own ethnic group, the Acholi. Many believed he was mad or possessed by evil spirits, but Kony saw himself as the voice of the “holy spirit” who was to redeem the Acholi from President Museveni’s rule, and establish his own rule under the biblical Ten Commandments.⁵²

The civilians were caught between a rock and a hard place. They were forced to move to protected camps to escape the rebels, because the government seemed unable to protect them in their homes. They lived in crowded conditions, ever afraid of raids by the LRA. Yet, even these camps were not safe, as one boy narrated:⁵³

“At one time, we went to a displaced persons camp and immediately killed three people. This was done to warn people not to stay in the camps but to move back to their villages. I don’t know why these three were selected. We later abducted many children from that camp.”

Most civilians were traumatised and distressed by this whole situation, wondering why Kony would target them and their small children, fighting a senseless war, and why the government was unable to offer them protection.⁵⁴ One woman narrated to the Human Rights Watch researchers how in December 2004 she was beaten up and undressed by the rebels as she worked on her farm about five miles from her camp. She expressed dread for the rebels.⁵⁵

I have found many narratives seeking to explain why the LRA engaged in this savagery in Uganda, yet none sounds convincing enough to justify the atrocities committed on

⁵² Vinci 2005 *SWI* 361.

⁵³ Ehrenreich 1998 *Africa Today* 96.

⁵⁴ Ehrenreich 1998 *Africa Today* 96.

⁵⁵ HRW www.hrw.org/reports/2005/09/19/uprooted-and-forgotten-0 (Date of use: 19 September 2013).

children. Ehrenreich⁵⁶ posits various theories attempting to explain the rationale for this conflict, from the simple insanity of Kony theory to the more plausible ethnic extermination theories and government duplicity theories. She says that from the narratives she heard from various people in Northern Uganda, some people believed that Kony was mad, otherwise how else would one explain such a senseless bloodshed against one's community in a war that he would not win, and base it on some unbelievable mystic powers? Others believed that this was a government of Uganda conspiracy to destroy the Acholi, by watching as they killed each other and annihilated their children. They claimed that the Acholi had always posed a threat to the government due to their numbers in previous military regimes, and also because they presented the biggest onslaught against the NRM and President Museveni. Others ridiculously believed that the LRA were just government soldiers disguised as rebels. Still others believed that President Museveni used the LRA conflict to get budgetary approvals from Parliament, and then used this money for other purposes such as extending his influence to the Democratic Republic of Congo ("the DRC"), Rwanda and South Sudan.

Vinci⁵⁷ opines that the LRA have political goals despite the fact that they keep morphing time and again. He presents the LRA's atrocities as well-thought out strategies of instilling fear into every fabric of the society. They commit conspicuous mutilations by severing ears, lips and limbs. The victims silently "consent" to the mutilations after being threatened with death, which they know that the LRA is all too willing to undertake. They also abduct and initiate their abductees in very cruel ways, making the abductees easier to control, extremely violent and fearful of returning to the society. Using the "holy spirit" blackmail, they pretend to be fearless and omnipotent, and present Kony as a deity. One of the abductees described Kony's authority as follows:⁵⁸

⁵⁶ Ehrenreich 1998 *Africa Today* 102.

⁵⁷ Vinci 2005 *SWI* 368.

⁵⁸ Ehrenreich 1998 *Africa Today* 99.

“It happens like this: Kony himself, he says he works with the ‘Holy Spirit’, and it talks to him, and he translates to the soldiers. So some days he says: ‘Today, you must burn the earth and kill the people.’ That is the reason the rebels make so much destruction.”

The image of Kony as a deity was so entrenched in the psychology of the rebels that they would not rape women as they abducted them in the fields, rape almost always occurred when the abducted women were taken to the camp. One community reader told Human Rights Watch researchers that the rebels believed Kony knew and saw everything, and they had to take the women to him first so that he could take his pick before they were contaminated, then he would distribute the rest to his commanders.⁵⁹

The LRA also made use of the element of surprise, with road-side ambushes on public transport vehicles, schools, villages and even the government soldiers. Their targets and timings were very unpredictable, creating a lot of anxiety for soldier and civilian alike. Their tactics also confused the government soldiers on who was the actual target. One day they would kill everyone riding a bicycle, the other day they would let them pass by. At one time they would decide not to attack churches, then during the next ambush they would target the churches.⁶⁰

What the LRA succeeded in doing, according to Van Acker, is to immobilise a whole population through fear. Their violence was indiscriminate, and since anybody could be targeted, anybody could be blackmailed by their terrorism.⁶¹

Interestingly, once in the camps, the abducted children were introduced to a family setting, albeit a weird one. The commanders served as the heads of the families with

⁵⁹ HRW www.hrw.org/reports/2005/09/19/uprooted-and-forgotten-0 (Date of use: 19 September 2013).

⁶⁰ Vinci 2005 SWI 373.

⁶¹ Van Acker *Uganda and the Lord's' Resistance Army* 350.

authority to discipline, even if this meant killing some, and the abductees lived as siblings. This form of organisation bound the abductees who saw themselves, for lack of a better alternative, as families. Those who obeyed were promoted in ranks.⁶² In the absence of ideal parental figures, some children looked up to their abductors as parent figures, and even when caned, they accepted it since they had been caned in their proper families though on much smaller scale.⁶³ These children defy the presumption of the innocence of childhood, though not by choice. In fact, UNICEF has been criticised for ignoring the notion that the abducted children are not children in the true sense of the word, since they are ideologically twisted. Indeed, the Ugandan soldiers say that when these “children” point guns at the soldiers, they became legitimate targets.⁶⁴

Those that were not abducted were forced to live in settlement camps for protection, and they only ventured out in the farms to look for food during the day. However, they lived with abuses even within the camps, where women and girls were raped and defiled by the Ugandan (UPDF) soldiers with notoriety. In addition, since the soldiers were the only ones with a regular income in the camps, they enticed young girls to have sex with them in return for financial favours; others forced the girls into early marriages. Tales abound of the gross atrocities committed by the soldiers, who more often than not went unpunished. One girl aged 16 years was repeatedly raped by a soldier in the Bobi camp, in the Gulu district on 26 January 2005. Another was found in the fields picking millet where her mother had left her temporarily and was raped. Her mother reported the rape to the police. The soldier later came to her hut in the camp and abducted her and made her his third wife. She only escaped months later after a lot of mistreatment, and by that time she was pregnant.⁶⁵ Many other civilians were killed or maimed by the soldiers within or outside the camps. The soldiers often went unpunished, since they

⁶² Cheney 2005 *Children's Geographies* 30.

⁶³ Cheney 2005 *Children's Geographies* 32.

⁶⁴ Cheney 2005 *Children's Geographies* 32.

⁶⁵ Majtenyi 1998 *Refuge* 25.

claimed that the civilians were rebel collaborators. Such incidents made the soldiers a much detested lot in Northern Uganda.⁶⁶

Persistent UPDF operations in Northern Uganda and South Sudan, coupled with the indictment of Kony by the International Criminal Court, made the LRA run deeper into hiding in the DRC. Here the LRA continued with their atrocities of killing and abducting civilians, especially children. They employed the same tactics they did in Uganda and especially targeted schools. Since most of the places attacked are in remote areas, Human Rights Watch observes that these attacks go unreported.⁶⁷ An eye witness who had managed to escape and hide in the forest for two days gave an account of what he found out after he came from his hiding place as follows:⁶⁸

“I found bodies everywhere, all along the road ..., including those of my older brother and uncle. I buried 22 bodies that day. I saw at least another 40 bodies. Some of the victims were tied together in groups of three or four. They were all killed with four blows of the axe on the back of the head ... Some of the bodies had pieces of wood stuck in the side or the chest.”

The LRA rused villagers by claiming that they were either Ugandan or Congolese army soldiers, and since the latter were trusted by the villagers, they would stay calm. These soldiers would be clean and in military fatigues, and they spoke lingala, the local dialect. However, the LRA would then unleash terror. The dirty group, which was made up of militias with long unkempt hair, would then arrive, abducting children and killing adults in the most macabre of ways. They would hit their heads with axes or slit their throats.⁶⁹

⁶⁶ Majtenyi 1998 *Refuge* 25.

⁶⁷ HRW “Trail of death: LRA atrocities in north eastern Congo
www.hrw.org/reports/2010/03/28/trail-death (Date of use: 19 September 2013).

⁶⁸ HRW www.hrw.org/reports/2010/03/28/trail-death (Date of use: 19 September 2013).

⁶⁹ HRW www.hrw.org/reports/2010/03/28/trail-death (Date of use: 19 September 2013).

Human Rights Watch has been engaged in an online campaign to bring an end to the atrocities of the LRA. It released a video entitled “Dear Obama: a message from the victims of the Lord’s Resistance Army”, which received accolades globally. The US government enacted the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, aimed at authorising the US intervention in this long-drawn conflict. The American government then promised to act to help the Ugandan civilians, and in 2011 the US president sent about 100 elite soldiers to assist in the capture of the rebel leaders. Since these efforts were primarily addressing Uganda, human rights defenders in Niangara, a town in the northern DRC deeply affected by LRA attacks, also wrote an online public letter to President Obama to seek his intervention even in the DRC.⁷⁰ However, so far Kony and his accomplices still roam freely leaving a trail of blood and tears in their wake in the remote areas of the Democratic Republic of Congo and the Central Africa Republic.⁷¹

The children of Northern Uganda, as with many other child-soldiers, present a very painful dilemma. On the one hand, they were abducted and subjected to unimaginable atrocities by the LRA; they underwent traumatic training and were sent to the battlefield, where they were killed by the Ugandan soldiers in combat. James, aged 17 years, described how the Ugandan soldiers shelled indiscriminately at the rebels, killing many abductees:⁷²

“The air bombing happened a few weeks after I was abducted. It was a UPDF helicopter gunship that shot at us. I was wounded during the attack, but many abductees were killed as well as LRA soldiers. We were a group of 500 before the attack, with 400 of those abducted children and adults. Hours later only 200 had survived.”

⁷⁰ HRW www.hrw.org/reports/2005/09/19/uprooted-and-forgotten-0 (Date of use: 19 September 2013).

⁷¹ Invisible children “A critical look: Recent LRA attacks prove Kony is still a threat” invisiblechildren.com (Date of use: 4 December 2014).

⁷² HRW www.hrw.org/reports/2005/09/19/uprooted-and-forgotten-0 (Date of use: 19 September 2014).

When one thinks of an LRA child soldier pointing a gun at a UPDF soldier, the notion of the supremacy of the best interests of the child becomes a fallacy. That soldier does not see a child, he sees an enemy combatant whom he must kill before he is killed. Similarly, when the child soldier goes back to the villages to loot, kill and abduct civilians, then his interests cease to be of any consideration, and in fact one would argue that the interest of the civilians are to prevail over and above those of that child-soldier.

When not abducted, the children of Northern Uganda lived in deplorable conditions. When their abducted peers were rescued or managed to escape, they were taken by relief organisations for rehabilitation, and their standards of living were enviably better than those of the other children in the camps. Indeed, the Ugandan soldiers report incidents of children fabricating stories that they had escaped from LRA custody just to get beneficial treatment like the child soldiers. The same was replicated on a bigger scale by the adults, who eyed the LRA soldiers who had taken advantage of the amnesty and surrendered with envy since they received cash entitlements to help them rebuild their lives. This caused resentment amongst the civilians.⁷³

2.2.2 Somalia: A generation of war-children

2.2.2.1 Background

The Somalia conflict as a case study is unique mainly because of its prolonged nature and the fact that it has undergone a metamorphosis of its kind. Somalia has been described as the quintessential failed state, having been without a proper government

⁷³ Phuong, Vinck & Stover “The Lord’s Resistance Army and forced conscription in Northern Uganda” 2008 *HRQ* 411.

for almost two decades.⁷⁴ The fall of the Siad Barre government in 1991 precipitated a state of anarchy that has seen a whole generation of children who know nothing of an organised democratic government.

The fact that what looks like a homogenous community, sharing a language, culture and religion can be so fragmented has left many people baffled. Beneath that homogeneity is a clan factor that is intertwined in every socio-political aspect of life in Somalia. In traditional Somali society, the clan acted as a basis for identity, the settlement of disputes and conflicts, and communal security. Modernisation brought a structured national judiciary and constitutional laws but this system did not replace the clan. Indeed, much of the wars that followed the fall of the Barre regime were fought along clan lines.⁷⁵

Efforts to form a strong government in Somalia have been besieged by clan interests much to the chagrin of the terrorists who are ravaging that nation with their own brand of extremist religion.⁷⁶ The Somali children are caught between a rock and a hard place, surviving warlordism only to face terrorism while still not sure of when their government will achieve stability and thus give them sufficient protection.

While conflicts over resources and territorial boundaries have been part of mankind since time immemorial, the conflict in Somalia, like most others, can be traced to the partition of Africa when Somalia was divided into five distinct parts:⁷⁷

- French Somaliland, which is the modern day Djibouti
- British Somaliland, modern day Somaliland

⁷⁴ Balthasar "Somalia: unable to escape its past? Revisiting the roots of a fractured state and elusive nation" 2014 *Critical African Studies* 223.

⁷⁵ Balthasar 2014 *Critical African Studies* 224.

⁷⁶ Barnes & Hassan "The rise and fall of Mogadishu's Islamic courts" 2007 *JEAS* 150.

⁷⁷ Dersso "The Somalia conflict: Implications for peacemaking and peacekeeping efforts" 2009 *ISS Paper 2*.

- Italian Somaliland, modern day Somalia
- The Northern Frontier district, which was part of the Kenya colony
- The Ogaden region, which is modern day Ethiopia and which was liberated from the colonialists by Emperor Menelik II.

British and Italian Somaliland merged in 1960 to become Somalia, but British Somaliland later sought autonomy from the rest of Somalia.⁷⁸ Though Somaliland has sought (but has not received) international recognition as a different state, it operates in a largely autonomous way and its territory is relatively stable compared to the rest of Somalia.⁷⁹

Some of the effects that this division of territory amongst the European powers had was that the Somalia people were divided under different sovereigns. Subsequently, their evolving culture was influenced by their colonisers. One of the nationalist dreams of Somali leaders has been to bring the people of Somalia back together and form the greater Somalia. This expansionist aspiration led to conflict with their neighbors, especially Ethiopia, Kenya and Djibouti.⁸⁰

The 1964 OAU Cairo Declaration that sanctioned colonial borders did not go down well with Somalia, and in 1977, it waged a war against Ethiopia in which it was defeated. However, the Ogaden secessionist groups, which were supported by the then Somalia president Siad Barre, continued clamouring for political autonomy of the Ogadenis, who are part of the Somalis. In return, the Ethiopian government supported opposition groups against the Barre regime, which eventually contributed immensely to his ouster in 1991.⁸¹ Ethiopia has since been part of the Somalia politics because of the Ogaden

⁷⁸ Dersso 2009 *ISS Paper 2*.

⁷⁹ Walls "The emergence of a Somali state: Building peace from civil war in Somaliland" 2009 *African Affairs* 373.

⁸⁰ Walls 2009 *African Affairs* 373.

⁸¹ Dersso 2009 *ISS Paper 2*.

threat, and the subsequent war with Eritrea. Ethiopia and Eritrea have been cited as fighting proxy wars in Somalia, with Eritrea accused of arming the Al Shabaab Al Mujahideen group (hereinafter “the Al Shabaab”), a terrorist group seeking to unite Somalis and establish a strict form of Sharia law in the entire Somali region and later spread it to its neighbours.⁸²

The colonial administration ignored the traditional structures of governance and imposed their model of the European nation state, where the state exercised power and control of resources. The Somali people had their structures based on the clan and sub-clan system.⁸³ With the new model of governance at independence, clans struggled amongst themselves to fill in the power vacuum left by the departing colonisers. The majority clans took control and were detested by the minority. This laid the foundation for the bitter clan rivalry that has permeated the Somali political fabric.⁸⁴ Some clans had access to privileges such as education and control of economic resources, while others were marginalised and even had violence meted on them. The 1978 attempted coup against Barre made things worse as Barre used his clan, the Marehan, to solidify his power base to the exception of other clans.⁸⁵ Add this to the fact that at independence, the Somali cultures had been contaminated by the different styles of their colonisers and you have a recipe for instability. Those who survived Barre’s onslaught after the attempted coup fled to Ethiopia and formed several opposition groups.⁸⁶

The Somali Salvation Democratic Front (hereinafter “the SSDF”) was formed by members of the Majertan clan in 1978. In 1981, the Somalia National Movement (“the SNM”) was formed by members of the Isaaq clan exiled in London. The Hawiye formed

⁸² Heintz “Eritrea and Al Shabaab: Realpolitik on the Horn of Africa” 2010 *Small Wars Journal* www.smallwarsjournal.com (Date of use: 19 September 2013).

⁸³ Ahmed & Green “The heritage of war and state collapse in Somalia and Somaliland: Local-level effects, external interventions and reconciliation” 1999 *TWQ* 114.

⁸⁴ Ahmed & Green 1999 *TWQ* 114.

⁸⁵ Ahmed & Green 1999 *TWQ* 114.

⁸⁶ Ahmed & Green 1999 *TWQ* 114.

the United Somali Congress. In 1988, Barre and Mengistu Haile Mariam of Ethiopia entered into an agreement to stop supporting opposition groups. This agreement gave a renewed momentum to the Somali opposition groups to push Barre out of power. By the end of 1990, these groups were advancing on Mogadishu, the capital of Somalia. Barre fled and left the groups fighting over the control of Mogadishu. The power vacuum left by Barre's downfall and the lack of agreement among the opposition groups as to who would take control of government fomented an already volatile situation. The SNM took control of Somaliland and established an autonomous regime. The rest of the country was subdivided by warlords belonging to various clans, each with his own militia.⁸⁷

In addition, Barre's regime was very militarised; it received weapons from parties to the cold war and Barre gave the weapons to his clan members to ensure that he remained in power. After his government collapsed, the weapons were left in the hands of clan militias who fought and killed each other so frequently that life in Somalia fulfilled Thomas Hobbes' prophesy of being short, nasty and brutish.⁸⁸

Barre's regime did not concentrate on income-generating ventures for the growth of Somali's economy but rather relied on foreign aid from its cold-war allies. The war lords inherited an impoverished population and war over resources raged. Hegemonies emerged that controlled areas deemed to have resources such as the sea ports of Mogadishu and Kismayu.⁸⁹

Efforts at giving peace a chance in Somalia saw the establishment of a weak government that controlled the capital Mogadishu in 2007. However, as Al Shabaab continuously attack Mogadishu, the government set up its seat in Baidoa in Somalia.⁹⁰

⁸⁷ Menkhaus "Governance without government in Somalia" 2006 *International Security* 80.

⁸⁸ Leviathan 1, XIII.

⁸⁹ Dersso 2009 *ISS Paper* 6.

⁹⁰ Barnes & Hassan 2007 *JEAS* 151.

In the early 2000s, global terrorist groups such as Al Qaida saw an opening in Somalia, especially after they were pushed against the wall in their traditional bases of Afghanistan and Pakistan.⁹¹ They started sending their seasoned jihadists who embarked on radicalisation of youth in Somalia. The jihadists brought a common purpose in Somalia, which had been lacking. They promised unity above clanism based on religion and equitable sharing of resources. Religious extremism started taking root in Somalia. The extremists took over a system of courts which had been formed by clan elders to dispense justice in the absence of formal courts. These courts became formally known as the Islamic Courts Union (“the ICU”). For some time, there was a semblance of order returning to Somalia. However, this was short-lived.⁹²

As would be expected, the anti-terrorism wave followed the jihadists in Somalia. Having suffered a humiliating defeat in Somalia in the mid 1990s, the United States of America reportedly funded a group of war lords that sought to uproot the extremists. The alliance of war lords, known as the Alliance for Restoration of Peace and Counterterrorism, sought to gain territory over the extremists in 2006. The Ethiopian troops also joined in the uprooting of the jihadists;⁹³ Ethiopia has always been wary of any group that might unite Somalis and revive the dream of secession of the Ogadens.⁹⁴

The Ethiopians’ and the warlords’ alliance drove the ICU out of Somalia in December 2006. However, the youth arm of the ICU regrouped under the auspices of Al Shabaab. They waged a war against Ethiopian troops who subsequently withdrew in 2009. The weak Trans-national Federal Government, which had been beleaguered by clan wars, could not fill in the power vacuum, and Al Shabaab promptly stepped into place.

⁹¹ Shinn “Al Shabaab’s foreign threat to Somalia” 2011 *Orbis* 204.

⁹² Barnes & Hassan 2007 *JEAS* 155.

⁹³ Barnes & Hassan 2007 *JEAS* 155.

⁹⁴ Barnes & Hassan 2007 *JEAS* 155.

Al Shabaab waged a war against the Trans-national Federal Government (hereinafter “the TFG”), especially over the control of Mogadishu; they already had control of Kismayu and the revenues from this port funded their war. However, due to their extremism, they were viewed as a threat regionally and internationally, and the African Union sent a peace-keeping mission into Somalia, dubbed the African Union Mission in Somalia (“AMISOM”). At first it was made up of Burundi and Ugandan soldiers. AMISOM managed to help the TFG keep the Islamists at bay, and this angered the Islamists who sought revenge by launching terrorist attacks against football fans who had gathered to watch the 2010 FIFA World Cup finals in Kampala, Uganda. At the same time, they became a threat to Kenya due to their frequent incursions into the Kenyan territory and kidnapping of Kenyan and foreign citizens.⁹⁵

In the meantime, the TFG outgrew its limping infancy and moved on to a weak adolescence. Some of the leaders of the ICU had formed an Alliance for the Re-liberation of Somalia (hereinafter “the ARS”) and through negotiated agreements in Djibouti, they joined the government. Indeed, one of the leaders of the ICU and later the ARS, Sheikh Ahmed Shariff, went on to become the president, taking over from Colonel Abdullahi Yusuf.⁹⁶

Kenya sent its troops to fight Al Shabaab and secure its borders with Somalia in 2011, and since then Al Shabaab has lost many of its bases, especially Kismayu. However, it continues to wage guerilla war-fare and carry out suicide bombings, particularly in Mogadishu. The TFG has matured to the Federal Government of Somalia and has its third president, Hassan Sheikh Mahmud.⁹⁷

⁹⁵ Shinn 2011 *Orbis* 211.

⁹⁶ Dagne “Somalia: Prospects for a lasting peace” 2009 *Med Quat* 100.

⁹⁷ BBC News Afrika “Hassan Sheikh Mohamud: Somalia’s new president profiled” www.bbc.co.uk/news/world-africa-19556383 (Date of use: 2 October 2013).

Lost in this social and political quagmire is the suffering of millions of Somalis, to whom war has become endemic and part of their identity. Somali has an entire generation born and brought up in war, and they know how to handle a gun more than they would know how to read a book. Even before Al Shabaab came into the picture, many children had died as a result of war-inflicted injuries. Some had died due to malnutrition while others had died as they moved to safer grounds as refugees. The conditions in the refugee camps in Northern Kenya are dire; the prolonged nature of the Somali conflict has ensured a continuous flow of refugees who have overstretched the available resources. As a result, many children in the camps die of communicable but preventable diseases.⁹⁸

Half of all the dead are reported to be children.⁹⁹ Children have been left orphaned and have to take care of younger siblings, such that there are many cases of child-headed households.¹⁰⁰ Somalia has one of the lowest school enrolment rates in the world.¹⁰¹

Al Shabaab brought new dynamics into the Somali conflict, with their recruitment of minors to join their ranks. Though children had always been used by war lords and clan militias, Al Shabaab started mass recruitment of minors by targeting villages and schools for compulsory recruitment. This saw an increase in the number of refugee

⁹⁸ Mediciens San Frontiers “Somali refugees imperiled in overcrowded camps in Kenya” www.doctorswithoutborders.org/press/release.cfm?id=3621 (Date of use: 19 September 2013).

⁹⁹ Amnesty International “In the line of fire: Somalia’s children under attack” www.amnesty.org/en/library/info/AFR52/001/2011/en (Date of use: 19 September 2014).

¹⁰⁰ Amnesty International www.amnesty.org/en/library/info/AFR52/001/2011/en (Date of use: 19 September 2014).

¹⁰¹ UNICEF “Somalia, Statistics” www.unicef.org/infobycountry/somalia_statistics.html#77 (Date of use: 19 September 2014).

children in Kenya, especially since 2007. Some arrived in the camps without their parents and therefore became heads of households.¹⁰²

2.2.2.2 *Atrocities on children*

Human Rights Watch interviewed Somalis who had fled the conflict from 2010; children recounted how they had been abducted from playgrounds, markets, schools and homes. Though the real numbers have not been known, a report from the UN Secretary-General, quoting from military sources, indicated that in 2010 alone, Al Shabaab had recruited 2000 children.¹⁰³ Interestingly, some of the children were recruited by their parents or older siblings who had joined the militia. Some parents believed that they had to give to the cause of religion and voluntarily handed over their children to the militia.¹⁰⁴

A mother told Human Rights Watch how her husband took their 10-year-old son to battle.¹⁰⁵

“My husband was in al-Shabaab. He came and said to my eldest son, ‘You must also join.’ He overpowered me and took my son. Later I heard my son died in the war. I went to where my husband was, Horera mosque, and I said, ‘I heard my son died.’ He said, ‘I am pleased to inform you that our son died a martyr.

¹⁰² UN General Assembly and Security Council “Report of the Secretary-General on children and armed conflict” www.un.org/children/conflict/_documents/S2011250.pdf (Date of use: 20 September 2014).

¹⁰³ UN General Assembly and Security Council www.un.org/children/conflict/_documents/S2011250.pdf (Date of use: 20 September 2014).

¹⁰⁴ HRW “No place for children: Child recruitment, forced marriages and attacks on schools in Somalia” 2012 www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

¹⁰⁵ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use 20 September 2014).

He went straight to paradise.’ He showed me footage he took of my son being killed in the war, his blood, his body. I cried.”

Al Shabaab took advantage of prevailing poverty and used promises of monetary and material gain to entice children. A case in point is how they managed to recruit across the borders, among Kenya’s poor urban youth. However, most of the youth got frustrated when they realised that the salary they were promised was just an illusion. Once in Somalia, they were forced to fight for religion and await their reward, which, they were convinced, is entry into paradise.¹⁰⁶

Al Shabaab also visited schools and forced teachers to include jihad in their curriculum, or brought in their own teachers who took over the schools and made them indoctrination centres.¹⁰⁷ Some children became indoctrinated and agreed to join jihad, those who were not convinced were still taken by force. One girl narrated to Human Rights Watch how 15 of her 45 classmates, 5 girls and 10 boys, decided to join after jihad classes.¹⁰⁸

Schools were turned into battle grounds from where Al Shabaab would launch attacks against government soldiers and other militias. They banned some subjects like English, which were deemed to reflect heathen culture, and insisted on Arabic which they used as a medium of instruction on jihad. They abducted and killed teachers who did not conform to their teachings, or who attempted to oppose their take-over of schools. As a result, children and teachers abandoned schooling altogether. One teacher narrated to Human Rights Watch how he was assaulted in class:¹⁰⁹

¹⁰⁶ Shinn 2011 *Orbis* 210.

¹⁰⁷ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

¹⁰⁸ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

¹⁰⁹ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

“In December 2009, six al-Shabaab fighters came to class, I was teaching ... a geography lesson and they told me, ‘We warned you not to teach these subjects.’ They took a bayonet and stabbed me in the right upper lip They did it in front of the students. They picked a female teacher as she was not wearing a hijab [headscarf]. They came to her class and said, ‘Why don’t you have a hijab and veil?’ They took her in a Toyota vehicle and her body was found ... near the mosque.”

The teacher further narrated how students were killed merely for speaking English:¹¹⁰

“In the first months of 2010, I had students who were killed for practicing English as they were walking home. They were between 10 and 17 years old. An al-Shabaab fighter asked, ‘Are you speaking English You don’t want to be Muslim?’ He then shot them. In late 2010, al-Shabaab came to the school and picked 20 students between 15 and 17 years ... They took 3 girls – a 12-year-old and two 14-year-olds. No one tried to stop them ... it was impossible.”

This particular teacher was forced to leave for the refugee camps when attacks on schools intensified. He explained that the headmaster and his deputy were killed when they refused to stop teaching some subjects.¹¹¹

One boy narrated how on his way to school, he saw Al Shabaab fighters driving towards the school; he ran and warned the teachers and pupils. When they started running, the fighters threw four mortar shells at them, killing many of them. Al Shabaab also took

¹¹⁰ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

¹¹¹ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

over schools and made them their operational bases; indeed, the UN Secretary-General reported that between 2008 and 2010, Al Shabaab had occupied at least 34 schools.¹¹²

The children that refused to join were killed, either alone or together with their families. The killings were chilling and done in public so that others who were not for jihad would be fearful and join the Islamists. One girl told Human Rights Watch how her brother was killed after he refused to join the militia:¹¹³

“Al-Shabaab said to my elder brother, ‘Come with us.’ He refused and they beheaded him. He was 16. They took him and put his head in front of our house.”

Terrified of Al Shabaab, and knowing that they would be taken by force, children would scramble out of classroom windows whenever a report of Al Shabaab militia sighting within the school compound was heard. Al Shabaab would not spare even school teachers who tried to shield the children. Two girls narrated how all their teachers were taken away:¹¹⁴

“Al-Shabaab came in a full vehicle. They came upstairs and called everyone down They said, ‘Come and be part of jihad.’ They told the teachers, ‘We will take the students or we will take you.’ The teachers said, ‘Instead of taking the Somali children, it is better you take us.’... Then they took the teachers and the school was closed.”

¹¹² UN General Assembly and Security Council “Report of the Secretary-General on children in armed conflict in Somalia” www.un.org/children/conflict/_documents/S2011250.pdf (Date of use: 20 September 2014).

¹¹³ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

¹¹⁴ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

Parents who refused to give up their children were often killed. Two fathers, who had refused to sign an agreement in school to hand over their children were found dead a day later in the market place, with letters pinned on their bodies warning other parents that refusal to hand over their children would result in the same fate for them.¹¹⁵ Another boy narrated how his family was wiped out because his parents refused to hand him over to Al Shabaab:¹¹⁶

“They went to my house to my parents and said, ‘We want your child.’ My parents refused. They killed my parents, my four brothers, and three of my four sisters. The girls were crying and then the other boys tried to defend my parents. Only my 10-year-old sister and I survived. I wasn’t there. I came and found my sister crying and the bodies only. My sister was crying and saying, ‘Go away. They will kill you and I can’t live alone if they kill you.’ I just got my sister and fled We left the bodies and my sister and I ran away.”

Once in the training camps, children underwent hostile training, including grueling physical training and beatings, while having just one meal a day. Any child who attempted to escape would be locked up or killed as a lesson to others who harboured such thoughts. A boy narrated how his classmates, who refused to take part in the training, were killed as the other boys watched.¹¹⁷

Some children were given the job of patrolling towns and whipping all those, including adults, who did not abide by Al Shabaab rules. Residents who did not close their shops for prayers or the women who were found to be dressed in “inappropriate” clothing such as brassieres were whipped in public by young boys. People listening to secular music

¹¹⁵ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

¹¹⁶ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

¹¹⁷ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

or watching football would also be whipped.¹¹⁸ One boy narrated how he was forced to punish the errant ones as follows:¹¹⁹

“I was given two jobs, to whip women and to punish boys who had music on their mobile phones. I would make them swallow the memory card. I made 20 youth swallow the cards and I must have whipped 50 women. I would go with older men backing me up. They were about 30 years old and there were five of them. They would stand with me and force me. I felt bad to whip someone my mother’s age.”

As in most other conflicts involving child soldiers, Al Shabaab put children on the front line, and the adults crouched behind them.¹²⁰ Children were also used as suicide bombers. One Mogadishu resident narrated how an eleven-year-old boy killed eight other children when, disguised as a food vendor, he detonated explosives within a school compound.¹²¹

Girls were given the roles of carrying supplies to the war front and taking bodies of the dead and injured, besides serving as wives to the fighters.¹²² However, as the conflict intensified, Al Shabaab started using girls as suicide bombers since they would be hard to notice or suspect, and therefore would stealthily attack the target. In 2011, Somalia

¹¹⁸ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

¹¹⁹ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

¹²⁰ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

¹²¹ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

¹²² HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

interior minister Abdishakur Sheikh Hassan was killed in a suicide bombing incident by his teenage niece.¹²³

When Al Shabaab were in control of Mogadishu, they would hold public meetings after Friday prayers where the young girls who had been abducted from schools or the villages would be paraded before the militia. The leaders would then ask all the young unmarried men to come forward and choose brides from amongst the girls. Of course the leaders would first choose some of the girls for themselves.¹²⁴

Part of the extremist curriculum that they introduced in schools also included convincing girls of their religious obligation to marry the fighters, even at a tender age. A school teacher told how a girl who had refused early marriage was killed:¹²⁵

“She was given to a commander. He was an old man. He told his men to kill her and they filmed it and sent it to mobile phones. My students saw it. They saw the mutilation. They brought back her head to the school and assembled all of the girls and said, ‘This is an example of what will happen if you misbehave.’ The girl was 16 years old.”

Rape is a taboo subject in Somalia that is rarely spoken about in public. Though they would like to deny it, Al Shabaab operatives have gang-raped women, sometimes so that they can subjugate them and force them to get married. However, rape was not carried out by Al Shabaab militias alone, even the TFG soldiers and other clan militias

¹²³ BBC Africa “Somali interior minister killed” www.bbc.co.uk/news/world-Africa-13730603 (Date of use: 20 September 2014).

¹²⁴ Shinn “Al Shabaab takes control of Somalia” *Foreign Policy Research Institute* www.fpri.org (Date of use: 19 September 2014).

¹²⁵ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

were involved in this vice. One girl described to Human Rights Watch how she was raped one evening:¹²⁶

“My younger sister and I were sent one night to go to the store to buy things. Then the Shabaabs appeared in front of us. There were very many. They caught us. They beat us but my sister managed to escape from them. They told me, “You will be taken to the station. Why are you walking around at this hour? We will arrest you.” But they didn’t take me to the station. They raped me. I got pregnant and have this small baby. There were six but I went unconscious after two so I don’t know if all six raped me. They used the butt of the gun to pierce my eye [indicating her left eye which was obviously damaged and which she said was blind]. Then they just left me.”

One boy, Mohamed, who was one of the refugees relocated to foreign countries from the refugee camps of Northern Kenya, narrated how he saw his childhood friend gang-raped as they walked home from school. They met seven militias and one started to shoot. Mohamed was shot in the leg and he passed out. When he came to, he found the men in the act of raping Halimo, his friend, and he described the bizarre sight that he saw:¹²⁷

“Halimo’s clothes were torn and she was naked. ... I was horrified ... while the deformed man was raping Halimo, the others were standing there watching, laughing and shooting in the air. These were the sounds I could hear and they ring in my ear whenever I think of that day. Halimo’s lips were swollen, bleeding; she was injured on her right cheek near the eye. Her eyes were wide open and dark. She seemed unconscious. I felt terrible pain, but I tried to move, shout, do anything, throw a stone at least, to make them stop, but I was frozen, paralysed, I could not move. I was so angry. My body failed me completely, I was trapped. I

¹²⁶ HRW www.hrw.org/reports/2012/02/20/no-place-children (Date of use: 20 September 2014).

¹²⁷ Schauer “Narrative exposure therapy in children: A case study” 2004 *Intervention* 25.

felt so helpless. Since then I blame myself for not helping her ... when the second man started raping her I fainted again, it was too much, too terrible to bear...”

It is worth noting that it was not just Al Shabaab that recruited children into their ranks; other militias that were fighting Al Shabaab did the same. Other children joined to earn a livelihood, because in a country so ravaged by war, there are not many income generating activities; in fact fighting has become so institutionalised that joining one militia or the other is a profession. Other children joined to avenge the killing of their kin by Al Shabaab. Still others joined to escape recruitment by Al Shabaab.¹²⁸

Somalia is so dangerous a place that even humanitarian groups find it difficult to operate. Even where they have scant presence, they operate in perpetual fear of being expelled, killed or kidnapped, not to mention that they have had to pay taxes to the militias controlling that area. As a result, efforts to mitigate the suffering of the children have been thwarted and in fact many parents are encouraged to take their children to the refugee camps in Kenya. Unfortunately, the camps are far for many of them. There is also a lack of mechanisms to deal with children who escaped from Al Shabaab, some reported to TFG camps and were enlisted to work with the soldiers instead of being taken through a recovery programme.¹²⁹

¹²⁸ Gartenstein-Ross “The strategic challenge of Somalia’s Al-Shabaab dimensions of jihad” 2009 *MEQ* 28.

¹²⁹ Gartenstein-Ross 2009 *MEQ* 35.

2.3 THE IMPACT OF ARMED CONFLICT ON CHILDREN

2.3.1 Introduction

Armed conflict impacts negatively on individuals and society in general. It causes physical and psychological trauma, especially on children who do not have the mental capacity to comprehend the source or rationale of the conflict.¹³⁰ They watch helplessly in horror as their lives and the environment they call home are destroyed. These impacts of war are summarised below.

2.3.2 War-related deaths and injuries

One of the obvious results of war is death of children and their parents and siblings. Some die as a direct result of injuries sustained in the fighting while others die of hunger and diseases. Even the post-war scenario is usually dire since overcrowding in refugee camps results in outbreak of diseases and inadequate food. When governments initiate or respond to wars, they increase the military spending at the expense of other crucial services such as child health and maternal care. Rape and defilement of children during and after the war also increases the rate of HIV infections. Wounds sustained during the fighting also take time to heal due to scarcity of health amenities.¹³¹

One of the greatest sources of casualties during and after the war is landmines, which have killed and maimed millions globally. Angola, for instance, is one of the countries most heavily affected by landmines and has more amputees than any other. Apart from killing and maiming, landmines also affect the lives of the general population by

¹³⁰ Boyden & Gibbs "Children of war: Responses to psycho-social distress in Cambodia" www.un.org (Date of use: 19 September 2013).

¹³¹ Albertyn *et al* 2003 *Pediatr Surg Int* 237.

confining them in isolated villages. They also affect food production since the arable land is mined, and on the other hand, the people who would work on the land are maimed. This compromises post-war standards of living.¹³²

2.3.3 Psychological impact

The psychological effect of war on children is greater than on adults. Their young innocent minds are unable to comprehend the magnitude of violence. Most experience death in horrible ways, amid immense suffering of their peers and beloved ones. They are prone to mental disorders such as anxiety, depression and post-traumatic stress disorders such as insomnia, irritability, aggression and excessive fear. The consequences of armed conflict include alienation as a result of losing contact with their families, fear, confusion and loss of trust, more so after cruel treatment by adult soldiers. Some children adopt denial as a coping mechanism.¹³³ Unfortunately, in the post-war reconstruction, the mental health of the child victims is often ignored as priority is given to rebuilding infrastructure. In Angola, for example, the mental distress of former child soldiers was associated with revenge by the spirits of the dead that they had killed, and thus many sought the intervention of traditional healers.¹³⁴

2.3.4. Sexual violence and exploitation

Sexual violence has become a weapon and strategy of war which is used to dominate, humiliate, expel and exterminate a targeted group.¹³⁵ Sexual violence and exploitation may take various forms, including rape, sexual slavery, forced pregnancy, forced

¹³² Albertyn *et al* 2003 *Pediatr Surg Int* 238.

¹³³ Kamya "The impact of war on children: How children perceive their experiences" 2009 *JIRS* 213.

¹³⁴ Kamya 2009 *JIRS* 213.

¹³⁵ Leatherman *Sexual Violence and Armed Conflict* 32.

marriage, mutilation, cannibalism or violation of pregnant and breastfeeding mothers.¹³⁶ Women and girls are commonly the victims, but men may also be targeted either on their own bodies or they may be forced to commit sexual violence against other family members, or watch them violated as a way of emasculating them.¹³⁷ Amongst the child soldiers, girls become the male soldiers' "wives", with one girl at times being a "wife" to several soldiers.¹³⁸ Most of them end up with sexually transmitted diseases. In Uganda, for instance, almost all the girls abducted by the LRA and who escaped or were rescued had venereal diseases and some had contracted HIV and AIDS.¹³⁹ Children are at risk not only from armed groups, but also from peace-keeping troops who have been accused of sexual exploitation of girls and women.¹⁴⁰

2.3.5 Displacement

People leave conflict zones to escape death and injuries, but also to escape from damaged habitats which can no longer sustain them. During conflict, many children are separated from their families or simply abandoned. During the Rwandan genocide in 1994, about 8 million people fled their homes and about 100 000 children were orphaned or separated from their parents.¹⁴¹ In the fight for survival, many of Africa's displaced children turn to child labour, prostitution and violent crime.¹⁴²

Leaving one's home in a hurry and without enough supplies to escape death is always physically and psychologically grueling. It is worse for children, to whom leaving home

¹³⁶ Leatherman 8.

¹³⁷ Leatherman 9.

¹³⁸ Ehrenreich 1998 *Africa Today* 94.

¹³⁹ Mckay "Effects of armed conflict on girls and women" 1998 *JPP* 385.

¹⁴⁰ Mckay 1998 *JPP* 385.

¹⁴¹ Albertyn *et al* "The effects of war on children in Africa" 2003 *Pediatr Surg Int* 235.

¹⁴² Albertyn *et al* 2003 *Pediatr Surg Int* 237.

in such a situation is akin to tearing down the only secure habitat they knew, and who are likely to feel that their world is falling apart.¹⁴³

Displacement forces children to seek new roles, and especially for adolescents, who are seeking identity, they may identify with their new role of soldiering, making their rehabilitation after the war difficult. Besides, having been used to violence which makes them feel superior, they may engage in violent crime to sustain the same images.¹⁴⁴

Internal armed conflicts leave a population of IDPs, who, unlike refugees (who are protected by the UN High Commission for Refugees) are without official recognition and protection.¹⁴⁵ They live in squalid conditions within their own countries, relying on the protection of the state which may be party to the armed conflict. At times, the state may be unable or unwilling to provide for them. In some instances, the IDPs may belong to an ethnic community that the ruling class may consider hostile, and as such they may not prioritise their needs. While the state may also genuinely lack resources to cater for the IDPs, it may not want outside intervention for fear of exposing its inability to take care of its own citizens. In addition, even when there are resources, the bureaucracy in the government systems may delay provision of basic necessities and justice for the IDPs. In the final analysis, they end up a forgotten lot, which the government would love to do away with for they are an embarrassment, and who the rest of the population would love to assume that they do not exist.¹⁴⁶

¹⁴³ Winter "War is not healthy for children and other living things 1998 *JPP* 420.

¹⁴⁴ Machel "Impact of armed conflict on children 1996" www.unicef.org/graca para 57 (Date of use: 20 September 2013).

¹⁴⁵ Miller "Research and intervention with internally displaced and refugee children 1998 *JPP* 366.

¹⁴⁶ Miller 1998 *JPP* 366.

2.3.6 Environmental impacts

Bombardment and mining, amongst other war techniques, destroy the environment and whole ecosystems. Winter¹⁴⁷ opines that whenever ecosystems are disrupted, human beings suffer, especially those with the weakest immunity, in this case children. The 1996 Machel study pointed out that every year, many children die from malnutrition and disease caused by or exacerbated by armed conflict.¹⁴⁸ Displacement of populations and destruction of vital infrastructure takes a heavy toll on children. When homes are destroyed, the children's sense of belonging and security are compromised. When families have to walk long distances to escape the conflict or look for amenities, children, who may not keep up with the prolonged starvation and distances are often the first casualties. Separation from families also causes psychological trauma, a sense of insecurity, as well as physical effects, since without any close family member to care for the child, and with the rest of the population on the run, the child will obviously be neglected. The situation is worse if the children have watched their parents or close family members killed or abducted.¹⁴⁹

2.4 CONCLUSION

Robinson opines, rightly so, that the position of children in armed conflict is becoming more and more complex. War is becoming so devoid of human values that even the best interests principle does not seem to help the situation.¹⁵⁰ Robinson says the following:¹⁵¹

¹⁴⁷ Winter 1998 *JPP* 419.

¹⁴⁸ Machel www.unicef.org/graca para [137] (Date of use: 20 September 2013).

¹⁴⁹ Albertyn *et al* 2003 *Pediatr Surg Int* 239.

¹⁵⁰ Robinson "Children in armed conflict: An overview of relevant humanitarian law and human rights law" 2002 *J. S. Afr. L* 697.

¹⁵¹ Robinson 2002 *J. S. Afr. L* 697.

“[T]he changing face of war leads to a constant deterioration of the position of children in armed conflict. Battles are fought from village to village or from street to street. Struggles are marked by horrific levels of brutality. Any and all tactics are employed, from systematic rape to ethnic cleansing and genocide. With all standards abandoned, human rights violations against children occur in unprecedented numbers.”

The narratives of the children in this chapter are a damning verdict on adults against children. Humanity is either willing or unable to protect its children. It has gone to the extent of dragging children into direct participation in armed conflict. Perhaps all this helplessness comes from society’s failure, for a long time, to define and enforce the rights of the children. It is against the back drop of such testimonies that the next three chapters will discuss children’s entitlements.

CHAPTER THREE

THE ORIGIN AND DEVELOPMENT OF HUMAN RIGHTS

3.1 INTRODUCTION

The term “rights” has become a household name in many jurisdictions, especially with the development of the international body of laws called the International Human Rights Law. It applies equally to everyone and its main goal is to protect individuals from arbitrary behaviour by their own governments.¹

The desire for the enforcement of rights is brought about by their abuse. Human beings are social beings, wanting to be organised into a society. That society requires leadership structures and as such hierarchies of command arise. However, the self-sustenance nature of man makes him want to remain at the top of the hierarchy and use any means to do so. This means that he would want to suppress those under him so that they do not rise up and demand to take control away from the persons at the top.

Most human rights abuses occur when human beings are seeking to sustain themselves politically; it is as if the rudimentary instinct of all species of survival for the fittest is always at play. In response to oppression, the oppressed societies also turn around and demand their rights, and in the process end up violating the rights of those they perceive as the oppressors. To understand human rights, one must understand politics.

¹ Droege “The interplay between international humanitarian law and international human rights law in situations of armed conflict” 2007 *Isr. L. Rev.* 312.

This chapter seeks to look at the definition of the concept of “rights” in simplistic terms, the origin of rights and the contemporary notion of “rights”. It further enunciates the notion of human rights and the systems of the enforcement of these rights.

3.2 DEFINITION OF THE CONCEPT “RIGHTS”

One of the most controversial subjects I have come across in the course of my research is the concept of rights. Sometimes the arguments advanced by various philosophers and scholars leave more confusion than conviction.

For instance, the right to life is one of the universally recognised rights. However, it is sometimes hard to tell exactly what it denotes in certain circumstances. Does it mean that one can kill in self defense, to protect his or her own life? Should a murderer who has taken the life of another have a right to life herself or himself? Again, does a sick person have the right to seek euthanasia?

Article 1 of the Universal Declaration of Human Rights 1948 (hereinafter “the UDHR”) states that all human beings are equal in rights. However, controversy exists even in these provisions. For instance, article 18 states that everyone has the right to freedom of religion. Yet, some religions dictate that human beings are not equal, such as religions that have the caste system where some men belong to a higher calling than others.² It is hard to convince such believers that all human beings are equal.

The concept of a “right” is closely connected to something being right.³ In most societies, people have an obligation to do what is perceived as the right thing though they may not understand that they can also possess rights. These obligations are

² Parashar “Gender inequality and religious personal laws in India” 2008 *BJWA* 104.

³ Corbin “Legal analysis and terminology” 1919 *Yale Law Journal* 163.

sometimes perceived as moral values as opposed to rights. Human⁴ opines that a society that does not have rights will be morally impoverished and relationships would be based on power.

The difficulty in understanding rights also relates to their source, whether they flow from God, morals or codifications. One of the contentions is whether rights arise from codified statutes or whether the statutes derive their legitimacy from natural rights.⁵ Interestingly, most of the statutes governing human rights, including customary ones such as the UDHR and the American Declaration of Independence (1776) derive their language from natural rights. The famous excerpt from the American Declaration: “We hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights...”⁶ is an affirmation of natural rights.

There are also questions as to whether rights are just those codified in the statutes, or whether there are other values that may qualify as rights.⁷ The preamble to the UDHR states that human rights are the foundation of freedom, justice and peace. However, it is silent on how these values are interconnected with rights.

In defining the concept of rights, I wish to borrow from Hohfeld⁸ and his fundamental legal conception of rights. Hohfeld noticed that even respected jurists confused various meanings of the term “right”, sometimes switching senses of the word several times in a single sentence. He wrote that such imprecision of language indicated a concomitant imprecision of thought, and thus also of the resulting legal conclusions. He argued that

⁴ Human “The theory of children’s rights” in Boezaart (ed) *Child Law in South Africa* 249.

⁵ See para 3.4 below.

⁶ Preamble to the American Declaration of Independence.

⁷ Wellman *A Theory of Rights: Persons under Laws, Institutions and Morals* 84.

⁸ Hohfeld *Fundamental Legal Conceptions* 71.

the word “right” is used to denote any sort of legal advantage, whether claim, privilege, power or immunity.⁹

Hohfeld went ahead to differentiate between these fundamental conceptions by giving examples. He wrote:

“X has a legal claim against Y with respect to some action if and only if Y has a legal duty to X to perform that action. ... X has a legal privilege in face of Y to perform some action if and only if X has no legal duty to Y to refrain from doing that action ... X has a legal power over Y in respect to some legal relation if and only if X is able to perform some action that changes this legal relationship of Y in some way ... X has a legal immunity from Y with respect to some legal relation if and only if Y is unable to perform some action that changes this legal relation of X.”¹⁰

Hohfeld looked at the law primarily in terms of its application in courts of law and how it is applied to a dispute between a plaintiff and a defendant. He presupposed that, in the absence of any such application in a court of law, the language of legal rights would lose its meaning.¹¹

In the Hohfeldian analysis, the concept of rights is summarised in his table of jural correlatives as follows:¹²

Right	privilege	power	immunity
Duty	no-claim	liability	disability

⁹ Hohfeld 72.

¹⁰ Hohfeld 72.

¹¹ Hohfeld 35.

¹² Hohfeld 35.

While applying this explanation of Hohfeld to practical examples of rights, when one has the right to life, another has a duty not to take that life. When the legal owner of an acre of land has the privilege to use his or her land as he or she wishes in accordance with any existing regulations governing the use of that land, his or her neighbours have no claim against him or her over his or her land et cetera.

This reasoning by Hohfeld is given strength by Hart when he says that the expression “right” is typically used when a claimant has a special justification to interfere with another’s freedom which others do not have, or when a claimant can resist such interference from someone else when the latter has no such justification. Hart proposes a model of legal rights consisting of a central bilateral legal liberty together with a protective parameter of legal duties. Part of these parameters may be natural, such as the right of a house owner to look over the fence of the neighbour, while others may be imposed by criminal and civil legislations. For the latter, the rights holder is at liberty to enforce, waive or leave unenforced the obligation owed to him or her by some other party.¹³

According to Freeman,¹⁴ rights are just claims or entitlements that derive from moral and/or legal rules and they are therefore in existence. The problem is that they have been left to lawyers and this explains why the human rights concept has been developed through national and international law. Social scientists have until recently neglected human rights, leaving them to complex legal discourses. The inclusion of rights in the political and moral arena is a new development, despite the rhetoric of rights having long dominated courtrooms.¹⁵ Freeman summarises the concept when he says that human rights are not just a legal issue, they are a social, economic, political and anthropological interdisciplinary concept.¹⁶

¹³ Hart *Bentham on Legal Rights* 175.

¹⁴ Freeman 6.

¹⁵ Freeman 6.

¹⁶ Freeman 12.

While there may be no agreeable definition of “rights”, there is universal consensus that rights exist. As Freeman puts it, we do not need the concept of human rights to know and say what things are wrong, because concepts are abstract.¹⁷

Mill says this of “rights”:¹⁸

“When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion.”

Suffice it to say that the concept of “rights” has a history marked by philosophical controversies. Nevertheless, they can be summarised as valid claims or legal entitlements which accrue to human beings because of their nature.

3.3 THE ORIGIN OF RIGHTS

In traditional African societies, communities had their own ways of expressing rights. In ancient Egypt, the law was based on a common sense view of right and wrong, following the codes based on the concept of *Ma'at*. *Ma'at* represented truth, order, balance and justice in the universe. This concept prescribed that everyone, with the exception of slaves, should be viewed as equals before the law in spite of their wealth or social status.¹⁹ During the past centuries, Africans had been practicing human rights especially at the levels of survival, livelihood, participation and protection. People lived in organised societies, with revered political leadership. Though they may not have experienced the contemporary concept of rights, they had a sense of what was right or

¹⁷ Freeman 3.

¹⁸ Mill “Utilitarianism” in Robson (ed) *The Collected Works of John Stuart Mill* 56.

¹⁹ Mancini *Maat Revealed: Philosophy of Justice in Ancient Egypt* 18.

wrong for peaceful coexistence, with laid down but unwritten boundaries of how far one could go in exerting their rights.²⁰

Freeman²¹ argues that the ancient Greeks (400-300 BC), whether or not they had a concept of rights, had a concept of power and its abuse as indicated in the origins of tyranny where the ruler governed in his or her own interests and oppressed his or her people.

However, it was in the Middle Ages (476-1453 A.D.) that the concept of rights that can be possessed emerged. This was greatly influenced by the Christian theology, hence the notion that rights were given by God. The concern of abuse of power by political leaders was also another stimulant for the growth of the concept of rights as we know it today.²²

The nature of rights is more clearly understood through an examination of natural rights, legal rights and moral rights.

3.4 NATURAL RIGHTS

One of the early debates and indeed the foundation of rights as we know them today came from contributions of natural rights thinkers. Natural rights were defined as rights that flow from a supernatural being and are not based on laws, customs or beliefs of society.²³ Natural rights were thus seen as universally applying to all men. They were

²⁰ Dalfovo *et al* (eds) "Ethics, human rights and development in Africa: Ugandan philosophical studies" in *Cultural Heritage & Contemporary Change Series II* 28.

²¹ Freeman 16.

²² Finnis *Natural Law and Natural Rights* 14.

²³ Wellman 9.

the foundation on which some early codifications of rights were based, such as the American Declaration of Independence.

The idea that certain rights are natural or inalienable has a long history dating back at least to the Stoics of Late Antiquity (2nd to 8th century),²⁴ and descending through the Protestant Reformation (16th century) and the Age of Enlightenment (18th century) to today.

In ancient history, the Stoics held that no one was a slave by their nature; slavery was an external condition juxtaposed to the internal freedom of the soul (*sui juris*). Seneca the Younger wrote:²⁵

“It is a mistake to imagine that slavery pervades a man’s whole being; the better part of him is exempt from it; the body indeed is subjected and in the power of a master, but the mind is independent, and indeed is so free and wild that it cannot be restrained even by this prison of the body, wherein it is confined”

The Dutch jurist Hugo Grotius laid some basis for the modern concept of rights when he said that the will of God, also known as man’s sociability, was the basis of all other laws in nature. For him, a right (*ius*) was what was just and the ability of a person to have or do something justly.²⁶

These ideas were claimed as justification for the rebellion of the American colonies. As George Mason stated in his draft for the *Virginia Declaration of Rights*, “all men are born

²⁴ Stoicism was a school of Hellenistic philosophy founded in Athens by Zeno of Citium in the early 3rd century BC. The Stoics considered destructive emotions to be the result of errors in judgment, and that a sage, or person of “moral and intellectual perfection” would not undergo such emotions. The word “stoic” now commonly refers to someone indifferent to pain, pleasure, grief, or joy (see Hadas *Essentials of Stoicism* 9).

²⁵ Seneca *Epistulae Morales Ad Lucilium*, 20.

²⁶ Wellman 35.

equally free”, and hold “certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity”.²⁷ Thus, in discussion of the social contract theory,²⁸ “inalienable rights” were said to be those rights that could not be surrendered by citizens to the sovereign. Such rights were thought to be *natural rights*, independent of positive law. However, many social contract theorists reasoned that in the natural state, only the strongest could benefit from their rights. Thus people formed an implicit social contract, ceding their natural rights to the authority to protect them from abuse, and living henceforth under the legal rights of that authority.²⁹

3.4.1 Natural-law thinkers

3.4.1.1 Thomas Hobbes

Hobbes (1588–1679) drew a sharp distinction between right and law. He included a discussion of natural rights in his moral and political philosophy. Hobbes’ conception of natural rights extended from his conception of man in a “state of nature”. Thus he argued that the essential natural right was as follows:³⁰

“[T]o use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything, which in his own judgment, and reason, he shall conceive to be the aptest means thereunto.”

²⁷ Maier *American Scripture: Making the Declaration of Independence* 134.

²⁸ An agreement whereby men surrender some of their natural liberties to a sovereign in exchange for order and protection in an organised state, as enunciated by Hobbes and Locke (see para 3.4.1.2 below).

²⁹ Hart “Are there any natural rights?” 1955 *Philosophical Review* 182.

³⁰ Leviathan 1, XIV.

According to Hobbes, to deny this right would be absurd, just as it would be absurd to expect that carnivores might reject meat or fish stop swimming. Hobbes sharply distinguished this natural “liberty” from natural “laws” (obligations), described generally as follows:³¹

“[A] precept, or general rule, found out by reason, by which a man is forbidden to do, that, which is destructive of life, or taketh away the means of preserving life; and to omit, that, by which he thinketh it may best be preserved.”

In his natural state, according to Hobbes, man's life consisted entirely of liberties and not at all of laws. He stated as follows:³²

“It followeth, that in such a condition, every man has the right to everything; even to one another's body. And therefore, as long as this natural right of every man to everything endureth, there can be no security to any man ... of living out the time, which nature ordinarily allow men to live.”

This would lead inevitably to a situation known as the “war of all against all”, in which human beings kill, steal and enslave others in order to stay alive, and due to their natural lust for “gain”, “safety” and “reputation”. Hobbes reasoned that this world of chaos created by unlimited rights was highly undesirable, since it would cause human life to be “solitary, poor, nasty, brutish, and short”.³³ As such, if humans wish to live peacefully they must give up most of their natural rights and create moral obligations in order to establish political and civil societies.³⁴ This is one of the earliest formulations of the theory of government known as the social contract.

³¹ Leviathan 1, XIV.

³² Leviathan 1, XIV.

³³ Leviathan 1, XIII.

³⁴ Leviathan 1, XIII.

Hobbes objected to the attempt to derive rights from “natural law”, arguing that law (“*lex*”) and right (“*jus*”), though often confused, signify opposites, with law referring to obligations, while rights refer to the absence of obligations. Since by their nature, human beings seek to maximise their well-being, rights are prior to law, natural or institutional, and people will not follow the laws of nature without first being subjected to a sovereign power, without which all ideas of right and wrong are rendered insignificant.³⁵

3.4.1.2 *John Locke*

Locke (1632–1704) conceptualised rights as natural and inalienable. Like Hobbes, Locke was a major social contract thinker.

According to Locke there are three natural rights.³⁶

- Life – everyone is entitled to live once they are created.
- Liberty – everyone is entitled to do anything they want to so long as it doesn't conflict with the first right.
- Estate – everyone is entitled to own all they create or gain through gift or trade so long as it doesn't conflict with the first two rights.

Locke argued that every individual had a duty from God to obey the law of nature. God had imposed on everyone the duty not to harm the lives, liberty and possessions of others. However, in this state, everyone sought self-preservation and was a judge in his own cause. There was need therefore for an authority, a government which would be entrusted with protection of the natural rights of those under its authority. The social

³⁵ Leviathan 1, XV.

³⁶ Wellman 17.

contract is a contract between a being or beings of power and their people or followers. The King makes the laws to protect the three natural rights. The people agree on the laws, but they have to follow them. The people can be prosecuted and/or killed if they break these laws. If the King does not follow these rules, he can be overthrown.³⁷

Locke's theory acknowledged the existence of rights which had been given by the creator but which could only be protected in a political community which should be governed for the public good. This weighing of right against collective good of society is what Freeman calls an unresolved tension in Locke's theory.³⁸

Locke is usually interpreted as a theorist of a strictly individualistic conception of natural law due to his belief that everyone had fundamental obligations to God, was endowed with reason and had a natural right to freedom, which was limited only by the obligation to respect the natural rights of others. He also believed that God's will for mankind, and the natural rights of men could only be protected in a political community. He believed that individual rights and public good were mutually compatible. Locke's theory of property, whereby he argued that each individual had a property in himself or herself, in his or her labour and in the products of his or her labour was criticised as supporting the inequality of wealth and proliferation of the bourgeois class.³⁹

Despite all the criticisms leveled against Locke's theory, it served as a moral and legal basis for many great revolutions and governments. It moved the realm of natural rights from self-defense, where man lived in absolute freedom, to the rule of law, and from the right to property, it brought about other rights such as the right to privacy. Locke provided the precedent of establishing legitimate political authority upon a rights foundation.⁴⁰

³⁷ Freeman 21.

³⁸ Freeman 21.

³⁹ Freeman 22.

⁴⁰ Freeman 22.

3.4.1.3 Thomas Paine

Thomas Paine (1731–1809) further elaborated on natural rights in his influential work *Rights of Man* (1791), emphasising that rights cannot be granted by any charter because this would legally imply they can also be revoked by charter and under such circumstances they would be reduced to privileges. He stated as follows:⁴¹

“It is a perversion of terms to say that a charter gives rights. It operates by a contrary effect - that of taking rights away. Rights are inherent in all the inhabitants; but charters, by annulling those rights, in the majority, leave the right, by exclusion, in the hands of a few. ... They consequently are instruments of injustice”.⁴²

Paine’s conception of natural rights was both individualistic and universalistic – the rights of man were the rights of everyone, everywhere, all the time. They were rights that men had by virtue of their status as human beings. They owed nothing to society or to state.⁴³

Paine’s inalienability arguments provided the basis for the anti-slavery movement to argue not simply against involuntary slavery but against any explicit or implied contractual forms of slavery. Any contract that tried to legally alienate such a natural right would be inherently invalid. Previously, many historical apologies for slavery and illiberal government were based on explicit or implicit voluntary contracts to alienate any natural rights to freedom and self-determination.⁴⁴

⁴¹ Paine *Rights of Man* 68.

⁴² Paine 68.

⁴³ Freeman 25.

⁴⁴ Maier 48.

Paine predicted that the monarchy and aristocracy would not survive in an enlightened Europe. He urged for an uprising against the Monarch in England, believing that the latter had been imposed on the people of England and had no authority to rule. Paine further believed the order existing in society was not due to the fact that the society has a government, but that it had its origins in the principles of society and the natural constitution of man. He went further to say the following about the order in society:⁴⁵

“[It] existed prior to government, and would exist if the formality of government was abolished. The mutual dependence and reciprocal interest which man has upon man, and all the parts of civilised community upon each other, create that great chain of connection which holds it together.”

Paine argued rationally that all men had an equal claim to political rights and that government must rest on the ultimate sovereignty of the people. Paine’s work produced a public furor and he was tried and sentenced for sedition in absentia in London. His discourse, though it influenced earlier revolutions such as the American revolution, was criticised as encouraging rebellion against the established governments.⁴⁶

3.5 LEGAL RIGHTS

The concept of rights deriving from God was criticised by many philosophers. Indeed, by the end of the 18th century, it was opposed particularly because its theological basis was fading.⁴⁷ The critics claimed that since religion was not universal, how could rights, tied to religion, be universal? Indeed, the diversity of religion was well enunciated by Martin Luther King when he said:⁴⁸

⁴⁵ Paine 82.

⁴⁶ Edison *Introduction to the Life and Works of Thomas Paine* vii-ix.

⁴⁷ Wellman 17.

⁴⁸ Martin Luther *Concerning Secular Authority* 1523.

“[E]very man is responsible for his own faith, and he must see it for himself that he believes rightly. As little as another can go to hell or heaven for me, so little can he believe or disbelieve for me; ... since then belief or unbelief is a matter of everyone’s conscience, and since there is no lessening of the secular power, the latter should be content and attend to its own affairs and permit men to believe one thing or another, as they are able and willing...”

Natural rights reasoning was also accused of allowing too much inequality in terms of wealth distribution. Alternatives to natural rights were therefore being sought.

Jonathan Wallace asserted that there was no basis on which to claim that some rights were natural, and he argued that Hobbes’ account of natural rights confused right with ability (human beings have the *ability* to seek only their own good and follow their nature in the same way as animals, but this does not imply that they have a *right* to do so).⁴⁹ Wallace advocated a social contract, much like Hobbes and Locke, but did not base it on natural rights:⁵⁰

“We are all at a table together, deciding which rules to adopt, free from any vague constraints, half-remembered myths, anonymous patriarchal texts and murky concepts of nature. If I propose something you do not like, tell me why it is not practical, or harms somebody, or is counter to some other useful rule; but don’t tell me it offends the universe”.

Edmund Burke did not reject the concept of natural rights completely. While he recognised the right to life, liberty, freedom of conscience, property and equal justice before the law, he considered the concept a distortion of the social order. To him, rights were social rather than natural. He also dismissed the universalism of natural rights

⁴⁹ Wallace www.spectacle.org/0400/natural.html (Date of use: 29 October 2013).

⁵⁰ Wallace www.spectacle.org/0400/natural.html (Date of use: 29 October 2013).

arguing that rights could not be universal since there was a diversity of culture in the world.⁵¹

Jeremy Bentham rejected the concept of natural rights completely. Writing in the 18th century, he claimed that rights arise from the actions of government, or evolve from tradition, and that neither of these can provide anything inalienable. He sought to explain law on a rational basis by the elimination of all concepts that were vague or fictitious. The only rights were legal rights, and no rights were absolute because one right-claim could conflict with another. Moreover, the assertion that all humans had equal rights was a fallacy since children had different rights from adults, and in practice, there were no equal rights for women, the poor and blacks. For him, the facts of pleasure and pain were the basis upon which rational laws could be built, and the objects of ethics and politics were the greatest happiness for the greatest number of people, or the common good, thus the principle of utility was more practical than natural rights. In keeping with the shift in thinking in the 19th century, Bentham famously dismissed the idea of natural rights as “nonsense on stilts”.⁵²

After the bashing by the opponents of the natural rights theory, legal rights dominated the field of rights theories. Legal rights are defined as rights conveyed by a body of laws codified into statutes and are by and large dependent on politics and culture.⁵³

This dominance of legal rights was further fueled by the emergence of the concept of utilitarianism, which gained momentum in the 19th century with a shift away from political and natural rights to economic interests. It was felt that natural rights theories had segregated the poor. Karl Marx⁵⁴ felt that though natural rights were alleged to be universal, they were just an expression of the interests of the bourgeois class. The

⁵¹ Freeman 27.

⁵² Bentham *Introduction to the Principles of Morals and Legislation* 41.

⁵³ Wallace “Natural rights don’t exist” www.spectacle.org/0400/natural.html (Date of use: 29 October 2013).

⁵⁴ Lyons “Benevolence and justice in Mill” *The Limits of Utilitarianism* 55.

natural-law theories concealed the inequalities in the society by emphasising individual and property rights while ignoring the aspect of labour and production. This gave rise to the concept of communism.

However, one of the greatest challenges to Marx's theory of communism was whether there would be a community with no rights, or whether his theory would just eliminate the natural, and therefore the bourgeois system of rights. This confusion proved a major defect in his theory when strong communist political regimes took root and totally disregarded the concept of human rights. Following utilitarianism, these regimes violently suppressed the voices of any dissenting groups under the guise of doing it for the common good.⁵⁵

On his part, John Austin, a follower of Bentham's utilitarianism, equated divine will with utilitarianism when he said:⁵⁶

“The commands which God has revealed we must gather from the terms wherein they are promulgated. The command which he has not revealed we must construe by the principle of utility.”

Even Hans Kelsen and his pure theory of law wanted to avoid the mistake which he attributed to natural-law tradition of reducing normativity of law to moral “ought”. He repeatedly argued that natural law, which would reduce the legal “ought” to moral “ought” fails because it can only achieve an account of the normativity of law at the expense of missing its target. Natural law, as Kelsen understood it, did not make any allowance for the possibility that a norm is legally valid and morally wrong. His pure

⁵⁵ Frederick *Classical Utilitarianism from Hume to Mill* 28.

⁵⁶ Harris “The concept of sovereign will” 1977 *Acta Juridica* 8.

theory was an attempt to find a middle way between natural law's dogmatism and positivism's reduction of law to social sciences.⁵⁷

The concept of rights survived in the late 19th century, though they were largely based on utilitarianism. After the First World War, the Covenant for the League of Nations was silent on rights; it was not until Hitler shook the world in the Second World War that rights were taken seriously.

Modern legal systems make references to human rights regardless of the philosophical debates that surrounded their origins. Certain fundamental rights are entrenched in the constitutions of these legal systems, and are given a degree of priority over competing legal considerations, though this can vary from system to system. Other rights are entrenched by other statutes and common law.

3.6 MORAL RIGHTS

The origin of rights is arguably based on morals emanating from different societies. Even the ancient thinkers who envisaged that there must be entitlements that accrue to human beings by virtue of their uniqueness must have been influenced by the views of what was regarded as moral or immoral within their societies.

The basis of the doctrine of natural law is the belief in the existence of a natural moral code based upon the identification of certain fundamental and objectively verifiable human behaviour.⁵⁸

⁵⁷ Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/lawphil-theory> (Date of use: 29 October 2013).

⁵⁸ Finnis 27.

However, due to the philosophical development of the concept of “rights”, contemporary theories dictate a dichotomy between moral rights and legal rights. From the original concept of morals and natural rights, political systems have codified rights and given them a legal sanctity.⁵⁹

The kind of moral rights envisaged in this chapter are therefore distinct from legal rights. While legal norms attempt to bring about certain behaviour by attaching to the opposite behaviour a socially organised coercive act, moral norms are a social order without such sanctions. Moral norms are relative, they vary according to societies. Men and women have different opinions as to what is right and wrong, just and unjust, in different places and in different times. While legal rights have clear enforcement mechanisms provided for by the law, moral norms lack such clarity as far as enforcement is concerned. The only common theme in moral norms is that they order certain behaviour of men and women, directly and indirectly, towards others.⁶⁰

Wellman⁶¹ argues that moral norms are equivalent to the traditional natural rights. Moral rights exist as recognition of the fact that certain issues in society, even if legislated against, cannot be enforced merely by legislation. They have a non-legal binding element, and just as societies are dynamic, so are moral rights.

However, the common practice has been that if a moral norm is so serious as to affect the exercise of a legal right, then the moral norm will be codified by way of legislation and its status uplifted, so to speak. For instance, the prohibition of abortion, largely due to societal beliefs, has been held to deny women their right to privacy and their reproductive rights. Some political systems have therefore gone ahead and legislated

⁵⁹ Wellman 182.

⁶⁰ Kelsen 59.

⁶¹ Wellman 156.

for abortion, especially after courts have upheld a woman's right to consent to an abortion.⁶²

The right to abortion has been the subject of contests in court over whether the state has a right to criminalise abortion,⁶³ whether a mother has a right to stop her daughters from procuring abortion⁶⁴ and whether a girl of sixteen years can procure an abortion without parental consent.⁶⁵ In all these instances, the courts have upheld the freedom of a woman to procure an abortion, thereby making this otherwise moral issue into a legal right.

From the foregoing, it is imperative to note that human rights certainly share an essential quality of moral rights; their valid existence does not depend on their being legally recognised. The concept of rights has undergone metamorphoses over time; however, it is clear that contemporary philosophy leans towards the use of the term "human rights". The rights have been deemed to be universal and have been codified in various instruments. The doctrine of human rights rests upon a particularly fundamental philosophical claim: that there exists a reasonable and rationally identified moral order, whose legitimacy precedes contingent social and historical conditions and applies to all human beings everywhere and at all times.⁶⁶

The notion of human rights has superseded natural or legal rights, and therefore eliminated the tension that existed between the two schools of thought.⁶⁷ Imperatively,

⁶² For instance article 26(4) of the Constitution of the Republic of Kenya 2010 permits abortion for medical reasons.

⁶³ *Doe v Bolton* 410 US 175.

⁶⁴ *Gillick v West Norfolk and Wisbeck Area Health Authority and the DHSS* (1985) 3 All ER 402, where a Roman catholic mother objected to her teenage daughters being given advise and treatment on abortion, following a notice by the then Department of Health and Social Security that stated that a doctor could, in exceptional circumstances lawfully give treatment or contraceptive advice to girls under age 16.

⁶⁵ *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T).

⁶⁶ Finnis 19.

⁶⁷ Kelsen *General Theory of Law and State* 37.

natural right thinkers played a major role in the definition of human rights; indeed, some of the earliest codifications of rights, such as the Virginia Declaration, the American Declaration of Independence and the UDHR were derived from the natural rights theory.⁶⁸

3.7 HUMAN RIGHTS

3.7.1 Definition

In the eighteenth century, the usage of the terms “human rights”, “rights of mankind” and “rights of humanity” did not refer to rights as we know them today, rather it referred to what distinguished humans from the divine on the one hand, and from animals on the other.⁶⁹

The origin, content and extent of human rights are by their very nature controversial. Douzinas expounds on this when he says:⁷⁰

“Human rights are first and foremost the claims of universal reason, the assertion of the rights of a common humanity ... based in their universal validity upheld by the operations of reason; but their application is paradoxically supposed to respect the dignity of difference, to protect the uniqueness of each separate individual, and to defy the logic of necessity and the interests of the state ... The problem of the relationship between the universal and the particular cannot be wished away or easily resolved through the subsumption of individuals to laws and principles of a purely inductive process of reasoning.”

⁶⁸ Wellman 5, 118.

⁶⁹ Hunt 23.

⁷⁰ Douzinas “Justice and human rights in post modernity” in Gearty & Tomkins (eds) *Understanding Human Rights* 119.

In his analysis of human rights, Freeman states as follows:⁷¹

“Human rights may not be rights one has simply because one is a human being, but they are rights of exceptional importance, designed to protect morally valid and fundamental human interests, in particular against the abuse of political power”.

Despite their controversial nature and origin, their existence is not in doubt. They come into existence through their proclamation; to have rights, one must claim them,⁷² and they are most appreciated when violated.

Contemporary human rights can be attributed to two famous proclamations, the American Declaration of Independence and the French Declaration of the Rights of Man and Citizen.

“We hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and pursuit of happiness.”⁷³

This is what Thomas Jefferson, an aristocrat and a Lafayette, wrote in 1776. Article I of the French Declaration of the Rights of Man and Citizen 1789 stated that “Men are born and remain free and equal in rights.” These two precepts have been quoted time and again in many human rights discourses. However, neither the American nor the French declarations stopped the reign of terror in France where the government repressed rights, or the discrimination against slaves, blacks, religious minorities and women in

⁷¹ Freeman *Human Rights - An Interdisciplinary Approach* 61.

⁷² Douzinas 119.

⁷³ Preamble to the Declaration of American Independence 1776.

America and everywhere else, an indication that the proclamation of rights alone is not enough, they must be enforced.⁷⁴

Human rights appear to have won the ideological battles of modernity. Respect for human rights seems to be the only regulative principle of state organisation, which unites every country, race and creed in the world. Indeed, some of the basic principles of international law will not apply in instances where there is a breach or a likely breach of human rights. The principle of domestic jurisdiction stating that states have no right to encroach upon the preserve of other states' internal affairs will not stand as a bar to scrutiny if there are suspected breaches of human rights.⁷⁵ But the paradox, in spite of the allure of human rights discourse, is that not all people enjoy their rights equally in most polities.

Donnelly points this out when he says:⁷⁶

“An anthropological approach that seeks to ground human rights on cross-cultural consensus faces equally serious problems. History is replete with societies based on hierarchies of birth, gender, wealth or power ... American history is marked by systematic torture and execution of religious deviants (witches); enslavement and legal discrimination against African Americans; ... denial of political participation, property rights and even legal personality to women; and repression of political dissidents (especially communists).”

According to Lynn,⁷⁷ human rights require three interlocking qualities:

⁷⁴ Hunt *Inventing Human Rights: A History* 18.

⁷⁵ Shaw *International Law* 254.

⁷⁶ Donnelly “Human rights and human dignity: An analytical critique of non-western human rights conceptions” 1982 *APSR* 303.

⁷⁷ Hunt 20.

- Rights must be natural (inherent in human beings).
- Rights must be equal (the same for everyone).
- Rights must be universal (applicable everywhere).

In addition to these three qualities, human rights must also gain political acceptance, for they are not rights of man in a state of nature, rather they are the rights of humans in the society. They are rights of humans vis-à-vis each other, not vis-à-vis the divine.⁷⁸

3.7.2 International human rights law

International human rights law refers to the body of international law that promotes and protects human rights at the international, regional and domestic levels.⁷⁹ It is contained in agreements between states (treaties or conventions), customary rules (which consist of state practice and *opinio juris*), the general principles of laws recognised by civilised nations, and judicial decisions and teachings of most highly qualified publicists of various nations (as subsidiary means for the determination of rules of law).⁸⁰ State practice is what governments do, while *opinio juris* is a belief, on the part of governments, that their conduct is obligated, prohibited or allowed as a matter of law (*opinion juris sive necessitates*) by international law.⁸¹

Many rules of customary international law have been codified into treaty provisions, while other customary practices have crystallised into rules as a result of treaties replicating and thus reinforcing them. A treaty provision prevails over any conflicting rule of customary international law.⁸² Sometimes countries conclude treaties to exempt

⁷⁸ Hunt 20.

⁷⁹ Freeman 12.

⁸⁰ A 38 (1) of the Statute of the International Court of Justice.

⁸¹ Henckaerts *Customary International Humanitarian Law* Vol. 1 xxxii.

⁸² Byers *War Law - Understanding International Law and Armed Conflict* 4.

aspects of their relations from otherwise applicable customary rules. However, no country can enter into an agreement to negate peremptory norms (*jus cogens* or compelling law), which are norms from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.⁸³ Some of the peremptory norms include the prohibition of genocide, piracy, slavery, war crimes, crimes against humanity and torture. Peremptory norms are not listed or defined by any authoritative body, but arise out of case law and changing social and political attitudes.⁸⁴

International human rights law, being tailored primarily for peacetime, applies to everyone. The principal goal is to protect individuals from arbitrary behaviour by their own governments. Certain fundamental rights are non-derogable, such as the right to life, the prohibition of torture and inhuman punishment or treatment, slavery or servitude, and the principle of legality and non-retroactivity of the law.⁸⁵

Before 1945, the primacy of the sovereign nation-state in international relations relegated the discussion on human rights issues to domestic politics. However, the League of Nations sought to recognise peoples in ex-enemy colonies who were not yet able to stand by themselves in the modern world; the mandatory powers were to grant them just treatment, freedom of conscience and religion.⁸⁶ The 1919 peace agreements with Eastern Europe and the Balkan states recognised provisions relating to the protection of minorities.⁸⁷

⁸³ A 53 of the Vienna Convention on the Law of Treaties.

⁸⁴ For instance, in *Michael Domingues v United States*,⁸⁴ Michael had been convicted and sentenced to death in Nevada, US, for two murders committed when he was sixteen years old. The case was brought before the Inter-American Commission of Human Rights, which delivered a non-binding report that there was a *jus cogens* norm not to impose capital punishment on individuals who committed offences before the age of eighteen. The United States consequently banned the execution of juvenile offenders.

⁸⁵ A 11 UDHR, a 15 ICCPR.

⁸⁶ A 22 & 23 of the Covenant of the League of Nations 1920.

⁸⁷ Finney "An evil for all concerned: Great Britain and minority protection after 1919" 1995 *Journal of Contemporary History* 535.

With the rise of nationalism in the 19th century, states started drafting their own constitutions, and human rights were at the heart of these constitutions. However, nothing brought the urgency of respecting human rights to the forefront faster than the atrocities of the Second World War. The drafting of the UDHR and the Nuremberg trials broke new ground. Around the same time, regional approaches to human rights interpretation and enforcement emerged. The countries of the continents of Europe and America convened and promulgated human rights instruments, with Africa following several decades later.⁸⁸

3.7.2.1 *The universal system of human rights*

This is represented by the United Nations Organisation and all the treaties and bodies under it. Article 1 of the Charter of the United Nations 1945 (hereinafter “the UN Charter”) provides that the purposes of the United Nations (hereinafter “the UN”) include promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Article 55 provides that the UN shall promote universal respect and observance of human rights. Article 56 states that all members shall take joint and separate actions in cooperation with the UN for the achievement of the purposes set out in article 55.

The cornerstone of the UN human rights activities has been the UDHR, which has influenced constitutions of many states and subsequent international treaties on the observance of human rights. The preamble to the UDHR provides that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace. Among the rights affirmed by the declaration are the equality of all human beings (article 1), the prohibition of discrimination (article 2), the right to life, liberty and security of the person (article 3), the prohibition of slavery (article 4), the prohibition of torture (article 5) and equality before

⁸⁸ Steiner, Alston & Goodman *International Human Rights in Context* 133.

the law (article 7). It also provides for rights to property, family, work, nationality and education, among others.

Other important human rights documents that are legally recognised as treaties include:

- The Convention on the Prevention and Punishment of the Crime of Genocide 1948.
- The International Covenant on Civil and Political Rights 1966.
- The International Covenant on Social, Economic and Cultural Rights 1966.
- The International Convention on the Elimination of all Forms of Racial Discrimination 1969.
- The International Convention on the Elimination of all Forms of Discrimination against Women 1981.
- The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1987.
- The Convention on the Rights of the Child 1989.

This list of treaties is by no means exclusive, but outlines some of the most basic treaties in terms of the protection of rights. Some of the treaties have obtained the status of customary international law and bind states that have not ratified, such as treaties dealing with the peremptory norms (*jus cogens*).

For instance, the crime of genocide, which has attained the status of *jus cogens*, can be tried anywhere or in the territory of the state where it occurred, regardless of whether the state has ratified the Convention on the Prevention and Punishment of the Crime of Genocide or not.⁸⁹ Indeed, the international community is very keen on this crime since

⁸⁹ Shaw 668.

the 1994 Rwanda genocide, the systematic killings in the former Yugoslavia and the killings in Darfur, Sudan.

3.7.2.1.1 UN enforcement mechanisms

UN enforcement mechanisms are divided into two categories: charter-based bodies flowing from the provisions of the UN Charter and treaty-based bodies established pursuant to the various UN treaties for the observance of human rights. Charter-based bodies have broad mandates, address an unlimited audience and take action based on majority voting. On the contrary, treaty-based bodies have their mandate limited by the treaties and address themselves to states that have ratified the treaties in question. Their decisions require consensus.⁹⁰ Some of the charter-based bodies include:

- The Human Rights Council,⁹¹ established by General Assembly Resolution 60/251 of 15 March 2006. The Human Rights Council is the successor of the Commission on Human Rights which had been established by Economic and Social Council resolution 5(1) of 16 February 1946, and which ceased to be in existence in 2006. The Human Rights Council has special procedures to check on implementation and/or abuse of human rights. They include special rapporteurs, special representatives, independent experts and working groups that investigate, discuss, and report on specific human rights issues under a country mandate. General Assembly Resolution 60/251 of 15 March 2006, which established the Human Rights Council, mandates a universal periodic review of each state's fulfillment of its human rights obligations and commitments. The Universal Periodic Review Working Group holds three sessions per year. At each session, sixteen countries are reviewed, resulting in a four-year cycle to complete a review of all 192 member states of the UN. The Human Rights Council

⁹⁰ Steiner, Alston & Goodman 737.

⁹¹ UNHRC www.ohchr.org/en/hrbodies/hrc/pages/hrcindex.aspx (Date of use: 15 October 2013).

Advisory Committee was established by Human Rights Council Resolution 5/1 of 18 June 2007. The Advisory Committee is composed of 18 experts serving in their personal capacity and functions as a think-tank for the Council.

- The UN High Commissioner for Human Rights,⁹² established under General Assembly Resolution 48/141 of December 1993, this office is charged with promoting and protecting the effective enjoyment by all of all civil, political, economic, social and cultural rights. The Commissioner has the mandate to visit countries and examine records of human rights observance, issue advisories through bodies such as the Centre for Human Rights, and make recommendations to competent bodies of the UN systems on observance of human rights. The Office of the UN High Commissioner for Human Rights (hereinafter “the UNHCHR”) plays a key part in the overall protection and promotion of human rights. Its role is to enhance the effectiveness of the UN human rights machinery and to build up national, regional and international capacity to promote and protect human rights and to disseminate human rights texts and information.

Some of the treaty-based bodies include:

- The Human Rights Committee,⁹³ established pursuant to art 28 of the ICCPR, the Committee meets in three sessions each year in New York and Geneva. Art 40 of the Covenant requires States parties to submit an initial report within one year of the Covenant’s entry into force for the State party concerned and then upon the Committee’s request. The Committee also considers communications under the Optional Protocol for the Covenant on Civil and Political Rights received from individuals who assert that their rights have been violated without

⁹² OHCHR www.ohchr.org/EN/Pages/WelcomePage.aspx (Date of use: 15 October 2013).
⁹³ www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx (Date of use: 15 October 2013).

domestic redress. The texts of the Committee's final decisions under the Protocol are included in its annual reports, as well as periodically cumulated on a selective basis. Economic and Social Council resolution 1988/4 requires States parties to submit to the Committee an initial report within two years of its entry into force of the International Covenant for Economic, Social and Cultural Rights for the State party concerned and then every five years.

- The Committee on the Elimination of Racial Discrimination,⁹⁴ established pursuant to art 8 of the International Convention on the Elimination of All Forms of Racial Discrimination 1969. Art 9 requires States parties to submit an initial report within one year after its entry into force for the State party concerned and then every two years.
- The Committee on the Elimination of Discrimination against Women,⁹⁵ established pursuant to art 17 of the Convention on the Elimination of Discrimination against Women 1981. Art 18 requires States parties to submit an initial report within one year after its entry into force for the State party concerned and then every four years
- The Committee against Torture,⁹⁶ established pursuant to art 17 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1987. Art 19 of the Convention requires States parties to submit an initial report within one year after its entry into force for the State party concerned and then every four years.

⁹⁴ CERD www2.ohchr.org/english/bodies/cerd/ (Date of use: 15 October 2013).

⁹⁵ CEDAW www.un.org/womenwatch/daw/cedaw/committee.htm (Date of use: 15 October 2013).

⁹⁶ CAT www.ohchr.org/EN/HRBodies/CAT/Pages/CATIndex.aspx (Date of use: 15 October 2013).

- The Committee on the Rights of the Child,⁹⁷ established pursuant to article 43 of the Convention on the Rights of the Child 1989. Article 44 of the Convention requires states parties to submit an initial report within two years of its entry into force for the state party concerned and then every five years.

3.7.2.1.2 Conclusion

Despite having an extensive charter and treaty mechanism of enforcement, the UN system grapples with treaties that remain unratified by many states and therefore do not bind such states. There is also growing concern that the existing system does not possess the necessary authority to ensure compliance or punish violators of human rights.⁹⁸ Nevertheless, the UN working groups and the specialised tribunals have had major successes which outweigh the challenges experienced by the UN.

3.7.2.2 *The European human rights system*

Three major organisations have been formed to enhance cooperation in the field of human rights in Europe:

- The Council of Europe⁹⁹ – formed to promote the rule of law, human rights, and democracy.
- The European Union¹⁰⁰ – formed to promote trade and economic stability for its members.

⁹⁷ CRC www.ohchr.org/english/bodies/crc/ (Date of use: 15 October 2013).

⁹⁸ Steiner, Alston & Goodman 750.

⁹⁹ COE www.conventions.coe.int (Date of use: 15 October 2013).

¹⁰⁰ EU www.europa.eu/index_en.htm (Date of use: 15 October 2013).

- The Organization for Security and Co-operation in Europe (hereinafter “the OSCE”)¹⁰¹ – founded to maintain peace and military security within Europe.

Though the last two were not primarily formed to address human rights issues, they have had to deal with them, given the latter’s fundamental nature which cuts across all spheres of life, social, political and economic.

3.7.2.2.1 The Council of Europe (hereinafter “the COE”)

The Council was created in 1949 after the signing of the Treaty of London, currently referred to as the Statute of the Council of Europe. It established the Council as a European organisation for developing intergovernmental and inter-parliamentary cooperation.¹⁰² Article 1 of the Statute lays down its aim as achieving a greater unity between member states for the purpose of safeguarding and realising the ideals and principles which are their common heritage, and facilitating their economic and social progress. The principles of the Council are laid down in article 3 of the Statute.¹⁰³

The Council of Europe is made up of several institutions:¹⁰⁴

- The Committee of Ministers, the main decision-making body of the COE. It is composed of the foreign affairs ministers of all member states.
- The Parliamentary Assembly, a deliberative body, composed of 313 members and 313 substitutes who are appointed by national assemblies.

¹⁰¹ OSCE www.osce.org (Date of use: 15 October 2013).

¹⁰² Preamble to the Statute of the European Council.

¹⁰³ “Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms...”

¹⁰⁴ A 10 & 36 of the Statute of the Council of Europe 1949.

- The Congress of Local and Regional Authorities of Europe, a consultative body with local and regional representatives. It is composed of a Chamber of Local Authorities and a Chamber of Regions.
- The Secretary General of the Council of Europe directs and coordinates the organisation's activities. The Secretary serves a five-year term.

3.7.2.2.2 European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (hereinafter “the ECHR”)

The ECHR was the COE’s first legal treaty to protect human rights, as well as the first international human rights treaty with enforceable mechanisms. It was inspired by the UDHR, and largely quoted from it. Its preamble provides for “the maintenance and further realisation of human rights and fundamental freedoms,” which “are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other hand by a common understanding and observance of the human rights upon which they depend.”

The treaty deals mainly with civil and political rights, which are found in articles 1 to 18. Articles 19 to 51 list the working mechanisms of the European Court and Commission, while Protocols I, IV, VI, VII, and XII include additional rights. The ECHR established the European Court of Human Rights, which came into being in 1953,¹⁰⁵ and its jurisdiction covers the COE member states that have opted to accept the Court’s optional jurisdiction.¹⁰⁶ Once a state has done so, all Court decisions regarding it are binding. The right of individual complaint (article 25) obliges the states to accept the Court as having authority to rule over issues from within that state.

¹⁰⁵ A 19 ECHR.

¹⁰⁶ A 46 ECHR.

The original structure of the Court and mechanism for handling cases provided for a two-tier system of rights protection, which included the European Commission of Human Rights (now obsolete) as well as the Court itself. The dichotomy between the two institutions initially worked well since the Court dealt with a relatively small caseload. However, as the caseload grew, Protocol XI of the European Convention on Human Rights came into force and eliminated the Commission of Human Rights, making the court the sole avenue for justice.¹⁰⁷

The Court has jurisdiction to hear applications on human rights violations from individuals and states, though states hardly file applications against other states.¹⁰⁸ The rule of exhaustion of domestic remedies applies before the Court can hear applications. The following conditions must be met by an applicant:¹⁰⁹

- The application must be brought within six months of the final ruling at a domestic court.
- The violation must be one envisaged by the ECHR.
- The applicant must be a victim of the violation, though he or she need not be a direct victim.
- The matter must not have been the substance of a previous petition before the court.

The Court then holds a public hearing to determine if there has been a violation to the Convention, and if it decides that the application is admissible, it advocates for a settlement which ranges from a change in the law(s) to compensation.¹¹⁰ Judgments of the Court are binding under international law, and states are obliged to prevent similar

¹⁰⁷ Protocol XI to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby.

¹⁰⁸ A 34 ECHR.

¹⁰⁹ A 35 ECHR.

¹¹⁰ A 40 & 41 ECHR.

violations from occurring in the future.¹¹¹ Judgments of the Court are binding under international law, and states are obliged to prevent similar human rights violations from occurring in the future.¹¹²

Some of the early instances where the court has had to interpret the ECHR include *Handyside v UK*,¹¹³ which related to the right of freedom of expression contained in article 10 of the ECHR. In this case, seizure of the book of Handyside was held to be justified under article 10(2) regarding protection of public morals.

*Ireland v United Kingdom*¹¹⁴ related to article 3 of the ECHR which deals with freedom from torture and inhuman or degrading treatment. The court held that the techniques applied amounted to a practice of inhuman and degrading treatment constituting a breach of article 3.

*Wemhoff v Federal Republic of Germany*¹¹⁵ related to the liberty of the person and involved the interpretation of article 5(3) and article 6(1) of the ECHR.

In *Tolstoy Miloslavak v United Kingdom*,¹¹⁶ the European Court of Human Rights noted that the award of damages and injunction clearly constitute an interference with the right to freedom of expression, and therefore any sanction imposed for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered, and the court further said that this should be specified in national defamation laws. In response, the UK amended its laws relating to damages in defamation cases.

¹¹¹ A 49 ECHR.

¹¹² A 49 ECHR.

¹¹³ (1976) (5493) ECHR 5.

¹¹⁴ (1978) Series A No. 25 2 ECHR 25.

¹¹⁵ (2122/64) (1964) ECHR 4.

¹¹⁶ (18139/91) (1995) (ECHR).

The ECJ has gone ahead to proclaim the European Community legal regime as a new legal order.¹¹⁷ This order has been granted supremacy over national laws¹¹⁸ and the court has affirmed that the European Community is a community based on the rule of law and that its treaty is recognised as a basic constitutional charter.¹¹⁹

3.7.2.2.3 Other regimes

Other human rights protection regimes under the European system include:

- The European Social Charter,¹²⁰ adopted in 1961 and revised in 1996. It guarantees social, cultural and economic rights, including education, health, housing, employment, non-discrimination, movement of persons and social protection. The European Committee of Social Rights oversees the implementation of this Charter.
- The European Convention for the Prevention of Torture and Inhuman or Degrading Punishment, adopted in 1987 and a Committee for the Prevention of Torture was formed under it to investigate cases of torture.¹²¹
- The European Charter for Regional or Minority Languages 1992,¹²² adopted in the wake of the disintegration of the USSR and the emergence of states with minority groups.

¹¹⁷ *NV Algemene Transporten Expedietie Ondernemeng Van Gend En Loos v Nederlandse Administratie der Belastingen* (1963) ECJ 26/62.

¹¹⁸ *Costa v ENEL* (1964) ECJ 6/64.

¹¹⁹ *Partie Encologiste 'Les Verts' v Parlement* (1983) ECJ 294/83.

¹²⁰ <http://Conventions.coe.int/treaty/en/treatis/html/163.htm> (Date of use: 15 October 2013).

¹²¹ <http://Conventions.coe.int/treaty/en/treatis/html/126.htm> (Date of use: 15 October 2013).

¹²² <http://Conventions.coe.int/treaty/en/treatis/html/148.htm> (Date of use: 15 October 2013).

- The European Commission against Racism and Intolerance,¹²³ set up in 1993 to fight racism (the belief that certain races are inferior), xenophobia (the fear of foreigners), anti-Semitism (prejudice against Jews), and other forms of intolerance. It evaluates existing mechanisms against racism and submits annual reports to the Committee of Ministers.

- The Commissioner for Human Rights,¹²⁴ established in 1999 to fulfill the following duties:
 - The promotion of respect and enjoyment of human rights by COE members.
 - The promotion of human rights education and awareness.
 - The identification of hiatus in areas of laws that fail to recognise and implement human rights.

- The Organisation for Security and Cooperation in Europe (hereinafter “the OSCE”)¹²⁵ has certain mechanisms for enforcement of human rights:
 - The Helsinki Final Act created the OSCE and connected security issues with human rights issues. It is a political as opposed to a legally binding document. Among its various principles is Principle VII, which calls upon members of the OSCE to act in conformity with the human rights principles of the UN charter and the UDHR. Principle VII emphasises equality of rights and the right to self-determination.
 - The Vienna Mechanism, also known as the human dimension mechanism, promotes rights through fact-finding, mediation and negotiations. An investigating team made up of bilateral negotiators, human rights experts and rapporteurs carry out investigations and take up accusations from one

¹²³ www.unhcr.org/refworld/publisher/COEC (Date of use: 15 October 2013).

¹²⁴ www.coe.int (Date of use: 15 October 2013).

¹²⁵ www.osce.org (Date of use: 15 October 2013).

state to another. They engage diplomatically and the matter may be taken to the conference of member states as the need arises.

- The Moscow Mechanism (1991) was established to work hand in hand with the Vienna Mechanism. While the latter allows for inquiries into states' human rights records, the former allows for independent experts to resolve human dimensions conflicts in member states. Though not frequently used, it was used in 1992 during investigations into alleged attacks on civilians in Croatia and Bosnia-Herzegovina by the US and 12 states of the European community, and in 1993 by the OSCE committee to investigate human rights violations in Serbia-Montenegro.
- The High Commissioner of National Minorities (hereinafter “the HCNM”)¹²⁶ was established in 1992 after the end of the Cold War and the breakup of the Soviet Union (USSR) when there was a great need to protect ethnic minorities. The HCNM primarily addresses minority issues before they evolve into serious problems.

3.7.2.2.4 Conclusion

The Second World War devastated Europe in a way that none of the parties to the conflict had anticipated. The fact that the hostilities began in Europe and spread to other continents was a wake-up call for the European nations to prevent such a catastrophe in the future. In addition, the fall of the United Soviet Socialist Republic (USSR) saw the fragments form small states mainly composed of small ethnic groups, and again, there was a need to protect the minorities within these states.¹²⁷ It is no wonder therefore, that Europe has one of the most comprehensive systems of human rights.

¹²⁶ www.osce.org/hcnm (Date of use: 15 October 2013).

¹²⁷ Steiner, Alston & Goodman 135.

3.7.2.3 *The inter-American system of human rights*

The Organisation of American States (hereinafter “the OAS”) was formed in 1948 in Bogota, Columbia under the Charter of Organisation of American States at a conference attended by 21 American countries. The participants also signed the American Declaration of the Rights and Duties of Man 1948 (hereinafter “the American Declaration”) and this became the first international document to lay down human rights principles.¹²⁸ The American Declaration is unique in that, unlike its United Nations counterpart, the UDHR, the American Declaration includes human rights that need to be protected alongside duties.

The preamble to the American Declaration states that the American states recognise that the essential rights of man do not derive from the fact that he is a national of a certain state; rather they are based upon attributes of his human personality. It further states that all men are born equal, in dignity and in rights, and being endowed by nature with reason and conscience, they should conduct themselves as brothers to one another. In imposing duties, the preamble further states that the fulfillment of duty by each individual is a prerequisite to the rights of all.

Among the rights provided for in the American Declaration are the right to life, liberty and personal security (a 1), the right to equality before the law (a 2), the right to religious freedom and worship (a 3), the right to family (a 6), and other social and economic rights such as the right to education (a 12), work (a 14) and social security (a 16), among others.

The American Declaration also sets out duties that are important for the enjoyment of rights, and these include the duty to conduct oneself well in society (a 29), duties

¹²⁸ Shaw 260.

towards parents and children (a 30), the duty to vote (a 32), the duty to obey the law (a 33), the duty to pay taxes (a 36) and the duty to work (a 37) amongst others.

Imperatively, the American Declaration limits the rights in article 28 as follows:

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

The American Convention echoed the provisions of the American Declaration; the preamble recognises that the rights of man are based upon attributes of human personality. Article 1 obligates the state parties to respect the rights set out in the Convention. The Convention then outlines the civil and political rights, followed by the economic, cultural and social rights. Article 27 suspends rights in times of war or other emergency that threatens the independence or security of a state party. The underogable rights include rights to juridical personality (a 3), life (a 4), humane treatment (a 5), freedom from slavery (a 6), freedom from *ex post facto* laws (a 9), freedom of conscience and religion (a 12), family (a 17), a name (a 18), nationality (a 20), and the right to participate in government (a 23). Just like the Declaration, article 32(2) provides that rights are limited by the rights of others, the security of all and the just demands of the general welfare in a democratic society. Article 32(1) also places a responsibility on every person to his family, community and mankind.

3.7.2.3.1 Enforcement

Under the American system, two main bodies are charged with the implementation of the American Declaration:

- The Inter-American Commission on Human Rights (article 33(a) of the American Convention)

The main functions of the Commission under art 41 of the American Convention are to promote respect for and defense of human rights, specifically:

- a. To develop an awareness of human rights among the peoples of America.
- b. To make recommendations for member states to adopt progressive measures in favour of human rights.
- c. To prepare reports and submit an annual report to the general assembly of the OAS.
- d. To take action on petitions and other communications submitted to it.
- e. To request governments of member states to supply it with information on measures adopted to promote human rights.
- f. To respond to inquiries made by member states on matters of human rights.

Petitions can be filed by an individual, a group or an NGO recognised in at least one of the OAS member states. A victim or a third party acting on behalf of the victim, with or without the knowledge of the latter may file the petition. The petition must include information on the petitioner, the reason for the petition and the complaint against the respondent.¹²⁹

¹²⁹ A 44-47 American Convention, art 26-41 of the Commission's regulations.

All petitions must include the personal details of the petitioners including name, nationality and occupation.¹³⁰ All petitions must include a list of violated rights, details of the violation, the victims, the place and names of the officials causing the violation. The Commission will only investigate claims made against a government of an OAS member state.¹³¹

For a petition to be eligible, the rule of exhaustion of domestic remedies applies unless the petitioner can show that access to these remedies has been denied or prevented, there has been an unnecessary delay in judgment, there was a denial of adequate legal counsel, or the domestic legislation does not provide due process to protect the rights violated.¹³² The petition must be submitted within six months of a final ruling of the domestic court. However, an extension will be granted when the member state interfered with the process, in which case it still must still be submitted within a reasonable time.¹³³

If a petition is inadmissible, the Commission informs the petitioner and closes the case. If admissible, it is given a case number and the Commission forwards pertinent information to the respondent government to respond within 90 days (or 180 days if the government seeks extension for plausible reasons). Sometimes the Commission may request that information be shared sooner than 90 days for special cases. If the government does not respond, it is an indication of guilt.¹³⁴

The government's response, if there is one, is forwarded to the petitioner, who then has thirty days to comment on the response as well as submit further material, if desired. The petitioner may ask for evidence on certain government statements or may request an oral hearing for the introduction of witnesses. The

¹³⁰ A 46(d) American Convention.
¹³¹ A 45 American Convention.
¹³² A 46(a) American Convention.
¹³³ A 46(b) American Convention.
¹³⁴ A 48 of the American Convention.

Commission will then decide whether or not to hold the oral hearing; it is authorised but not obligated to do so. The petitioner may also request the Commission to undertake an on-site investigation in the country in question. The Commission will only investigate allegations of widespread human rights violations within a country, and look at individual cases thereafter as demonstrative of a broader theme. This method is rarely undertaken for just an individual case.¹³⁵

The Commission, after making its decision on the petition, releases judgment on what should be done by issuing recommendations to the state concerned. In the event that the state is party to the American Convention, the Commission must attempt to formulate a friendly settlement, if possible. If a friendly settlement is not reached, the Commission writes a report with the facts of the case and the Commission's conclusions, recommendations, and proposals. The state concerned and the Commission then have 3 months to decide whether or not to submit the case to the Court of Human Rights or settle the matter. Next, the Commission formally adopts an opinion and a conclusion with time limits for the government to undertake the proposed measures. States that are not parties to the Convention are not subject to the friendly settlement clause.¹³⁶

If the state is a party to the American Convention and has accepted the Court's optional jurisdiction, the Commission or the state may refer the petition to the Court of Human Rights for a new evaluation culminating in a binding judgment with possible monetary ramifications.¹³⁷

- The Inter-American Court of Human Rights (article 33(b) of the American Convention)

¹³⁵ A 26-41 of the Commission's regulations.

¹³⁶ A 49, 50 & 51 of the American Convention.

¹³⁷ A 61 of the American Convention.

The Court is established under chapter VII of the American Convention. It consists of seven judges from member states elected by secret ballot. Only state parties and the Commission have a right to submit cases before it (art 61(2)). The Court will hear all cases concerning the interpretation and application of the provisions of the Convention submitted to it (art 62(3)). If the Court finds that indeed there was a violation of a right, it will rule that the enjoyment of the right be restored, the situation causing the violation be remedied and fair compensation paid to the injured party (art 63(1)). In cases of extreme urgency where irreparable damage may occur, the court may take such measures as it deems pertinent to stop the violation (art 63(2)). The judgment of the court shall be final (art 67) and state parties have undertaken to comply with the judgment of the court (art 68 (1)). The judgment of the court shall be final (a 67) and state parties have undertaken to comply with the judgment of the court (a 68 (1)).

For instance, in *Mauricio Herera Uloa v Republic of Coast Rica*,¹³⁸ (hereinafter “*La Nacione*”) Mauricio was convicted of defaming the Costa Rican honorary diplomat Felix Chawa in his newspaper *La Nacione*. He appealed before the Supreme Court of Justice of Costa Rica and his conviction was upheld. Mauricio had reported that Chawa had been implicated in a scandal involving illegal purchase of helicopters, and that he had been barred from entering Germany. However, Mauricio had taken care in accordance with professional standards to present both sides of the story. He was nevertheless sentenced to pay a total of over 150,000 US dollars and ordered to publish the decision in his newspaper, and to take measures to prevent internet users from accessing the articles in question before the court.

A non-governmental organisation, Global Campaign for Free Expression, referred the matter to the Commission, which declared it admissible and referred

¹³⁸ *Mauricio Herera Uloa and Fernan Vargas v Republic of Coast Rica “La Nacione”* (2001) Inter-American Court of Human Rights No. 12.367.

it to the Inter-American Court of Human Rights. The Court held that Costa Rica breached its obligations under the American Convention, especially article 13 which guarantees freedom of expression, by imposing harsh sentences for defamation and imposing liability beyond what was necessary to protect reputation. The court observed that though the ECHR has upheld criminal conviction for defamation on some occasions, it has gone to great lengths to explain that the sanctions were modest and meet the standards of proportionality, such as in *Tammer v Estonia*.¹³⁹

The Court also found that Costa Rica had breached its obligations under the Convention because of its defamation laws. Furthermore, the court cited the ECHR decision in *Tolstoy Miloslavak v United Kingdom*¹⁴⁰ in finding the award too punitive.

The efficacy of the Court as an enforcement mechanism is affected by several limitations. Cases can only be referred to it by state parties or the Commission, and only those state parties that have accepted the Court's optional jurisdiction.¹⁴¹ Unlike the European system where individuals have access to the ECHR, in the inter-American system, an individual or a petitioner may not independently bring forth a case to be considered by the Court. Nevertheless, the Court has had occasion to render opinion on serious issues affecting the public, such as the declaration that criminal defamation laws are illegitimate,¹⁴² among others.

Apart from the American Declaration and the American Convention, the OAS has adopted several other treaties relating to human rights. They include the following:

¹³⁹ (2001) (ECHR) 41205/98.

¹⁴⁰ (18139/91) (1995) (ECHR).

¹⁴¹ A 61 & 62 of the American Convention.

¹⁴² (2001) "*La Nacion*" Inter-American Court of Human Rights case No. 12.367.

- The Cartagena Declaration on Refugees 1984

It borrowed heavily from the United Nations Refugee Convention 1951 regarding the definition of refugees to include persons who have fled their country because their lives, safety or freedom are threatened by violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances.¹⁴³

Although not formally binding, the Cartagena Declaration has formed the basis of the refugee policy in the Inter-American system.

- The Inter-American Convention to Prevent and Punish Torture 1985

This Convention defines torturous acts and renders them illegal, and further states that the defence of “superior orders” does not apply to persons accused of torture. According to this Convention, there are no exceptions to torture, whether in war or in peace times.

- The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights 1988. This Convention deals with rights such as work, health, education, family, et cetera. It obligates states to legislate domestically for these rights.
- The Protocol to the American Convention on Human Rights to Abolish the Death Penalty 1990 obliges state parties to the Convention to abolish the death penalty.
- The Inter-American Convention on Forced Disappearance of Persons 1994 defines forced disappearance as deprivation of the freedom of a person(s) by a

¹⁴³ A 1 of the UN Convention on Refugees 1951.

state agent or persons or groups acting with authorisation or acquiescence of the state and giving no information on the whereabouts of the person(s) so as to prohibit the person(s) from any access to legal remedies.¹⁴⁴ State parties to this Convention have agreed to ban forced disappearances and to punish those who attempt to commit this crime.

- The Inter-American Convention on the Prevention and Eradication of Violence against Women 1994 defines violence against women as being gender-based and having a negative effect on a woman's physical, sexual, or psychological well-being (art 2). It lists rights of women, including freedom from violence in both the public and private sphere, as well as freedom from discrimination (art 3-6). State parties ought to prevent such violence from occurring, and enact relevant legislations prohibiting such violence, to provide women a just legal recourse in the case of violence, and to promote social awareness and cultural acceptance of these rights of women (art 7-9). To enforce these rights, the Convention further obliges states to include in their national reports to the Inter-American Commission of Women the measures they have adopted to prevent and prohibit violence against women (art 10). In addition, state parties and the Inter-American Commission of Women may request the opinion of the Inter-American Court of Human Rights on the interpretation of this Convention (art 11).

3.7.2.3.2 Conclusion

Despite slow growth of human rights enforcement in the Inter-American system, recent years have been characterised by referral of cases to the Inter-American Court of Human Rights. This is especially so with the massive disappearance of persons and

¹⁴⁴ A 2 of the Inter-American Convention on Forced Disappearance of Persons.

torture inflicted by states in Latin America, such as the *Honduran disappearance cases*.¹⁴⁵

3.7.2.4 *The African system of rights*

African states came together under the umbrella of the Organization of African Unity (hereinafter “the OAU”), which has since been replaced by the African Union (hereinafter “the AU”). Article 3(h) of the Constitutive Act of the AU states one of the objectives of the AU as promoting and protecting human and people’s rights in accordance with the Banjul Charter¹⁴⁶ and other relevant human rights instruments. While article 4 of the Act states that member states are obligated not to interfere with one another’s internal affairs, it also provides that the AU can intervene following a decision of the General Assembly in respect of grave circumstances such as war crimes, genocide and crimes against humanity.

The African system of human rights is premised on the Banjul Charter, which came into force in October 1986. One of the most distinctive features of the Charter is its recognition of collective rights.¹⁴⁷ It views individual and peoples’ rights as linked. The other distinctive feature is the recognition of the right to development, and the assertion that civil and political rights cannot be divorced from economic, social and cultural rights as stated in the preamble.

The preamble further states that fundamental human rights stem from the attributes of human beings which justify their national and international protection, and that enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.

¹⁴⁵ *Velasquez Rodriguez case* (1989) 28 ILM.

¹⁴⁶ African Charter on Human and Peoples’ Rights 1981.

¹⁴⁷ A 19-24 of the Banjul Charter.

The Banjul Charter lists the civil and political rights such as the rights to life (a 4), liberty (a 6), association, and assembly (a 10 & 11) amongst others. It also provides for the economic, social and cultural rights such as the right to family (a 18), education and culture (a 17), health (a 16) and work (a 15), amongst others.

Some of the unique rights are provided for in the following articles: Article 19 provides that all peoples are equal; they enjoy the same respect and have the same rights. Article 20 gives the right of self-determination to all peoples, stating that they have the right of existence, the right to freedom and the right to assistance from state parties. Article 22 provides that state parties shall undertake to eliminate all forms of foreign economic exploitation, particularly that practiced by international monopolies to enable their people to fully benefit from the advantages derived from their national resources.

In one of the most elaborate provisions on the duties of every person, article 29 of the Charter provides that individuals have the duty to work, to pay taxes, to preserve family, to respect parents, not to compromise state security, to strengthen national solidarity and independence, and to preserve African cultural values.

3.7.2.4.1 The African Commission on Human and Peoples' Rights (hereinafter "the African Commission")

Article 30 of the Banjul Charter provides for the establishment of an African Commission on Human Rights, whose mandate is to promote human and peoples' rights. In particular, it collects documents, undertakes studies and research on African problems in the field of human and peoples' rights, organises seminars, symposia and conferences, disseminates information, encourages national and local institutions concerned with human and peoples' rights, and makes recommendations to

Governments.¹⁴⁸ The Commission also ensures the protection of human and peoples' rights under conditions laid down by the Banjul Charter.¹⁴⁹

In carrying out its obligations, the Commission must however satisfy itself that all domestic remedies have been exhausted before it can entertain a matter brought before it, unless local remedies do not exist in that particular case, or the procedure for achieving them is unduly long.¹⁵⁰ This provision has seen many serious complaints rejected by the Commission. For instance, in *International Pen v Sudan*,¹⁵¹ Kemal Al Jazouli was held without charges from March to June 1992 in Sudan. He brought a communication alleging violation of his rights under article 6 (the right to liberty) and 7 (the right to fair trial) of the Banjul Charter. The Commission ruled that he had not exhausted local remedies since he had not filed the case in Sudanese courts; the fact that the government of Sudan had generally denied the existence of incommunicado detentions did not amount to saying that the case had been tried in Sudanese courts.

In *Stephen O Aigbe v Nigeria*¹⁵² the complainant had detailed his mistreatment by the Nigerian army and had alleged that his life was in danger, yet the application was dismissed for the similar reasons. In *Africa Legal Aid v The Gambia*,¹⁵³ an NGO submitted a communication on behalf of a minor who was being held in servitude, but the rule of exhaustion of domestic remedies rendered the communication inadmissible. However, in *John K Modise v Botswana*,¹⁵⁴ the Commission ruled that the complainant had been trying without success to access the courts but his access had been interrupted by the summary deportations of which he was the victim. In the circumstances, his communication was admissible.

148 A 45 (1) of the Banjul Charter.

149 A 45 (2) of the Banjul Charter.

150 A 50 of the Banjul Charter.

151 (1993) ACHPR 92/93.

152 (2003) ACHPR 252/2002 .

153 (2001) ACHPR 207/97.

154 (1993) ACHPR 97/93.

The foregoing notwithstanding, the African human rights monitoring system has been less effective than the European and Inter-American ones. Professor Makau Mutua¹⁵⁵ opines that the African system has been ineffective largely due to the “clawback” clauses in the Banjul Charter, the potential abuse of the language of duties, and the absence of an effective protection mandate for the African Commission.

Indeed, most of the articles of the Banjul Charter provisions that give rights contain overriding clauses, such as article 6 which provides for the right to liberty while stating that one shall not be deprived of his freedom except for reasons and conditions previously laid down by law. Article 11 provides for freedom of assembly “... subject to restrictions provided for by law ... in the interest of national security, the safety, health, ethics and rights and freedoms of others”. Freedom of religion and conscience (a 8) is also subject to law and order. Likewise, the right of association (a 10) is subject to the fact that the person exercising it abides by the law. Article 12, which provides for freedom of movement echoes similar restrictions. The right to property (a 14) may also be encroached upon in the interest of public need, the general interest of the community or in accordance with provisions of the law. It follows that citizens of African states whose basic rights and freedoms are curtailed do not have much recourse under the Banjul Charter. In essence therefore, the Charter gives rights with one hand and takes them away with the other.

In addition, the African Commission is vested with detailed promotional¹⁵⁶ but ambiguous protective roles, the latter being summarised in a single sentence viz: “... ensure the protection of human and peoples’ rights...”¹⁵⁷ The rule of non-interference with internal affairs of the state unless the General Assembly so resolves only renders the Commission more toothless.

¹⁵⁵ Mutua “African human rights system: A critical evaluation”
<http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf> (Date of use: 15 October 2013).

¹⁵⁶ A 45 (1) of the Banjul Charter.

¹⁵⁷ A 45 (2) of the Banjul Charter.

However, to be fair to the Commission, it has in the past pointed out oppressive laws and recommended action. In *Civil Liberties Organization v Nigeria*,¹⁵⁸ the Commission found that the Nigerian government enacted laws, in violation of the African Charter, to abridge due process rights and undermine the independence of the judiciary. It recommended that the government amends the laws in question accordingly.

At the same time, unlike other regional Conventions, the Banjul Charter allows even individuals and non-governmental organisations¹⁵⁹ to file complaints in regard to a breach of their rights under the charter, a major positive attribute of the charter.

3.7.2.4.2 The Africa Court on Human and Peoples' Rights

It was established by the Protocol to the African Charter on Human and Peoples' Rights 1998 with its jurisdiction being disputes concerning interpretation and application of the Banjul Charter, the Protocol and any other relevant human rights instruments.¹⁶⁰ As per article 2 of the Protocol, the Court is supposed to complement the protective mandate of the Commission. The bodies that can access the court include the Commission, state parties lodging a complaint or against whom a complaint has been lodged or a state party whose citizen is a victim of rights violations and African inter-governmental organisations.¹⁶¹ The Court received its first application on 11 August 2008.¹⁶² It has several applications pending before it.¹⁶³

¹⁵⁸ (1997) ACHPR 129/94, 1997.

¹⁵⁹ *Africa Legal Aid v. The Gambia* (2001) ACHPR 207/97.

¹⁶⁰ A 3 of the protocol.

¹⁶¹ A 5 of the Protocol to the African Charter on Human and Peoples' Rights.

¹⁶² *Michelot Yogogombaye v The Republic of Senegal* 001/2008 www.african-court.org/en/index.php/2012-03-04-06-06-00/finalised-cases (Date of use: 30 October 2013).

¹⁶³ www.african-court.org/en/ (Date of use: 30 October 2013).

3.7.2.4.3 The African Charter on the Rights and Welfare of the Child 1990

This charter addresses the protection of the rights of the child. Most of its provisions are modeled after the articles of the Convention on the Rights of the Child 1989 (which will be addressed in details in the next chapter). The main difference lies in the existence of provisions concerning children's duties, in line with the African Human Rights Charter.

The African human rights system is a work in progress, especially if the setting up of the Court and the number of applications pending before it is anything to go by. However, the enforcement of the Court's decisions will be an uphill task given governments' lackadaisical nature of adhering to court orders.

3.8 CONCLUSION

Internationally, the human rights scenario is a far cry from the post World War I period, and despite the shortcomings in the enforcement of these rights, governments are much more sensitive to rights than before. Indeed, the recognition of the rights of children, same-sex partners and other minorities in various jurisdictions are an affirmation of growth in the human rights jurisprudence.¹⁶⁴

¹⁶⁴ Ishay *The History of Human Rights* 354.

CHAPTER FOUR

CHILDREN'S RIGHTS

4.1 INTRODUCTION

There is no doubt that children, being human beings, are entitled to the rights enunciated in the various human rights instruments discussed in chapter three. They are also entitled to special protection by virtue of their age and legal capacity. This chapter looks specifically at the rights of children with emphasis on the rights and interests outlined in the UN Convention on the Rights of the Child, 1989 (hereinafter “the UNCRC”).

4.2 THE ORIGIN OF CHILDREN'S RIGHTS

In the African setting, most societies had a higher regard for adults than children, and amongst children, for boys than girls. Among the Kikuyu and the Maasai of Kenya, during the cattle raids, the young men had to return home with cattle and young girls, as part of their newly acquired wealth.¹ Among the Samburu community of Kenya, it was considered (and still is by some) a curse to give birth to twins, and they were left by the roadside to be eaten by wild animals.² In most communities, a disabled child was an abomination, and most were killed right after birth.³ Indeed, a story is told in African mythology of a certain king who had five wives who bore him only daughters. He longed for a son, and issued a decree that henceforth, all children born, if not sons, should be thrown into a river and left to drown. His least favourite wife gave birth to a son, but the other wives, knowing she would get the king's favour conspired to kill the

¹ Kenyatta *Facing Mount Kenya* 113.

² Spencer *The Samburu: A Study of Gerontocracy* 57.

³ Milner *Hardness of Heart / Hardness of Life – The Stain of Human Infanticide* 11.

baby and lie to the king that it was a baby girl. As fate would have it, the boy did not drown but was saved by a farmer, who brought him up and told him the truth that he was born into royalty but was thrown away like a girl. He subsequently reunited with his birth mother and the king bestowed great honour on his son and wife.⁴

In ancient Athens, the father had the right to decide whether to keep a newborn baby or dispose of it, and abandoning a child did not count as homicide. Moreover, children could be sold into slavery and parents were under no legal obligation to raise children. Children born to an unmarried woman were not even considered to be citizens. As a general rule, children and women could not be expected to act autonomously and men were responsible for controlling and protecting them. Children had a duty to honour their parents, but had no particular rights owed to them.⁵

Under Roman law, a father had absolute power, *patria potestas*, over his children.⁶ Though it would be unfair to say that parents did not love their children in Roman times, it is clear that the children belonged to them, had no rights of their own, and were brought up according to the parents' absolute desires and the customs of the day.

During the time of Blackstone's commentaries in England (18th century), there was a sense that fathers owed obligations to provide maintenance, protection and education to their children. However, these were mere moral obligations; there were no corresponding legal rights that children could assert.⁷

The influence of natural law thinkers such as John Locke and John Stuart Mill is frequently noted in this respect. For Locke, parents had a duty to take care of their

⁴ Marvin *Cannibals and Kings: The Origins of Cultures* 25.

⁵ Macdougall *The Law in Classical Athens* 91.

⁶ Burdick *The Principles of Roman Law and their Relation to Modern Law* 241.

⁷ Davis & Schwartz *Children's Rights and the Law* 7-21.

offspring “during the imperfect state of childhood ... [and to] govern the actions of their yet ignorant non-age, till reason shall take its place and ease them of that trouble.”⁸

Similarly, Mill excluded children from his principle of liberty because they were not “in the maturity of their faculties ... and must be protected against their own actions as well as against external injury.”⁹

In England, in the mid 17th century, there was an emphasis on status and classes within society, and children often occupied positions of great power arising from their lineage in a bid to reinforce status relationships.¹⁰

During the era of American colonisation (from the late 16th century to the mid 18th century), the widespread belief that children were immature and incapable of looking after themselves physically, mentally, and emotionally, took root. Childhood became a distinct legal status because children were perceived as lacking the ability to form their own judgments.¹¹

Towards the end of the nineteenth century, a nascent children’s rights movement opposed the view that children were primarily quasi-property and economic assets. The progressive movement, which continued into the early part of the twentieth century, focused on broad child welfare reforms as being integral to the development of a more humane society.¹²

⁸ Locke “An essay concerning the true origin, extent and end of civil government” in *Man and the State: The Political Philosophers* 89.

⁹ Mill *Utilitarianism, Liberty, and Representative Government* 73.

¹⁰ Brewer *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* 103.

¹¹ Again this was influenced by the writings of natural law thinkers, see ch 3 para 3.4.

¹² Guggenheim *What’s Wrong with Children’s Rights?* 12.

4.3 SHOULD CHILDREN HAVE RIGHTS?

In emphasising the importance of rights, Freeman notes as follows:¹³

“Rights are important because possession of them is part of what is necessary to constitute personality. Those who lack them are like slaves, means to others’ ends and never their own sovereigns.”

Narveson¹⁴ argues that there must be certain features or properties in a “right” such that others have good reason to acknowledge the obligation to refrain from interfering with them, or to help other bearers to do the thing that they have a right to do.

Richards¹⁵ thinks that the deep structure of the rights thesis is equality and autonomy, while Kant¹⁶ expresses this by asserting that persons are equal and autonomous in the kingdom of ends. It is the normative theory of equality and autonomy that form the basis of the Rawlsian contractarian conception. If we are to apply this equality and autonomy to children, it would follow that to respect children’s rights would mean granting them equality and autonomy. Freeman¹⁷ cautions however that this autonomy must not have deleterious impact on the child’s life chances.

The phrase “children’s rights” was once described as a slogan in search of a definition.¹⁸ By account of their tender age, vulnerability and the fact that they often have an adult making decisions on their behalf, children have been subjected to double

¹³ Freeman *The Ideologies of Children’s Rights* 31.

¹⁴ Naverson “Contractarian rights” in Frey *Utility and Rights* 164.

¹⁵ Richard “Rights and autonomy” 1981 *Ethics* 93.

¹⁶ Kant *The Moral Law: Kant’s Groundwork of the Metaphysics of Morals* 183.

¹⁷ Freeman “Taking children’s rights more seriously” in Alston, Parker & Seymour *Children, Rights and the Law* 65.

¹⁸ Rodham “Children under the law” 1973 *Harvard Educational Review* 487.

standards. Adults enjoy unlimited rights while those of children are exercised subject to those of their guardians. They are marginalised in an adult-dominated world.¹⁹

In my opinion, children rights have become legal rights by the enactment of legislation in various jurisdictions; however the moral foundation of these rights remains a grey area. There is no contention that we believe that it is morally important that adults should be regarded as rights-holders with all the benefits that this entails. In the same breath, we may rightly say that children have moral rights because they have that independent intrinsic value which places them at par with other human beings in terms of their worth and justifies the imposition of duty on others.

Dworkin²⁰ argues that if persons have moral rights to something, they are to be accorded these rights even if a utilitarian calculation shows that utility would be maximised by denying it to them. He believes that we should focus on the idea that all other principles derive from the principle of equal concern and respect for each person.

MacCormick defines a moral right as a right to that which is “a good of such importance that it would be wrong to deny, or withhold it from any member of a class.”²¹

Locke’s assertion that “children ... are not born in this state of equality, they are born to it”²² captures a widespread intuition that infants are born to personhood and thereby to a certain moral status.

¹⁹ Punch “Research with children: The same or different from research with adults?” 2002 *Childhood* 323.

²⁰ Dworkin *Taking Rights Seriously* 15.

²¹ MacCormick 160.

²² Locke “An essay concerning the true original, extent and end of civil government” in *Man and the State: The Political Philosophers* 55.

Efforts to internationally recognise children's rights started way back during the time of the League of Nations, when conventions dealing with trafficking in women and children (1921) and prohibition of slavery and slave trade (1926) were formulated. The International Labour Organisation adopted many instruments against the exploitation of child labour and for the protection of the working child. The Declaration on the Rights of the Child of 1924, which related to the rights of children affected by the Great War and its aftermath, focused on food, shelter, health care and care for orphans.

In 1959, the UN adopted the United Nations Declaration of the Rights of the Child (hereinafter "UNDRC"), which emphasised duties to children and set out ten rather vague principles. The principles enumerated by the UNDRC included children's rights in the rubric of fundamental human rights and focused on children's rights as arising from their dependency needs, rather than as being autonomous, individual rights.²³ For instance, principle 6 of the UNDRC provided for the full and harmonious development of children's personalities through love and understanding, through growing up in the care and under the responsibility of parents, and "in any case, in an atmosphere of affection and of moral and material security." Importantly, the UNDRC identified the best interests of the child as the paramount consideration for states in enacting laws to promote child development (principle 2). Between 1959 and 1989, there was an accelerated growth in children's rights awareness, culminating in the declaration of 1979 as the international year of the child. After ten more years of discussions and negotiations, the UNCRC set forth a broad range of dependency, autonomy, and equality rights.²⁴

The definition of children is contained in article 1 of the UNCRC, which provides that a child means every human being below the age of 18 years, unless under the law applicable to the particular child, majority age is attained earlier.

²³ Woodhouse "Talking about children's rights in judicial custody and visitation" 36 *FLQ* 108.

²⁴ www.unesco.org (Date of use: 9 May 2013).

4.4 THE PHILISOPHICAL UNDERPINNINGS OF CHILDREN'S RIGHTS THEORY

Some of the most interesting arguments and counter-arguments that I have come across relate to the various theories advanced in affirming or denying the existence of children's rights.

Indeed, Coady²⁵ opines that we need to be alive to the constraints that exist in discussing these theories. He states that we need to realise that positive rights need a justificatory underpinning of a broadly moral kind, and that the real-politik theories that meet this criterion are inappropriate in discussing children's positive rights since children have little influence on political power. He adds that a philosophical account of rights must also recognise that rights function as checks against the project of doing good, to others and to oneself, to avoid harm in the process of exercising rights, since, in some circumstances, it may be wrong to exercise a right. Coady also cautions that discourse on children's rights must be realistic and unsentimental about childhood and adulthood; that children (just like adults) can be inspiring and delightful, tiresome and irritating, loving and altruistic but also cruel and selfish. Coady also says that we must accept that there may be no single analysis of rights that may cover all nuances and functions of rights talk. We may have to accept that every theory has its own important analysis, and look at them in a holistic manner.

The following is a brief analysis of some of the prominent theories advanced to justify existence of entitlements accruing to children:

²⁵ Coady "Theory, rights and children: A comment on O'Neill and Campbell" in Alston, Parker & Seymour (eds) 43-44.

4.4.1 The power (will) theory of rights

According to the power theory of rights, a right is a normative capacity that the bearer may choose to use for the furtherance of his or her own interests, a sanctioned exercise of legitimate control over others.²⁶ The beacon of this theory is capacity to choose to enforce or waive the right. From this theory it follows that small children, being in no capacity to choose to enforce or forfeit, have no rights. Though this theory recognises that a proxy, such as a parent, may exercise the right on behalf of the child, this is less than the full possession of the right since the bearer's will, which is paramount for the exercise of the right, is not involved. The proxy would therefore be exercising the right almost as the right-holder. Consequently, children can only have rights once they acquire adult-like capacities to claim and enforce them, and even this is taking the liberal view of the power theory.²⁷

This theory is grounded in the paternalism of the early natural law thinkers Thomas Hobbes, John Locke and John Stuart Mills.²⁸ Hobbes based his writing on the fear of the father as the head of the family (arguing that a child could only be protected if he entirely depended on the father) and comparing the relationship of the father and child to that of a sovereign and subject (where the subject had to surrender some of his rights to get the protection of the sovereign).²⁹ One cannot help but wonder what Hobbes thought of the relationship between a mother and child, if at all he had any regard for it. On his part, Locke espoused that children are in a temporary state of irrationality and ignorance but would later achieve reason in adulthood. This temporary state demanded that parents take control on behalf of their children.³⁰ Mill on his part seemed to

²⁶ Hart "Legal rights" in *Essays on Bentham – Studies in Jurisprudence and Political Theory* 170.

²⁷ Human in Boezaart (ed) *et al Child Law* 248.

²⁸ See ch 3 para 3.4.

²⁹ De Villiers "The rights of children in international law: Guidelines for South Africa" 1993 *Stell LR* 291.

³⁰ Locke *Second Treatise of Civil Government* (1689) as analysed by De Villiers 1993 *Stell LR* 291.

advocate for unqualified paternalism over children because of their incapacity to make their own decisions.³¹

4.4.2 The interest theory of rights

The interest theory of rights defines rights as a normative defence and furtherance of interests.³² Children have rights if their interests are the basis for having rules which require others to behave in a certain way with regard to these interests. There is no presupposition that rational capacity is a prerequisite for the expression of these interests, nor is the choice of the interest-bearer a consideration.³³

Power theorists argue that the interest theory reduces rights to mere assertions, thereby missing the distinctiveness of rights, and that there is no way of identifying the distinctive feature of rights-creating interests. In their defence, interests theorists argue that duties that go with correlative rights may be distinguished from other duties by the fact that they are grounded in the interests they serve. Interest theorists can also explain a wider range of rights than power theorists who restrict themselves to capacity and choice.³⁴

Brighouse,³⁵ while protesting the notion that children have rights, looks at what he calls the child-centred strategy, which acknowledges children's interests to be central. However, he argues that granting children rights is inappropriate as a means of protecting these interests. In this strategy, the moral status of children does not become lesser or greater. Children count equally as adults, but their interests require

³¹ Mill *On Liberty* 135.

³² Campbell "The rights of the minor: As person, as child, as juvenile, as future adult" in Alston, Parker & Seymour (eds) 4.

³³ Campbell in Alston, Parker & Seymour (eds) 4.

³⁴ Campbell in Alston, Parker & Seymour (eds) 4.

³⁵ Brighouse "What rights (if any) do children have?" in Archard & Macleod (eds) 32.

different protective mechanisms. Brighthouse argues that protecting children's interests as rights inevitably leads to neglect of some of the most fundamental interests.

In their contribution to the interest theory of rights, Goodin and Gibson support an alternative model of rights for children when they say:³⁶

“It does not matter that right holders are not in a position to assert rights.... what it is to be a right holder ... is to merely be a direct intended beneficiary of someone else's duty-bound performance.... All that is strictly required (to be a right holder) is that one has interests which are recognizable by others who are duly empowered, by the moral community more generally, to press those claims on one's behalf.”

Since rights then are supposed to protect fundamental interests, children will be beneficiaries of rights, and even if they cannot claim them, they have trustees who can claim them on their behalf, and there must be a way of holding the trustees accountable.³⁷

Brighthouse³⁸ argues that the rights that can be attributed to children are welfare rights, which are interest-based, as opposed to agency rights, which are choice-based. Brighthouse³⁹ further argues that welfare rights justify themselves, a starving man needs no further justification for his need of food, the fact that he is starving means he needs food. Adults, unlike children, have the agency rights, and therefore choices, to waive their welfare rights.

³⁶ Goodin “Utility and the good” in Singer (ed) *A Companion to Ethics* 49.

³⁷ Goodin in Singer (ed) 49.

³⁸ Brighthouse in Archard 38.

³⁹ Brighthouse in Archard 39.

4.4.3 Arguments for and against the will and interest theories of rights

4.4.3.1 *MacCormick and Campbell on the interest theory of rights*

According to MacCormick,⁴⁰ children have interests that require people to behave in a certain way towards them and as such their rights are not determined by their capacity to act rationally. Indeed, the existence of these rights precedes the duty towards them; since children have a right to nurturance and care, parents have a duty to provide nurturance and care.

Campbell⁴¹ considers the approach of rights by basing them on interests as making them subordinate; these interests can easily be brushed aside thus negating the rights attached to them. This theory assumes that the person who has a duty arising out of the children's interests always has the best interests of the children at heart, which assumption we all know is a far cry from reality. Many people assume that children have love and compassion from their guardians and that childhood is a golden age full of bliss where there are no responsibilities. Indeed, Freeman considers a fallacy the idea that childhood is a golden age, synonymous with innocence, a time of freedom, joy and play when children are spared the rigours of adult life.⁴² In a world full of abuse, poverty, disease, exploitation, war and famine, for many children, childhood is no bliss.

⁴⁰ MacComick 122.

⁴¹ Campbell "Philosophy, ideology and rights" *Legal Studies* 10-20.

⁴² Freeman "Limits of children's rights: in *The Ideologies of Children Rights* 30.

4.4.3.2 *Eekelaar on the interest theory of rights*

Eekelaar⁴³ looks at children's rights in terms of the interest theory, stating that the test is whether someone has an interest which is sufficient ground for holding another to be subject to a duty. A key precondition for this theory is a social perception that an individual or a class has certain interests, capable of isolation from the interests of others. Since children lack information or ability to decide what is best for them, some kind of imaginative leap and a guess of what the child might retrospectively have wanted once he or she reaches maturity is considered. Three kinds of interests form the foundation of these leaps:

- **Basic interests:** This refers to children's claims to physical, emotional and intellectual care, and the duty to fulfill these interests falls on parents and guardians, failure of which the state would intervene.
- **Developmental interests:** All children should have equal opportunity to maximise the resources available to them during childhood and to maximise the degree to which they enter adult life affected by avoidable prejudices incurred during childhood. These interests are also asserted against the wider community. Eekelaar doubts whether they are legal rights, because, though the law imposes a duty on parents to fulfill these interests, their fulfillment depends on natural dynamics of the family and society at large.
- **Autonomy interests:** These refer to the freedom of the child to choose a lifestyle and to enter into social relations free from control of parents and other adults. These interests are subordinate to the other two.

⁴³ Eekelaar "The importance of thinking that children have rights" in Alston, Parker & Seymour (eds) 222.

4.4.3.3 *Wald on the interest theory of rights*

Wald,⁴⁴ a prominent American child lawyer, does not delineate specific rights but attempts to formulate a framework for analysis of the concept of children's rights. He considers that children have rights against the world (viz rights to freedom from poverty, adequate healthcare, adequate housing and a safe community: these rights are not necessarily limited to children but are for enjoyment by all people) and protection against inadequate care, which must be legislated for them to be enforced. For instance, the state must protect children from harm by adults, thus ensuring that they are protected from inadequate care.

Wald⁴⁵ also opines that children have rights against their parents, because parents may not always be the best judges of the children's best interests. In deciding whether authority for decision-making ought to be removed from the parents, Wald outlines the following factors to consider:

- Can the child make such decisions adequately?
- If not, are others likely to decide better than parents?
- Can the state really remove these powers from the parents?
- What are the costs of removing the decision from the parents in terms of family autonomy and family privacy?
- What are the costs of not giving the decision to the child?

In determining the rational capacity of the child, Wald opines that there is a need to consider the skill required for such a decision, and whether the child possesses such skill. He acknowledges the importance of family and opines that courts or the state may

⁴⁴ Wald "Children's rights – A framework for analysis" 1979 *UCDLR* 255.

⁴⁵ Wald 1979 *UCDLR* 271.

not be better than parents at making decisions for the child, since the child needs familiar relationships. Courts or the state do not live with children but are just professionals who will not be there to take responsibility for the decisions. Wald does not propose a theory of rights, preferring protections instead.⁴⁶

4.4.3.4 *Hafen on rights*

On his part, Hafén⁴⁷ bases his argument on the individual vis-à-vis family tradition. He argues that societies are becoming more and more individualistic, but notes that maintenance of the family tradition is a prerequisite for existence of a rational and productive individual tradition. Children are excluded from the individual tradition because they lack capacity for rational decision-making, but are part of the family tradition. He considers two groups of children's rights, viz rights of protection and rights of choice. Rights of protection include property and physical protection amongst others, aimed at protecting children against adults. Rights of choice include the right to make affirmative choices of binding consequences, such as the right to marry or vote, all based on the assumption that there is capacity for making rational and moral decisions. Parents' role is to guide their children's judgmental capacity towards maturity. Hafén opines that children should not be abandoned to their rights.

In my opinion, this theory would be limited by the real meaning of family, as most writers still cling to what Freeman calls a "cereal packet" image of family,⁴⁸ while the family has been devolving to include other types apart from the traditional nuclear family.

⁴⁶ Wald 1979 *UCDLR* 280-81.

⁴⁷ Hafén "Puberty, privacy and protection: the risks of children's rights" 1977 *AAJ* 1383.

⁴⁸ Freeman *The Ideologies of Children's Rights* 30.

4.4.3.5 Freeman on rights

Freeman⁴⁹ defines human rights as the right of every person to be treated as an equal and have his or her autonomy respected. He argues that the deep structure of the rights thesis is equality and autonomy. Therefore children's rights require recognition of their autonomy, both actual and potential. Freeman argues that limited intervention is only necessary to protect children from their own irrational actions. He sets out the test of intervention as follows:⁵⁰

“What sort of action or conduct would we wish, as children, to be shielded against, on the assumption that we would want to mature to a rationally autonomous adulthood and be capable of deciding our own system of ends as free and rational human beings?”

Freeman cautions that irrationality must be defined in terms of a neutral theory capable of accommodating pluralistic visions of the good, and that an action ought to be deemed irrational if it is so severe and systematic as to lead to major irreversible impairment of interests.⁵¹

Freeman prefers that a balance be struck between “nurturance” and “self-determination”, recognising that children need to be taken care of and protected from the dangers of complete liberation, but at the same time need to be granted their autonomy to determine what is good for them. He gives the example of sexual abuse and the age of consent, saying that a child ought not to be deemed to have consented to sexual abuse despite attaining the age of competency. He says the following:⁵²

⁴⁹ Freeman *The Ideologies of Children's Rights* 31.

⁵⁰ Freeman *The Ideologies of Children's Rights* 31.

⁵¹ Freeman *The Ideologies of Children's Rights* 38.

⁵² Freeman *The Ideologies of Children's Rights* 39.

“To take children’s rights seriously requires us to take seriously nurturance and self-determination and demands of us to adopt policies, practices and laws which both protect children and their rights”.

Freeman notes that the passage of laws to give effect to children’s rights is just one step and that implementation is a major challenge. Finally, he notes that rights without services are meaningless. The enactment of the UNCRC has seen many governments come up with policies to address children’s rights, but not many resources are allocated for this noble cause.⁵³

4.4.3.6 *O’Neill’s theory of obligations*

On her part, Professor Onora O’Neill argues that taking rights as fundamental in ethical deliberation about children has no theoretical or political advantages, and prefers taking obligations as fundamental. She uses a three tier mode to look at obligations:

- Those owed to all children by all agents, for instance, we are obliged to refrain from abuse and molestation of children, whether or not they are under our care, and this is an obligation owed by all agents to all children.
- Those obligations owed to specific children by specific agents, what she calls a perfect obligation. For instance, those who have undertaken to care for specific children will have obligations to them, and those children will have a right to care of appropriate standards.
- Obligations that may bind all agents, but are not owed to any specific child, what she calls imperfect obligations. For instance, we may have a fundamental obligation to be kind to children and to care for them. The discharge of this obligation will differ

⁵³ Freeman *The Ideologies of Children’s Rights* 41.

with circumstances, depending on social and institutional arrangements that connect specific children to specific adults.

She argues that when we take children's interests as rights, we get an⁵⁴

“...indirect, partial and blurred picture ... the obligations of roles such as parent or teacher or social worker are commonly taken to require more than meeting those rights that are institutionalised with the role. Cold, distant or fanatical parents and teachers, even if they violate no rights, deny children the “genial play of life”: they can wither children's lives.”

O'Neill also argues that adults, especially parents and caregivers, do not want their children's dependence to continue indefinitely. Children, according to her, have less potential for using the rhetoric of rights as a political instrument, and those who urge respect for children's rights must address not children, but those whose actions may affect children.⁵⁵

O'Neill's arguments have received their share of criticism. Coady⁵⁶ wonders why O'Neill uses obligations as opposed to rights; he asks.⁵⁷

“Why not say that children have a right not to be denied ‘the genial play of life’, that they have a right to a cheerful environment, a right to consideration and kindness?”

⁵⁴ O'Neill “Children rights and children lives” in Alston, Parker & Seymour (eds) 28.

⁵⁵ O'Neill in Alston, Parker, Seymour (eds) 29.

⁵⁶ Coady in Alston, Parker & Seymour (eds) 45.

⁵⁷ Coady in Alston, Parker, Seymour (eds) 45.

He reckons that these rights would attach to children, and therefore it would not be true to say that there is nobody to waive or claim performance.

Freeman⁵⁸ thinks that the rot of O'Neill's argument lies in the fact that children may not be able to waive or enforce rights, and this wedds her to the will theory. Freeman thinks that O'Neill's suggestion that the child's main remedy is to grow up is wrong, because it underestimates the capacities and maturity of many children. He says:⁵⁹

“We expect adolescents to be criminally responsible at the age of fourteen ... but we are less willing to accept the correlativity of responsibility and rights.”

Despite the fact that I do not agree with O'Neill in her reference to obligations as opposed to rights, I must say that she looks beyond the realm of legal rights, into morality. It may not suffice to have legal provisions stating what rights accrue to children. Raising children is not just a legal matter, it is a moral one, where the caregivers are supposed to respect the rights, but also go beyond to showing love to children. It may be that the caregiver does not violate any of the rights in the UNCRC, but does not spend time with the child, leaving the child to his or her own devices. This is what leads O'Neill to say that denying children the “genial play of life”, even if not addressed by any legal provision, is a failure to meet obligations.

4.4.4 Conclusion

The common thread in the above discussions is the need for protection of that which accrues to children, by whatever name called. The enactment of the UNCRC (which seeks to bring children rights under one regime cutting across different cultures,

⁵⁸ Freeman “Taking children's rights more seriously” in Alston, Parker & Seymour (eds) 55-56.

⁵⁹ Freeman in Alston, Parker, Seymour (eds) *Children, Rights and the Law* 59.

nationalities, religions and gender), its ratification and the formulation of domestic legislations to be in tandem with the UNCRC could not have been timelier.

If left unregulated, different cultures would treat children rights differently. For instance, the right of the child not to be subjected to corporal punishment has been the cause of much debate.⁶⁰ Christians will argue that if you spare the rod, you will spoil the child, while more and more modern moralists are arguing that spanking a child demeans him or her and teaches him or her to be violent.

By and large, everyone concedes that children have entitlements that need protection; the bone of contention is over what these entitlements are to be called, and the most effective way to ensure they are protected. There is a general consensus that children need to be taken care of, and that they have a growing capacity to make decisions.

I therefore conclude that in my opinion, children's rights as are divided into two broad categories:

- Welfare (nurturance) rights – rights to be provided for or taken care of.
- Autonomy (self determination) rights – rights to make choices and decisions for oneself. Imperatively, autonomy is brought about by increased capacity to make choices. I opine that if a child achieves capacity to claim rights, then he or she must be made to understand that they will be expected to have duties and to take responsibility for the consequences of their choices.

⁶⁰ See Pete "To smack or not to smack? Should the law prohibit South African parents from imposing corporal punishment on their children?" 1998 *SAJHR* 430-460.

4.5 AGE, AUTONOMY AND STATE INTERVENTION

4.5.1 Age vis-à-vis autonomy

Having agreed with Freeman that autonomy is one category of children's rights, let me address myself to the exercise of this autonomy. Almost all the theorists discussed above delineate the rights (or interests or obligations) of children by acknowledging that their enforcement is affected by age. However, the use of the word "child" to describe an age ranging from a few seconds to 18 years is, in my opinion, very vague. Science has established beyond reasonable doubt that motor skills and rational capacity increase with age. An infant who cannot talk has no use for freedom of speech. A three-year-old toddler will start insisting on what he or she wants to eat and what clothes to wear, even against all advice of the parents, but he or she will ordinarily not be called upon to make choices over weighty issues such as contraceptives or abortion. The clustering of all these different ages as one stage, viz childhood, in my opinion, contributes to the incoherence existing in the search for a plausible theory of children's rights. It is no wonder that there are back and forth arguments as to whether children have rational capacity or are entitled to autonomy.

Many developmental theorists acknowledge the differences in age amongst children.⁶¹ Generally, there are three broad stages of development: Early childhood, middle childhood, and adolescence.⁶² These stages are separated by the primary tasks of development in each stage, though it is noteworthy that these are just the general milestones in each stage for the majority of children, but not all children achieve them at the given time.

⁶¹ Berk *Infants, Children and Adolescents* 12.

⁶² Stone & Church *Childhood and Adolescence: A Psychology of the Growing Person* 56.

4.5.1.1 Early childhood (birth to eight years)⁶³

This is a period of tremendous growth across all areas of development. An infant grows from complete dependency to reasonable independence, especially in terms of taking care of his or her own body and interacting effectively with others.

There are rapid physical changes between birth and age three; between three and five years of age, children continue to grow rapidly and begin to develop fine-motor skills. Physical growth slows down between five and eight years of age, while body proportions and motor skills become more refined. Language development also occurs rapidly between one and five years.

This is the period where the child also slowly gets attached to a particular caregiver,⁶⁴ and the attachment theorists suggest that the quality of emotional attachment, or lack of attachment, formed early in life, may serve as a model for later relationships.⁶⁵ According to the attachment theory, children who are securely attached generally become visibly upset when their caregivers leave, and are happy when their caregivers return. When frightened, these children will seek comfort from the parent or caregiver. Contact initiated by a caregiver is readily accepted by securely attached children and they greet the return of a caregiver with positive behavior. While these children can be comforted to some extent by other people in the absence of a caregiver, they clearly prefer caregivers to strangers.⁶⁶

⁶³ Stone & Church 56.

⁶⁴ Bowlby 1982 *American Journal of Orthopsychiatry* 665.

⁶⁵ Bowlby 665.

⁶⁶ Stone & Church 59.

Between three and five years, children identify themselves with their peers, become aware of their gender and develop a sense of right or wrong. Between ages five and eight, children enter into a broader peer context and develop enduring friendships. They also develop an awareness of their environment and become very curious to understand happenings around them.

Rights and/or interests of infants will inevitably be determined by others, be they parents, caregivers, courts or the state; they are therefore not capable of claiming autonomy rights. A two-year-old who throws a tantrum in a shop because he or she does not get the item on the shelf will be different from the adolescent who for example wants to choose the career path he or she wants to take. The only autonomy you can grant the two-year-old is the freedom to cry himself or herself hoarse, until he or she realises the vanity of his or her actions. Indeed, the period of infancy (the early stages of childhood) captures a real dilemma when discussing children's rights, for infants have rights which they cannot understand, express or enforce. Deborah Philips describes this tender age as a quiet crisis for young children in the United States when she says:⁶⁷

“‘Quiet’ because babies rarely make the news: they are not terrorising neighbourhoods, and they are not contributing to unemployment or the deficit or crime statistics ‘quiet’ because parents of infants and toddlers deal silently and often alone with their anguish at having to return to work within weeks of the birth of their baby, with worries about finding affordable and decent childcare, and fears about their patchwork health care coverage that may well not cover their medical costs should their children get seriously ill. ‘Quiet’ because the lives of policy makers and other national leaders are usually far removed from the crises that face our youngest citizens.”

⁶⁷ Phillips “Giving voice to the young children” 3 *EECRJ* 6.

4.5.1.2 Middle childhood (eight to twelve years)⁶⁸

This period was referred to as the latency stage by Sigmund Freud⁶⁹ in his psychoanalytic theory as he thought that no significant development took place during this stage, perhaps because physical growth seems to stagnate during this period. However, recent theorists have recognised this period as one associated with the development of cognitive skills, personality and inter-personal relationships.⁷⁰ The child gets integrated into society and starts to appreciate societal norms. They develop the appreciation of their peers, but are also greatly influenced by the family.⁷¹

Middle childhood is a time when children can gain enthusiasm for learning and work, for achievement can become a motivating factor as children work toward building competence and self-esteem. Their reasoning at this stage is rule-based.

For many children, middle childhood is a time of searching for autonomy, broader friendships, and developing interests, such as sports, art, or music.⁷² As such, their autonomy rights cannot be wished away, though they would be exercised with guidance from their guardians. For instance, courts take judicial notice of the fact that children within this age bracket are aware of what is happening during divorce proceedings, and some even know that they are at the centre of the tussle between the parents. Indeed, in *Ressel v Ressel*,⁷³ the court noted as follows:

“[I]t is an undesirable thing for so much litigation to proceed over the head of a boy of this age of eight years who cannot fail to be aware of it and be influenced in some way by what is happening between his parents in court, and I think the

⁶⁸ Stone & Church 62.

⁶⁹ Freud *Three Essays on the Theory of Sexuality* 49.

⁷⁰ Stone & Church 66.

⁷¹ Stone & Church 66.

⁷² Stone & Church 68.

⁷³ 1976 (1) SA 289 (W).

parties would be very well advised to show some reasonableness in their dealings with each other and have regard to the interests of the child as being paramount and not the interests of themselves.”

The court in *J v J*,⁷⁴ shared similar sentiments with regards to a boy of twelve years.

4.5.1.3 *Adolescence (twelve to eighteen years)*⁷⁵

Adolescence is a period of accelerated physical and sexual maturity, the primary developmental task being identity formation. Development during this period is governed by the pituitary gland through the release of the hormones testosterone (males) and oestrogen (females). While adolescents are excitedly seeking independence, they also need assurance that the people to whom they are attached are there for them, otherwise they will feel rejected. They are at a paradox of sorts, they want to explore their independence but they still want to come back and seek security from the familiar surroundings. They need to feel wanted yet independent, and any changes from their stable relationships have deep psychological effects on them. They struggle with issues of self esteem and are prone to mood swings largely because of the hormonal changes but also as a logical reaction to the social, physical and cognitive changes facing them.⁷⁶ An adolescent will have an opinion as to which parent he or she would want to stay with, in the event of divorce and custody issues, and therefore deserves to be heard in such matters. While the adolescent may have a preference of what school he or she would want to attend, he or she more often than not has no financial resources of his or her own, and therefore, he or she cannot make an autonomous decision of the school he or she is to attend. As Freeman says, if fourteen years of age attracts criminal responsibility, it follows that it should also attract

⁷⁴ 2008 (6) SA 30 (C) para [39].

⁷⁵ Stone & Church 72.

⁷⁶ Stone & Church 72.

autonomy rights.⁷⁷ Wessells opines that too often, adolescents are treated as recipients of assistance, while they indeed can be creative persons who can provide valuable advice and leadership.⁷⁸

The autonomy question was extensively discussed in *Gillick V West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security*.⁷⁹

The UK Department of Health Security issued to area health authorities a memorandum of guidance on the family planning services which contained a section dealing with contraceptive advice and treatment for young people. It provided that attempts would always be made to persuade children under the age of 16 years who attended clinics to involve parents or guardians at the earliest stage of consultation, and that it would be most unusual to provide contraceptive advice to such children without parental consent. However, to safeguard doctor-client confidentiality, the health authority provided that in exceptional cases, it was for the doctor exercising his clinical judgment to decide whether to prescribe contraception. The plaintiff, a mother of five girls under the age of 16 years, wrote to the local area health authority seeking an assurance from them that no contraceptive advice or treatment would be given to any of her daughters while under 16 years of age without her knowledge and consent. The area health authority refused to give such an assurance and stated that the final decision would be for the doctor's clinical judgment.⁸⁰

The plaintiff went to court seeking a declaration that the health authority's guidance gave advice which was unlawful and wrong and which adversely affected parental rights and duties. The trial court held that the plaintiff had to first show that adherence to the advice contained in the guidance would inevitably result in the commission of unlawful conduct, that the probabilities were that a doctor would not render himself liable to

⁷⁷ Freeman in Alston, Parker, Seymour (eds) 59.

⁷⁸ Wessells "How we can prevent child soldiering" 2000 *Peace Review* 414.

⁷⁹ (1985) 3 All ER 402, see also ch 3 para 3.6.

⁸⁰ (1985) 3 All ER 402.

criminal proceedings by following the advice in the guidance, and that a girl under 16 was capable of consenting to medical treatment so that lack of parental consent would not render the doctor's conduct unlawful.⁸¹

The plaintiff appealed and the Court of Appeal allowed her appeal on the grounds, *inter alia*, that a girl under 16 was incapable of either consenting to medical treatment or of validly prohibiting a doctor from seeking the consent of her parents, and that the advice contained in the guidance was contrary to law, and that any doctor who treated a girl under 16 years without the consent of her parent or guardian would be infringing the inalienable and legally enforceable rights of parents relating to the custody and upbringing of their children unless it was in the best interests of the children.⁸²

The House of Lords allowed the appeal by the Department on the grounds that:⁸³

- The National Health Service legislation indicated that Parliament regarded contraceptive advice and treatment as essentially medical matters and that there was no statutory limit on the age of the persons to whom contraceptive facilities may be applied.
- A girl under the age of 16 had the legal capacity to consent to medical examination and treatment, including contraceptive treatment, if she had sufficient maturity and intelligence to understand the nature and implications of the proposed treatment.
- The parental right to control a minor child deriving from parental duty was a dwindling right which existed only in so far as it was required for the child's benefit and protection; that the extent and duration of that right could not be ascertained by reference to a fixed age, but depended on the degree of

⁸¹ (1985) 3 All ER 402 at 403.

⁸² (1985) 3 All ER 402 at 403.

⁸³ (1985) 3 All ER 402 at 403.

intelligence and understanding of that particular child. Although in the majority of cases parents were the best judges of matters concerning the child's welfare, there might be exceptional cases where a doctor would be in a better position to judge over medical advice and treatment which would be conducive to a child; accordingly, the health authority's guidance did not contain advice which was an infringement of parents' rights.

- The *bona fide* exercise of a doctor's clinical judgment is believed to be necessary for physical, mental and emotional well-being of a patient. Therefore, a doctor prescribing contraceptives to a girl under 16 was unlikely to be criminally liable. Consequently the health authority's guidance did not contain unlawful advice.

The House of Lords held inter alia that a girl under the age of 16 had the legal capacity to consent to medical examination and treatment, including contraceptive treatment, if she had sufficient maturity and intelligence to understand the nature and implications of the proposed treatment.

Lord Fraser, in what has come to be popularly referred to as the *Fraser guidelines*, stated that in exceptional cases, a doctor will be entitled to give contraceptive advice and treatment to a girl under 16 without the knowledge and consent of her parents if he is satisfied that:⁸⁴

- The girl will understand the advice
- He or she cannot persuade her to inform her parents or to allow him to inform her parents
- She is very likely to begin or continue having sexual intercourse with or without the contraceptives
- Unless she receives contraceptive advice, her physical, mental and emotional health are likely to suffer

⁸⁴ (1985) 3 All ER 402 at 413.

- Her best interests require him or her to give contraceptive advice and treatment.

Lord Scarman's comments are often referred to as the test of "*Gillick* competency". In deciding whether a child is mature enough to make decisions, he held the following:⁸⁵

"[I]t is not enough that she should understand the nature of the advice which is being given; she must also have sufficient maturity to understand what is involved."

On parents' versus children's rights, he commented:⁸⁶

"Parental rights yield to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to make up his own mind on the matter requiring a decision."

The "*Gillick* competency test" has been widely accepted in various jurisdictions. In Australia, the High Court gave strong approval of the *Gillick* case in *Marion's Case*.⁸⁷ "Marion" was the pseudonym of a 14-year-old who suffered from intellectual disabilities, severe deafness, epilepsy and other disorders. Her parents sought an order from the Family Court of Australia to have her sterilised by a hysterectomy and oophrectomy (removal of ovaries). The debate was as to who had authority to authorise such an operation, and whether it would be in the child's best interests. The Department of Health argued that only the court had authority to give consent to such an operation; the parents argued that as long as the procedure was in the best interests of the child, parents as guardians could give lawful consent to a sterilisation on behalf of a mentally

⁸⁵ [1985] 3 All ER 402 at 424.

⁸⁶ [1985] 3 All ER 402 at 422.

⁸⁷ *Secretary, Department of Health and Community Services v JWB and SMB* 175 CLR 189.

incompetent child. The court held, *inter alia*, that where a medical procedure had sterilisation as its main object, parents did not have such authority to give consent.

The Supreme Court in the United States of America has rejected the notion that children may be denied legal protection for autonomy interests until they attain the age of majority. In *Re Gault*,⁸⁸ the court rejected the state's argument that minors charged in juvenile courts are not entitled to the protection of the due process clause because children are always in someone's custody and therefore have no right to liberty.

In *Carey v Population Services International*⁸⁹ the Supreme Court held that a complete ban on the distribution of contraceptives to minors violated due process. In *Planned Parenthood of Central Missouri v Danforth*⁹⁰ the court held that a ban on minors' access to abortion violates the Constitution, stating that constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.

While Freeman's kind of autonomy may be good for the child, the application of this autonomy, in my opinion, must be very subjective. Age becomes an important factor in determining what kind of autonomy to grant a child. It is important that a child is able to handle the consequences of the autonomy bestowed on them. By and large, there is general judicial consensus, as shown above, that autonomy rights can be fully exercised by adolescents.

4.5.2 State intervention and parental authority

This then brings to the fore the question of when it is right for the state to interfere with parental authority. Towards the end of the last century, children's rights gained

⁸⁸ 387 US 1 (1967).

⁸⁹ 431 US 678 (1977).

⁹⁰ 428 US 52 (1976).

prominence, especially with court enforcement of these rights and the coming to force of the UNCRC. This has led some authors to argue that parental rights have been relegated to the background, while children's rights and parental liabilities have taken centre stage.⁹¹

The UNCRC recognises the need for protection of the family as the fundamental unit of society and the natural environment for the growth and well-being of all its members particularly children.⁹² One of the substantive provisions that arguably seek to recognise the rights of the parents is article 5, which provides that state parties shall respect the responsibilities, rights and duties of parents. Article 14(2) obligates state parties to respect the rights and duties of parents to provide direction to the child, while article 29(1)(c) provides that the education of the child should be directed at the development of respect for the child's parents.

The question arises as to the position of parental rights in this debate. In the 16th century, there was a belief that children owed their parents a duty to take care of them for bringing them up. In one of Blackstone's commentaries, he says the following:⁹³

“The power of parents over their children is derived from ... their duty: this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it”

The recompense meant that parents were entitled to some benefit from their children; back then, it was accepted that parents were entitled to the benefit of their children's

⁹¹ Bainham “Honour thy father and thy mother: Children's rights and children's duties” in Douglas & Sebba (eds) *Children's Rights and Traditional Values* 92-105.

⁹² Preamble.

⁹³ Blackstone *Commentaries on the Laws of England* 1452.

labour while they lived with them. The English Poor Law of 1601⁹⁴ stated that children had an obligation to support their parents in old age.

In *Gillick*,⁹⁵ Lord Scarman stated that this reward concept envisaged by Blackstone had been “swept away”.⁹⁶ However, this concept may not have been completely extinguished, because in practice, people are taking care of their elderly parents, which, especially in Africa, is a customary obligation.⁹⁷

Lord Fraser, in *Gillick*, expressly outlined the purpose of parental rights when he said:⁹⁸

“[P]arental rights ... do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child, and towards other children in the family.”

Lord Scarman echoed similar sentiments when he said:⁹⁹

“Parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.”

Seymour¹⁰⁰ uses three terminologies to examine the current legal role of a parent: powers, authorities and recognised interests. He states that powers enable parents to make decisions affecting their children, such as choice of name, school, and religion amongst others. Authority is exercised to enable the child to do what he or she would

⁹⁴ S 7.

⁹⁵ (1985) 3 All ER 402.

⁹⁶ (1985) 3 All ER 402 at 421.

⁹⁷ *Kenyatta Facing Mount Kenya* 125.

⁹⁸ (1985) 3 All ER 402 at 410.

⁹⁹ (1985) 3 All ER 402 at 420.

¹⁰⁰ Seymour “An ‘uncontrollable’ child” in Alston, Parker & Seymour (eds) 112-114.

do if he or she had the capacity, especially in dealings with the outside world. He opines that recognised interests is the most difficult to define because it is meant to show that there is something special about the parent, such that in matters affecting the child, a parent occupies a position different from that of other members of the community. Indeed, Lord Fraser in *Gillick* noted that “in the overwhelming majority of cases, the best judges of a child’s welfare are his or her parents”.¹⁰¹

Seymour, however, acknowledges that his classification is not without problems, and offers that the boundaries of the categories are not fixed.¹⁰²

There have been instances when the interests of the family have overridden those of the child, usually for a good cause. The best interests of the child are supposed to be paramount in deciding all matters affecting the child, but this does not necessarily mean agreeing to all of the child’s wishes. In *Re H (a minor)*,¹⁰³ a 14-year-old girl had sought the leave of the court to apply for a residence order and a specific issue order under the UK Children Act 1989 to enable her to live with a friend’s family and to travel to Bulgaria for a holiday with them. The judge considered the family interests and declined to grant the leave.

*Re H (a minor) (Sexual Abuse: Standard of Proof)*¹⁰⁴ presented a more complex situation of child versus family interests. A girl of 15 years alleged that she had repeatedly been sexually abused by her mother’s cohabitant. The man was charged with rape but acquitted. The state acting through the local authority and being concerned about the fate of three younger girls in the mother’s custody sought to make them the subject of care orders. However, the alleged abuser was not convicted; it was his word against that of the 15-year-old girl and the jury did not believe her. The

¹⁰¹ (1985) 3 All ER 402 at 412.

¹⁰² Seymour in Alston, Parker & Seymour (eds) 114.

¹⁰³ *Re H (A minor) (Leave to seek section 8 orders)* (1994) 1 F.L.R. 26.

¹⁰⁴ (1996) AC 563.

judge in the care proceedings, though suspicious of the alleged abuser, thought that the standard required was high. In a narrow majority of 3-2 the House of Lords decided that though the standard of proof required was a balance of probabilities, suspicion of abuse alone was not enough. The minority thought that the allegations of the eldest girl were still evidence which ought to be relied upon, and that it was not absolutely necessary to establish the truth for the court to protect the younger girls.

Yet, in *Re H (Paternity: Blood Test)*,¹⁰⁵ the family vis-à-vis the child's interests were again put to the test. A woman whose husband had undergone a vasectomy separated from him and had a sexual union with another man, B. She conceived and gave birth, and later reunited with her husband. The two raised the child as if it was theirs, in a family setting. B went to court seeking a DNA test to establish the paternity of the child, whom he claimed was his child. The mother and her husband objected, arguing that they also had a sexual union even when they were separated, and in any event, they were already raising the child in a family setting and there was no need to upset this arrangement. The basic issues before the court was where the primary interests in this case lay, whether the child had a right to know his or her biological parent, or whether the man's desire to establish paternity would end up destabilising the child's living environment, ultimately being detrimental to the child. The court, in allowing the paternity test, relied on article 7 of the UNCRC in deciding that it was the child's right to know and be cared for by his parents, while the mother had a duty not to "live a lie". This, by all standards, was a difficult case, involving the interests of the child involved, the stability of a family unit which would be affected by the outcome of the test especially if B turned out to be the biological father, and the interests of B in wanting to know if the child was his and establishing a relationship therefrom. The court did not want to be seen to prefer biological truth to the stability of the child, thus the reliance on article 7.

¹⁰⁵ (1996) 2 FLR 65.

Historically, however, the state and the courts were reluctant to interfere with the family setting, treating it as a private domain. The presumption, which I opine was wrong, was that what happened within the confines of the home was not to be interfered with, for the home was a warm loving environment. Aristotle, the great Greek philosopher, made a distinction between the *polis* and the *oikos* (or *oikia*). The *polis* referred to public life, to which only men were entitled, while the *oikos* referred to private life, meant for women, children and slaves.¹⁰⁶

Goldstein, Freud and Solnit also argued that family life was a private area outside the law, and that parents ought to be given freedom to bring up their children autonomously without state intervention.¹⁰⁷

It is no wonder then, that cases such as that of Joshua in *De Shaney*¹⁰⁸ went unaddressed till they became almost fatal. Joshua, a four-year-old boy, was beaten repeatedly by his father and suffered serious and permanent brain damage despite the fact that the Wisconsin Child Protection Services had known of the abuse and had repeatedly failed to take action to remove Joshua from harm. The case is clearly a “hard” one because it involved senseless assaults by a parent on a defenseless child, but more heartbreaking were Joshua’s caseworker’s chilling remark when told of Joshua’s last beating that “I just knew the phone would ring some day and Joshua would be dead.”¹⁰⁹

But the real tragedy was that the Court refused to accept the notion that the government has a duty to protect children even where the government is responsible for the child

¹⁰⁶ Roy Greece and Rome (2nd Series) 46.

¹⁰⁷ Goldstein *et al* *Before the Best Interests of the Child* 4-5.

¹⁰⁸ *DeShaney v Winnebago County Department of Social Services*, 489 U.S.189.

¹⁰⁹ *DeShaney v Winnebago County Department of Social Services*, 489 U.S.189 at 209.

remaining in known danger,¹¹⁰ thus supporting the proposition that an autonomy model predicated on a right to be free from interference is inadequate for children.

Although the UNCRC does not specifically deal with early childhood, many of the articles have strong implications for improving the lives of children below five years. They form a special category of children; because most of them are at home, where demand for privacy means that whatever happens to these children is hardly open to the outside world.

For these children especially but also for all children generally, I opine that state intervention is a necessary safeguard against excessiveness of guardians. The modern day conflicts in families have negated the presumption that parents have the best interests of their children at heart. There are increased cases of grave abuse of the rights of children, especially the very young, by their parents and guardians.¹¹¹ In fact, it is the moral duty of the society to watch over children. Neighbours of abused children have a duty to inform the relevant authorities of the ongoing abuse for the latter's intervention, otherwise the state may never know of the abuse until it is too late. I hate to imagine that Joshua, in the above case, had neighbours who knew that he was being abused but turned the other way.

Freeman¹¹² argues for a balanced state intervention, without necessarily disturbing the family setting, but also being careful not to prejudice children under the guise of non-intervention. I would agree with Freeman; balanced intervention would ensure that children are not suffering silently under their caregivers, but also at the same time give parents space to play their rightful role in the development of their children.

¹¹⁰ *DeShaney v Winnebago County Department of Social Services*, 489 U.S.189 at 202.

¹¹¹ Middleton, Warwick et al "Institutional abuse and societal silence: An emerging global problem" *Australian and New Zealand journal of psychiatry* 22.

¹¹² Freeman *The Ideologies of Children's Rights* 39.

4.6 SUBSTANTIVE RIGHTS UNDER THE UNCRC

The UNCRC creates a definitive body of international law on children rights. It consists of fifty four articles which have been divided into three main types of rights:¹¹³

- Provision rights – rights to minimum standards of health (a 24), education (a 28), social security (a 26), physical care (a 27), family life (a 16), and play, recreation, culture and leisure (a 31).
- Protection rights – rights to be safe from discrimination (a 2), life (a 6), protection from physical and sexual abuse (a 19), exploitation (a 32), protection from substance abuse (a 33), and protection from injustice and conflict (a 38).
- Participation or autonomy rights – civil and political rights such as the right to a name and identity (aa 7 & 8), to be consulted and to have their opinion taken into account (a 12), to religion (a 14), to meet and join groups (a 15), to privacy (a 16) and to information (aa 13 and 17).

Freeman describes the Convention as one that can be used in a number of ways:¹¹⁴

“[T]o make children aware of their rights, to put pressure on the legislature, on governments and policy makers, to measure practice and policies against it, to make the case for child impact statements, to be used in committee discussions and commissions of enquiry and as an advocacy tool.”

¹¹³ Lansdown “Children’s rights” in Mayall (ed) *Children’s Childhoods: Observed and Experienced* 37.

¹¹⁴ Freeman “The importance of children’s rights perspective in litigation” 1996 *Butterworths Family Law Journal* 172.

The duty to implement children's rights by means of all appropriate legislative, administrative and other measures is recognised in the UNCRC.¹¹⁵ The basic structure of the Convention is that of a combination between rights and interests. For instance, the right to life brings about children's interests not just in living but also in quality lives.

Article 12 provides for consideration of the opinion of a child when he or she is capable of forming an opinion on matters affecting him or her, and that opinion should be given due weight in accordance with his or her age and maturity.

4.6.1 Weaknesses inherent in the UNCRC

The drafters of the UNCRC recognised that there would be instances when other legitimate and competing interests had to be addressed, thus the framing of article 3 that the best interests of the child shall be "a" (not "the") primary consideration. Therefore, the best interests of the child are not the only interests for consideration, but must be given utmost weight in decisions affecting children. In addition, other substantive articles in the UNCRC give directions and limits on the treatment of children.¹¹⁶

Some of the rights in the UNCRC remain merely aspirational, but a more significant problem may be that there is an internal conflict between individual autonomy enjoyed by the child and the role of the family, in particular the authority enjoyed by parents, in

¹¹⁵ A 44.

¹¹⁶ (a 28); have family relations (a 8); know and be cared for by his or her parents (a 7); be heard in matters concerning him or her (a 12), and to be respected and seen as an individual person (a 6). In the same breath, the Convention states what is not in the best interests of the child: for instance, to be exposed to any form of violence (a 19); to be wrongly separated from his or her parents (a 9); to be subjected to any traditional practices prejudicial to the child's health (a 24); to perform any work that is hazardous or harmful (a 32), or to be otherwise exploited or abused (a 33-36).

relation to children. The ideological conflict between those who see children's rights in welfare terms and those who wish to promote a child's self-determination still exists in the Convention. The Convention addresses the needs of all children, but as will be discussed above, some of the autonomy rights cannot be exercised by all children.

The protection of minorities is another weakness. Article 30 of the Convention provides as follows:

“In those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his/her group, to enjoy his/her own culture, to profess or practice his/her own religion, or to use his/her own language.”

This is a general repetition of article 27 of the UN Covenant on Civil and Political Rights 1966. Although there is mention of children, the rights of these indigenous persons, who continue to be decimated by intrusion into their traditional heritage, should have been better specified. This affects their means of survival in addition to genocide and racial cleansing, despite the existence of the UN Convention on the Prevention and Punishment of the Crime of Genocide.¹¹⁷

Article 38 obligates states to respect the rules of international humanitarian law and take all feasible measures to ensure that persons below the age of 15 do not take part in armed hostilities. The truth is that there are many adolescents in the world's battle fields, which makes one wonder whether the age of 15 years is too tender to be set as the minimum limit. The Convention states a child is anyone below 18 years, yet it

¹¹⁷ Stavenhagen “Background Paper” *UN Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States* <http://www.ciesin.org/docs/010-283/010-283.html> (Date of use: 6 June 2013).

allows 15-year-olds to be used as soldiers.¹¹⁸ Is this an indication that there are so many battles being fought that there are not enough adults in the battle fields, justifying the conscription of minors? If that be the case, what would stop belligerents from taking on children as young as 12 or 13 years, after all they are still adolescents? Indeed, this is the reality ranging in many war theatres in our world today.¹¹⁹

The implementation system of the Convention, like all other UN instruments, has been fettered by the rule of state sovereignty, which is so conveniently cited by those states that want to hide their abuse of human rights. For this particular Convention, under article 44, state parties must submit to a committee of independent experts periodic reports on the status of children's rights. The committee reviews the reports and has powers to request additional information. I know that in Kenya, even though these reports are submitted as required (albeit with delays), the situation of children is far from being satisfactory. The state has also been slow on educating the population on the provisions of the Convention (a 42) and in publicly displaying reports submitted to the committee (a 44(6)).

4.7 CONCLUSION

To deny that children have rights is absurd, and calling "rights" something else makes them seem subordinate to adult "rights". Human¹²⁰ advocates for a proper children's rights framework, arguing that without it, children's rights will succumb to the romantic fallacy of adult decision-makers always acting in the best interests of children.

¹¹⁸ Most legal jurisdictions put the majority age at 18 years, though previously it was put at 21 years for the sole reason that 21 was the age at which medieval England deemed a man strong enough to bear full armour and fight as a knight. See Freeman *The Ideologies of Children's Rights* 34.

¹¹⁹ Egesult *Country Reports on Human Rights Practices for 2007* 496,593.

¹²⁰ Human "The theory of children's rights" in Boezaart (ed) *Child Law* 244.

Basing rights on logic and reason opens them to misconstruction and abuse. It would mean that certain classes of people are not human and thus human rights do not apply to them, such as comatose persons, persons with mind-debilitating diseases such as Alzheimer's and of course children. In addition, accepting the will theory in a world full of racial, language and tribal prejudices, would be tantamount to saying that the colonialists were right when they denied the colonised their rights,¹²¹ by calling them savages with less thinking capacity, or the Nazi scientists who used the Jews as guinea pigs in laboratory experiments because they were an "inferior race".¹²² I shudder to think what would happen to children, if we decided that they have no rights because their capacity to rational judgment is limited. Imperatively, this capacity to reason rationally is very subjective in children; an infant relies on reflex action; a toddler will start to have a mind of his or her own, while at adolescence, he or she starts to seek total autonomy, and has reasonable capacity to make rational decisions. Indeed, if the *Gillick* case is anything to go by, then children in their late teens will be regarded as having capacity to make choices close to that of adults.

I prefer the Freeman approach of striking a balance between nurturance and self-determination because children need to be nurtured and given reasonable autonomy. However, I insist that the age of the children is a major determinant of the care and autonomy that a child ought to receive. Perhaps it is time we formulated a test based on the ages of children. This test may seem cumbersome, but then it may guide in clarification of rights that accrue to children. Even the levels of intervention, by state or courts will vary greatly according to age. For instance, the state would withdraw from the custody of the parent an infant who is being mistreated without consideration for the child's opinion, because at that age they may have none or are not able to express it. The situation will be different with an eight-year-old, the state authorities would want to hear what mistreatment the child has suffered from the child himself or herself. For a

¹²¹ Smith "Voices unheard: The Rape of the Native American Women"
www.edu/stand/sexualviolence (Date of use: 7 June 2013).

¹²² Gutman & Berenbaum *Anatomy of the Auschwitz Death Camp* 301-336.

sixteen-year-old, the state would give them a choice to decide where to live and with whom.

CHAPTER FIVE

THE “BEST INTERESTS OF THE CHILD” PRINCIPLE

5.1 INTRODUCTION

The best interests principle is a universal principle governing actions affecting children, who in many cultures symbolise the survival of the family, the group, the nation and even humanity itself. This principle is one of the most analysed principles in legal jurisprudence. Much has been written on this standard, with little or no consensus as to whether its usage should continue or be exchanged for another formula. Indeed, Kohm asserts that:¹

“The Best Interests of the Child doctrine is at once the most heralded, derided and relied upon standard in family law today. It is heralded because it espouses the best and highest standard; it is derided because it is necessarily subjective; and it is relied upon because there is nothing better.”

The best interests principle has been defined as “a golden thread which runs throughout the whole fabric of our law relating to children”.² It is part of international law, having been envisaged by the Assembly of the League of Nations which passed a resolution in 1924 endorsing the Declaration of the Rights of the Child, stating in Principle III that the child should be put first, not only in times of war but always.³ The next international document was the non-binding Declaration on the Rights of the Child of 1959, which provided that the child was to enjoy special protection and given facilities and opportunities to enable him or her to develop physically, morally, spiritually and socially

¹ Kohm “Tracing the foundations of the best interests of the child standard in American jurisprudence” 2009 *Journal of Law and Family Studies* 337.

² *Kaiser v Chamber* (1969) 4 SA 224 (C) 228G per Tebutt AJ.

³ www.un-documents.net/gdrc1924.htm (Date of use: 19 May 2013).

in a healthy manner. In enacting laws for this purpose, the best interests of the child were to be the paramount consideration.⁴

It was later immortalised in the 1989 UN Convention on the Rights of the Child (hereinafter “the UNCRC”).⁵

Regionally, article 18 of the African Charter on Human and Peoples’ Rights 1981 provides that due protection should be accorded to women and children according to recognised international instruments. Article 20 of the African Charter on the Rights and Welfare of the Child 1990 provides that the primary responsibility for the upbringing and development of children rests upon the parents who are required to ensure that the best interests of the child are their basic concern at all times. The charter also places a burden on the state to assist and support the parents in fulfilling this duty.

5.2 WHAT, THEN, ARE INTERESTS?

The fact that children have rights is no longer in question. As Feinberg puts it, the types of beings that can have rights are those that can also have interests.⁶ It is thus not in doubt that children have interests, though the term interests has been deemed to be an ambiguous concept in the context of children. Professor John Kleinig gives the different meanings of the term “interest”:⁷

“One use of ‘interest’ generally capturable in expressions of the form ‘X is interested in Y’ refers to an inclination to pay attention to something ... We speak

⁴ Principle 2.

⁵ A 3(1) “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

⁶ Feinberg “The rights of animals and unborn generations” in Blackstone (ed) *Philosophy and Environmental Crisis* 50.

⁷ Kleinig “Crime and the concept of harm” 1978 *American Philosophical Quarterly* 15.

here of interest being aroused or excited, dampened or suppressed or it waxing and waning. It is a psychological phenomenon. A person lacking interest in this sense is said to be uninterested...

A statement in the form of 'X has an interest in Y' means the interests are restricted to those projects in which one has a stake ... to stand to gain or lose from it, because of some investment of energy or goods in it or some project affected by it, or because its outcome affects one advantageously or otherwise ...

... Expressions of the form 'Y is in X's interests' points (sic) to the fact that what a person desires ... is not always in his interests.... Normally people have an interest in what is in their interest. However, they do not always behave rationally or with sufficient knowledge of the consequences of their actions."

The last two of Professor Kleinig's definitions are what apply to children's rights. Children find themselves located where they are, as a result of the actions of others, not their own. They are also not in a position to influence the actions of others to ensure that their interests are well taken care of.

5.3 THE HISTORICAL UNDERPINNINGS OF THE BEST INTERESTS OF THE CHILD PRINCIPLE

The value of children in society has always had its high and low ebb in history. In ancient civilisations, there seemed to be a special place for children. The Greek mythology shows a special regard for children. Indeed, ancient Greece records Socratic reflections as follows:⁸

"Did not Socrates love his own children, though he did so as a free man and as one not forgetting that the gods have the first claim on our friendship?"

⁸ Lewis *Abolition of Man* 101.

Classical Athenian writers like Plato and Aristotle took a special interest in children. Plato recognised the developmental nature of the child when he said:⁹

“[A] man ... is called the same man from boyhood to old age ... he does not in fact retain the same attributes, though he is called the same person; he is always becoming a new being and undergoing a process of loss and reparation...”

Children were largely seen to be innocent and were associated with the pure state of nature and the gods. The Greeks balanced their view of children; while they did not dismiss them, they also did not take seriously their actions or comments.¹⁰

Roman law placed children under the complete authority of the parents and the country. Under Roman law fathers had absolute rights to their children, their labor and property, including the right of life and death.¹¹ The men could sell their wives and children as slaves and labourers in the market and determine their children's marital partners. Roman law recognised no rights or claims on the part of the mother to her children, even if a father died intestate leaving no guardian. He could not even appoint her their guardian.¹² Corporal punishment was commonly used to discipline children and slaves.

Even when the Romans embraced Christianity, corporal punishment was still justified as payment for sin. Augustine stated as follows:¹³

⁹ Plato *The Symposium* (trans) paras 207D-208A.

¹⁰ Golden *Children and Childhood in Classical Athens* 4-7.

¹¹ Brundage *Law, Sex, and Christian Society in Medieval Europe* 38-39.

¹² Forsyth *A Treatise on the Law Relating to the Custody of Infants in Cases of Difference Between Parents or Guardians* 3.

¹³ Augustine *The City of God* Book XIX 155-156.

“[I]f anyone in the household opposes the domestic peace through disobedience, he is disciplined by word or by whip or by any other kind of just and legitimate punishment...”¹⁴

Thomas Aquinas believed children were the property of the father, that a son belonged to his father since he was a part of him.¹⁵ The concept that human beings are inherently sinful for they are born with the original sin meant that for the puritanical, children were bad and had to have their behavior restrained.¹⁶

The Jewish tradition, however, was more sympathetic towards children, if the Bible (in both the Old and New testaments) is anything to go by.¹⁷

The Christian views of the child took over with time and children were seen as nearest to God.¹⁸ This gave way, towards the end of the 18th century, to the philosophy of the Romantics who saw children as pure, innocent and cute beings who deserved protection. They depicted children as a symbol of goodness, joy in living, human

¹⁴ Augustine *The City of God* Book XIX 155-156.

¹⁵ Aquinas *Summa Theologiae*, Part II, Book II Question 57 Article 4.

¹⁶ Archard *Children: Rights and Childhood* 38.

¹⁷ *The Holy Bible*, King James Version *Genesis* 33:5 (stating God graciously gives children); *Psalms* 113:9 (stating children bless a barren woman as a mother); *Psalms* 127:3 (indicating sons are a blessing); *Isaiah* 8:18 (stating children are given by God); *Mark* 9:37 (“Whoever welcomes a little child in my name welcomes me...”); *2 Corinthians* 12:14 (“[F]or the children ought not to lay up for the parents, but the parents for the children.”); *Ephesians* 6:4 (“And, ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the LORD.”); *Colossians* 3:21 (“Fathers, provoke not your children to anger, lest they be discouraged.”); *Psalms* 128:3 (describing sons around your table as olive shoots); *Proverbs* 17:6 (describing grandchildren as a crown); *Proverbs* 20:7 (stating children are blessed); *Proverbs* 31:28 (stating children rise to bless their mother); *Matthew* 19:14 (“But Jesus said, Suffer little children, and forbid them not, to come unto me: for of such is the kingdom of heaven.”); *Mark* 10:16 (describing Jesus taking children in his arms).

¹⁸ *The Holy Bible* *Mathew* 19:14.

progress, instinct and original innocence (as opposed to original sin). They in essence created a cult of childhood.¹⁹

The Romantics displayed the end of childhood as a decline of status since childhood was the best part of life. They sanctified childhood and this led to a tradition of revering it as an important stage worthy of protection.²⁰ This ideology influenced public actions towards children and led to charity work for the disadvantaged children. Breen states that it is the concept of the innocent child which provided the norm by which the best interests principle has been measured; however, Breen notes that it is the opposite of the “innocent” child, that is, the “corrupt child” which has been the true object of the best interests principle. The “innocent” child already exists in a state of nirvana, and it is this state that the best interests principle seeks to obtain for the other child, the “corrupt” child.²¹

Natural law theorists such as John Locke viewed children as God’s property; they were neither good nor bad but needed education to move from immature children to rational adults.²² For Jean Jacque Rousseau, children, like all things were created good and pure by God, but men would meddle with them and consequently they became evil.²³

Natural law, however, also saw the father as the head of the family with powers over his children. The concept of *patria potestas*, or paternal power, gave the father absolute rights to his children. The idea of viewing children as the property of the fathers persisted despite romanticism. Thomas Hobbes, for instance, had extreme paternalistic views, he opined that children were like imbeciles and beasts, and that fathers were

¹⁹ Kaye *Children Through the Ages: A History of Childhood* 62.

²⁰ Cunningham *Children and Childhood in Western Society Since 1500* 72-73.

²¹ Breen *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* 43.

²² Locke *Two Treatises of Government* 185.

²³ Rousseau *Emile* 15.

sovereign and had power of life and death over children.²⁴ John Stuart Mill supported paternalism, albeit liberally basing his argument on utilitarianism (that power was to be exercised over any member of the community to prevent harm to others) and the fact that protection of children was based on the assumption that they lacked capacity for rational decisions.²⁵

The English common law transformed *patria potestas* into *parens patriae*, recognising the state as a parent when there was need to intervene in family matters.²⁶ The Courts of Equity in England applied *parens patriae* by using patriarchal rules in actions involving children. Indeed, several judgments of the King's Bench show how deeply this concept was embedded in the family law fabric. In the historic case of *De Manneville v De Manneville*,²⁷ Leonard De Manneville entered his estranged wife's house, wrenched his eight month old daughter from her mother's breast and went away with the naked child, in an open carriage and in adverse weather. The wife filed a writ of *habeas corpus* to the King's Bench but the court proclaimed that the father was entitled to complete custody of his children and could even prohibit the mother from having any access to them.

Paternal rights were so strictly enforced that even if a father voluntarily gave up his rights in separation agreements, the latter were deemed to be null and void as long as they deprived the father of his power over his children, or provided that the mother should have possession of them in exclusion of him.²⁸

²⁴ Hobbes *Leviathan* 209.

²⁵ Mill *On Liberty* 68.

²⁶ Kohm "Tracing the foundations of the best interests of the child standard in American jurisprudence" 2008 *Journal of Law and Family Studies* 336.

²⁷ (1804) 102 KB 1054.

²⁸ Wright "*De Manneville v. De Manneville*: Rethinking the birth of custody law under patriarchy" 1999 *HRJ* 15.

De Manneville came at a time when women were trying to liberate themselves from the strict patriarchal requirements and be seen as equal partners in marriage. However, *De Manneville* set them back for a long time. Wright saw *De Manneville* in this light when she wrote:²⁹

“Although Eldon denied Mrs. De Manneville's claim on the basis of coverture — a married woman could not bring suit against her husband without first obtaining a legal separation in the ecclesiastical court — he granted her request to order that the child not be removed from England. More important, he viewed leaving the child with the father as an incentive to Mrs. De Manneville to cease living in her legally unauthorized manner, that is, to return home to her husband where she belonged.”

At no time did this court consider the interests of the child; Lord Eldon never mentioned the father's limited means to support the child, nor that the mother had family in England to help support them, nor that she owned her own property.”³⁰

Prior to *De Manneville*, there had been progress towards a departure from paternal rights.³¹ However, it was as if *De Manneville* had opened a Pandora's box; for several decades afterwards, the cases that followed borrowed heavily from its reasoning.³² In *Rex v Greenhill*,³³ a mother took her children from the marital home where the father had moved in with his paramour, and the father brought a *habeas corpus* writ to the court to reclaim the custody of his children. Although it was obvious to the court that the husband was using the children to force the wife to return to the marital residence without having to give up his extramarital liaison, the court nevertheless granted custody to the father. This ruling so appalled a lawyer in the case, Lord Talfourd, that he

²⁹ Wright 1999 *HRJ* 18.

³⁰ Wright 1999 *HRJ* 18.

³¹ See *Creuze v Hunter* (1790) 2 Bro.C.C. 500 and *Ex parte Warner* (1792) 4 Bro. C.C. 102.

³² See *Ex parte Skinner* (1824) 9 Moore 278.

³³ (1836) 111 Eng. Rep.922.

succeeded in a three-year campaign to reform the law which ended in the British Parliament legislating an exception to the paternal preference rule that formed the basis of the “tender years” doctrine. That legislation became known as Lord Talfourd’s Act.³⁴

In the 20th century England departed from paternal preference and began recognising mothers as custodians. They even adopted the “tender years” doctrine,³⁵ though not necessarily for the benefit of children but as recognition of gender equality. British courts presumed that it was in the interests of the children of tender years to be looked after by their mothers.³⁶ This recognition was influenced by Jeremy Bentham’s utilitarianism and his clamour to place the general good above that of the individual. Bentham argued for reforms for the common good, including state protection of children.³⁷

“The feebleness of infancy demands a continual protection. Everything must be done for an imperfect being, which as yet does nothing for itself. The complete development of its physical powers takes many years; that of its intellectual faculties is still slower. At a certain age, it has already strength and passions, without experience enough to regulate them. Too sensitive to present impulses, too negligent of the future, such a being must be kept under an authority more immediate than that of the laws. . .”

In the United States, common law usage meant that there was bias towards paternal preference. However, it was not long before an Anglo-American culture took root, and courts started focusing on the interests of children.³⁸ With emphasis on the best interests of children, the courts started recognising that children of tender years needed

³⁴ An Act to Amend the Law as to the Custody of Infants, 1839.

³⁵ A doctrine recognising that children below seven years were supposed to live with their mothers, see Mnookin *In the Interests of Children* 235.

³⁶ Wardle & Nolan *Fundamental Principles of Family Law* 858.

³⁷ Bentham *Theory of Legislation* (Vol. 1) 248.

³⁸ See *Prather v Prather*, (1809) 4 SC Eq. (4 Des. Eq.) 33, *Commonwealth v Addicks* 5 Binn.520 (Pa. 1815), *Commonwealth v Wales Briggs* (1834) 33 Mass. (16 Pick.) 203, 205 where the court declared “the good of the child is to be regarded as the predominant consideration.

their mothers more than their fathers. This brought about the “tender years” doctrine, alongside the best interests of the child,³⁹ though it was subsequently questioned by the concept of gender equality, having been seen as being discriminative against fathers.⁴⁰

As the best interests principle became widely used, the judges’ discretion widened, relying on subjectivity of the case and intuition.⁴¹ The increase in the consideration of the interests of children brought about awareness that children have rights. For instance, in the United States, the case of *Re Gault*⁴² was a watershed case in the history of children’s rights. The appeal court held that delinquent juveniles must be afforded many of the same due process rights as adults, such as the right to timely notification of the charges, the right to confront witnesses, the right against self-incrimination, and the right to counsel. This case guaranteed constitutional rights for children.

5.4 WEAKNESSES INHERENT IN THE BEST INTERESTS OF THE CHILD PRINCIPLE

Despite the milestones achieved in the recognition of the best interests principle, it is not without its share of challenges as far as its application is concerned. While most children’s rights advocates agree that it was a godsend for children, they are all too aware of its shortcomings. The most common criticism is that it gives judges too much discretion, as its application is very subjective, dependent on the particular facts of each

³⁹ See *Mercein v Barry* (1840) 25 Wend. 64 where the court held that the interests of the infant were paramount to the claims of the parents; see also *Clark v Bayer* (1877) 32 Ohio St. 299, 305 the court ruled that it was not bound to address the needs of the parents in a custody dispute, but would look to an analysis of the best and highest interests of the child alone. In *Clark*, the best interests principle nearly outgrew all other rules of law, and led to a conflict especially with parental rights.

⁴⁰ Wardle & Nolan *Fundamental Principles of Family Law* 858–89.

⁴¹ See Ewing “Ethical intuitionism” in Lillie *An Introduction to Ethics* 161 &164.

⁴² 387 U.S. 1 (1967)

case. This wide discretion means that some conclusions will be marred by the judge's own bias and social inclinations.⁴³

Robert Mnookin argued strongly against the use of the best interests principle because of its indeterminacy. He stated as follows:⁴⁴

“The phrase is so idealistic, virtuous and high sounding ... its mere utterance can trap us into the self-deception that we are doing something effective and worthwhile. However, the flaw is that what is best for any child ... is often so indeterminate and speculative and requires a highly individualized choice between alternatives.”

Mnookin argued that society lacked any clear-cut consensus on the values which would be used in determining what is “best” or “least detrimental”; this would make formulation of necessary rules to activate the best interests principle even more problematic. He sought to develop two themes to deal with child custody disputes first: The degree of weight to be given to the different standards for the resolution of custody disputes, and secondly the decision as to who should decide custody disputes and by what process.⁴⁵

Mnookin further said that in applying the best interests principle, a judge would be choosing between alternatives and making a selection which maximised the child's best interests, and this would be a question of rational choice. Rational choice meant that the decision maker should consider alternative outcomes associated with different courses of action; this meant that he or she must be able to specify the probability of each possible outcome for a particular course of action. The utility of each possible

⁴³ Mnookin & Szwed “The best interest syndrome and the allocation of power in child care” in Geach & Szwed (eds) *Providing Civil Justice for Children* 8.

⁴⁴ Mnookin & Szwed in Geach & Szwed 8.

⁴⁵ Mnookin & Szwed in Geach & Szwed 10.

outcome was then to be discounted by its probability.⁴⁶ A judge's life values were likely to influence his decisions. Mnookin concluded that "deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself".⁴⁷

Jon Elster in criticising the best interests principle called it indeterminate, unjust, self-defeating and liable to be overridden by more general policy considerations.⁴⁸ The best interests principle was indeterminate because it relied on unlimited and undefined factors, unjust because it disregarded parental rights and needs, self-defeating because its application was likely to leave children worse off and liable to be overridden because there were some matters of public policy that were likely to take precedence over the standard.

To Elster, a determinate standard would require that the following requirements be met:⁴⁹

- That all options be known
- That the possible outcome of each option be known
- That the probability of each possible outcome occurring be known
- That the value to be attached to each outcome be known.

The first requirement may be easily achievable, but there could be too many possible outcomes of each option. To reach a decision on the probability of each possible outcome occurring, it would be necessary to determine how plausible such an outcome would be. If an outcome was plausible, then it would be easier to determine its probability, and if values could be attached to the outcome, then its utility would be

⁴⁶ Mnookin "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" 1975 *Law and Contemporary Problems* 256.

⁴⁷ Mnookin 1975 *Law and Contemporary Problems* 260.

⁴⁸ Elster *Solomonic Judgments: Studies in the Limitations of Rationality* 140.

⁴⁹ Elster 134.

calculated. However, if values, as opposed to probabilities, were attached to each outcome, then there would be uncertainty, and thus the best plausible option would have to be chosen. Elster took issue with the attachment of values to the outcomes, arguing that even if the child was of the capacity to make decisions, these decisions would be impaired by inexperience and the judge imposing his or her personal values to the child's choice. For this approach to work, the child would have to be given autonomy and be allowed to reach maturity.⁵⁰

In regard to his second criticism, Elster felt that the best interests principle gave dominance to the welfare of the child, ignoring the rights and needs of the parents. He gave an example of where the primary caregiver failed to get custody of children in divorce matters.⁵¹ Elster agreed that the children's welfare and parental rights must be balanced. Children were in need of special protection; however he contended that such protection should not be achieved at the expense of large losses in parental welfare rights.⁵²

With regard to the self-defeating nature of the best interests principle, Elster based his argument on two grounds. First, there was a possibility that promoting the best interests of a particular child may have adverse effects to children in general, either because legislators failed to distinguish between act-oriented and rule-oriented principles, or because they ignored the costs of the legal decision-making. Second, the best interests principle was self-defeatist because of the litigation costs, which would be borne by the child (for lack of an automatic procedure for arriving at decisions and the likelihood of protracted litigation). Elster also argued that the best interests principle was liable to be overridden by public interest to show that it could not be absolute, that there were times policy considerations had to take precedence.⁵³ He gave an example of a mother, who lost custody because she was a lesbian, as the judge thought that

⁵⁰ Elster 142.

⁵¹ Elster 144.

⁵² Elster 145.

⁵³ Elster 146.

exposing the children to lesbianism would cause them stress and unhappiness that might scar them for life.⁵⁴ The effect of such a judgment would be discrimination against same-sex partners, which would not serve public interest.

Heaton⁵⁵ opined that this principle is indeterminate and speculative. Further, it is not known whether it should be viewed from a short-term, medium-term or long-term perspective.

Eekelaar argued that attention should be paid to what any adult who looked back to his or her childhood would have chosen for himself or herself. In his view, every reasonable person would choose that as a child, his or her basic, developmental and autonomy interests should be protected. His or her basic interest is to be physically, emotionally and intellectually cared for. His or her developmental interest is to be helped to develop to the best of his or her abilities, while his or her autonomy interest is to be able to choose his or her own lifestyle and social relations.⁵⁶

The question also arises as to whether the best interests principle should be approached from a subjective (taking into consideration the child's and parents points of view) or objective (taking into consideration the views of the community) point of view. Heaton⁵⁷ opines that both points ought to be considered in so far as it is possible to extract a community norm with regard to the issues in question.

⁵⁴ *S v S* (1980) 1 *FLR* 143.

⁵⁵ Heaton "Some general remarks on the concept 'best interests of the child'" 1990 *THRHR* 95.

⁵⁶ Eekelaar "The emergence of children rights" 1986 *OJLS* 170.

⁵⁷ Heaton "Some general remarks on the concept 'best interests of the child'" 1990 *THRHR* 98.

Bekink⁵⁸ says, rightly so, that the question of the best interests of the child is a very factual one which the courts have to determine for each individual child. This gives the court a wide discretion and it may even consider inadmissible evidence and order investigations into the child's circumstances.

Clark opines that the two stumbling blocks of this principle are the inability to predict the consequences of alternative outcomes and the lack of consensus in what criteria to use in evaluating the alternatives.⁵⁹

What is consensually accepted is that there is no single factor in determining the best interests that would always carry the most weight, and there can be no fixed number of factors. Indeed, the courts, as the upper guardians of minors, face an onerous task while applying the best interests principle in our heterogeneous societies where there is no consensus on religion, lifestyle, morality and child-rearing practices. The lack of a definition and guidelines as to what constitute the best interests principle and the state's unclear role as *parens patriae* have complicated the situation.

In acknowledging the existence of a conflict between the rights of a child and those of the parents, the court in *Re New England Home for Little Wanderers* stated:⁶⁰

"In invoking the 'best interests of the child,' the Legislature did not intend to disregard the ties between the child and its natural parent, or to threaten a satisfactory family with loss of children because by reason of temporary adversity they are placed in foster care. A parent cannot be deprived unless some affirmative reason is shown for doing so such as a finding ... of a separation so

⁵⁸ Bekink "Defining the standard of the best interest of the child: modern South African perspectives" 2004 *De Jure* 21-40.

⁵⁹ Clark "A golden thread? Some aspects of the application of the standard of the best interest of the child in South African family Law" 2000 *Stell LR* 9.

⁶⁰ 328 N.E.2d 854, 861 (Mass. 1975).

long as to permit very strong bonds to develop between the child and the prospective adoptive parents.”

Breen considers the best interests principle the foundation of the notion of rights for children:⁶¹

“[T]he best interests standard may be described as a strand of tradition, which ... should become the guiding tradition in the meta-tradition of societal cohesion ...”

Breen acknowledges that the best interests principle has gained international and cross-cultural recognition and this has lent significant legitimacy to it. She opines that instead of criticising the best interests principle, a more productive outcome might be achieved with a rethinking of the second element of the standard, the child.⁶² There is a degree of arbitrariness involved in the application of the best interests principle resulting from inconsistency in the individual, case-by-case analysis and application of the standard. Moreover, there remains a wide variety of circumstances which cannot be accounted for both in the present and in the future. This results in a complexity of contradictions in terms of interpretation and application.⁶³

In advocating for the approximation rule (a rule proposing the preference of the primary caregiver in custody disputes), Scott says that the best interests principle obscures the importance of the role of parents in caring for children during the subsistence of a marriage, and the judge may use anything he finds important to the child’s welfare to adjudicate on custody matters.⁶⁴

⁶¹ Breen *The Standard of the Best Interests of the Child* 24.

⁶² Breen 24.

⁶³ Breen 17-18.

⁶⁴ Scott “Pluralism, parental preference and child custody” 1992 *CLR* 620.

Scott argues that the best interests principle weakens the reliance on past parental care in custody disputes and puts parents in a destructive contest in trying to prove which one of them is the best. Since the courts are not guided on how to apply this principle, they fail to properly take into account past parental caretaking roles.⁶⁵

5.5 CONFLICT OF INTERESTS IN THE APPLICATION OF THE BEST INTERESTS PRINCIPLE

The UN Committee on Children has highlighted three types of conflicts, either perceived or real, that can occur in the implementation of the best interests principle:⁶⁶

- The interests of a child clashes with the wishes of one or both parents or guardians;
- The interests of a child or a group of children clashes with those of other children;
- The interests of a child or a group of children contradict a broader societal interest.

5.5.1 Parental interests against children interests

5.5.1.1 Divorce and custody cases

While divorce is as old as the institution of marriage, the dynamic nature of our society has brought about many changes that have challenged long existing norms and customs, especially in the realm of the family. We are coming from a historical era where gender roles were clearly defined, with the father being largely the provider and the mother the primary caregiver.

⁶⁵ Scott 1992 *CLR* 622.

⁶⁶ www.ohchr.org (Date of use: 13 May 2013).

The best interests principle has its origins in child custody adjudication. Indeed, it is the protection of the rights and interests of adults which have been at stake in divorce proceedings that led to the rise of the best interests principle. It is also in custody cases that the best interests principle has been put to its most difficult test. This is because more often than not, divorce cases are characterised by a lot of acrimony, and some parents tend to use the children as pawns to spite their partners.

Emery opines that the harmful effects of divorce on children are caused primarily by reduced contact with one parent, conflict between the parents, and by economic deprivation.⁶⁷

The influence of the paternalistic past on custody cases had seen many court decisions with heart-wrenching consequences for the children. One such case, which merits specific mention for its sheer inconsideration for the children, is *Westmeath v Westmeath*.⁶⁸ Lady Emily Westmeath, brought an action for *habeas corpus* for her daughter Rosa, having been separated from her husband George Nugget due to his adulterous relationships and violent nature. They separated via a deed and agreed that Emily should have custody of Rosa. However, after some time George felt that Emily was poisoning Rosa against him and refused to release her on one of the visitations. The parties later reconciled and Emily returned to the matrimonial home with a private agreement granting her custody of Rosa and £3000 if she ever separated from him again. Unfortunately, they separated again and signed a deed granting Emily full custody of Rosa. Soon thereafter George sued for custody of Rosa and a baby boy who had been born that year. Emily obtained a writ of *habeas corpus* to Chancery for delivery of the children according to the separation deed, but Lord Eldon refused to enforce the deed insofar as it deprived the father of his children. George relocated Rosa and the boy to Ireland, where the boy died. Emily then pleaded with George to let Rosa return to London with her. However, on returning to London himself, George retained

⁶⁷ Emery *Marriage, Divorce and Children's Adjustment* 35.

⁶⁸ 162 Eng. Rep. 1035-36.

Rosa after a visit and denied Emily access and poisoned Rosa against her mother. Emily once again had to seek a writ of *habeas corpus* to see her daughter, this time in the Court of Common Pleas. Once again, the court would not interfere with the father's entitlement to the custody of his children. By the time Emily died, she had not gotten custody of Rosa.

American jurisprudence contributed much more than the English case law to the growth of the best interests principle. Towards the end of the 19th century, it was a common expectation that courts would consider the interests of the children. In *Friederwitzer v Friederwitzer*⁶⁹ the New York Court of Appeals held that the only absolute in the law governing custody of children is that there are no absolutes, and that custody was to be determined by the circumstances of the case and the best interests of the child. The Court added that “[i]n all cases there shall be no prima facie right to the custody of the child in either parent”.⁷⁰

In *Eschbach v Eschbach*,⁷¹ the court *inter alia* held that while considering child custody, every effort had to be made to promote the best interests of the child and to stick to what would promote its welfare and happiness. The court would also consider the preference of the child depending on its age, maturity and potential for influence.

*Nehra v Uhlar*⁷² was a case where the litigation for custody of the children had gone on for almost seven years, with the mother shuttling back and forth between the courts in New Jersey and New York. She also did not reveal all the facts in both courts. The court noted the undesirable behavior of the mother of defying the orders of other courts and engaging in forum shopping, but emphasised that what was paramount was the welfare of the children and not the tactics of the parent. Thus, the court upheld the best

⁶⁹ 55 NY2d 89.

⁷⁰ 55 NY2d 70.

⁷¹ 56 NY2 167 at 172.

⁷² 43 NY2 242.

interests of the children despite the improprieties of the mother and their impact upon the rights of the father.⁷³

5.5.1.2 *Medical interventions*

There have been instances when the religious convictions of parents are at logger heads with the best interests of their child. The courts have been quick to intervene and disregard the parents' beliefs for the sake of the children.⁷⁴ The courts do not permit the conviction of parents to lead to the death of their children.

In Re B (a minor) (Wardship Medical Treatment),⁷⁵ the court ordered surgery to remove a bowel obstruction for a minor child who suffered from Down's syndrome despite the fact that the parents wanted the child to die. In *Re C (Medical Treatment)*,⁷⁶ the court ordered that the child, who was dying from a particularly debilitating form of muscular atrophy, and whose Jewish parents were insisting on trying all available alternatives for her, should not be placed on the ventilator again. In *R v Senor*,⁷⁷ a father failed to supply his child with health care, believing that prayer was superior to conventional medicine. He was convicted of manslaughter when the child died.

In *Hay v B*,⁷⁸ a medical practitioner sought the permission of the South African High Court to administer a blood transfusion to baby R, whose parents had refused this procedure claiming that it was against their religious belief. The court, having been convinced that R's life depended on an urgent transfusion, held that R's right to life was inviolable, and that his best interests demanded that the transfusion be carried out. The

⁷³ 43 NY2 196.

⁷⁴ *Re R (A Minor) (Blood Transfusion)* (1993) 2 FLR 757, *Re O (A Minor) (Medical Treatment)* (1993) 2 FLR 149).

⁷⁵ (1982) FLR 117.

⁷⁶ (1998) 1 FLR 384.

⁷⁷ (1899) 1QB 283.

⁷⁸ [2003] JOL 12167 (W).

parents' beliefs were unreasonable and unjustifiable, and their private beliefs could not override R's right to life. This application was so urgent that the court allowed presentation of oral evidence, since the applicant had argued that if the transfusion was not carried out within four hours, R would, in all probability, die. The court also observed that this was a case where the patient could not express his views, and it was the duty of the court to protect his rights in accordance with section 28(2) of the Constitution of the Republic of South Africa, 1996.

In South Africa, the enactment of the Children's Act 38 of 2005 has given powers to children over 12 years to consent to the medical interventions in certain circumstances, and to hospital superintendents, ministers in charge of health and courts to give consent if the person required to consent unreasonably refuses or is unable to do so. The Act also prohibits parents, guardians and caregivers from unreasonably withholding consent to medical interventions on grounds of religious beliefs, unless they can prove that there is a viable alternative to the procedure.⁷⁹

Generally, when parental interests clash with those of the child, the child's interests are likely to prevail. There is a departure from absolute parental rights to duties and responsibilities, and the recognition that children have not always had their interests taken care of by their parents.

5.5.2 Children's interests against other children's interests

I shall use two cases to demonstrate this scenario and to show that the best interests principle is not applicable in this situation. This is because it is improper to give preference to one child over another. The interests of these children are in conflict; one's best interests will not be the other's best interests.

⁷⁹ Children's Act 38 of 2005 s 129(1-10).

5.5.2.1 *Birmingham City Council v H (A Minor)*⁸⁰

The Birmingham local authority applied for a care order in respect of a young baby, whose mother was only 15 years. An application was made pursuant to section 34(4) of the Children Act 1989 for an order authorising the local authority to refuse contact between the baby and the mother. The question before the court was whether the mother should be allowed contact with her son aged 15 months. Section 1(1) of the Children Act 1989 provided that the child's welfare was to be the court's paramount consideration. The issue was that both subjects were children and the Act was silent on how to deal with situations when the parent may be a child or when the interests of siblings were conflicting.

At the first instance, Lord Slynn of Hadley held:⁸¹

“The question to be determined relates to that child's upbringing and it is that child's welfare which must be the court's paramount consideration. The fact that the parent is also a child does not mean that both parent's and child's welfare is paramount and that each has to be balanced against the other.”

So, at the first instance, the case was decided by ignoring the mother and focusing on the baby. The Court of Appeal proceeded differently and considered that the upbringing of both mother and daughter was involved and that section 1(1) of the Act governed the position. Balcombe LJ held:⁸²

“So the question of contact between R – the baby – and M – the mother – relates to the upbringing of each of them and in each case the Act requires that their welfare shall be the court's paramount consideration. But this is an impossibility

⁸⁰ [1994] 2 AC 212.

⁸¹ [1994] 2 AC 212 at 222.

⁸² [1994] 2 AC 880 at 890-892.

... M's welfare cannot rank above R's welfare, and his above hers. ... I can think of no reason why Parliament should have intended, when a question with respect to the upbringing of two children is before the court, that the court should regard one child's interest as paramount to that of the other. Accordingly ... the court must approach the question of their welfare without giving one priority over the other.”

Evans LJ concluded.⁸³

“The welfare of the two individuals cannot both be paramount in the ordinary and natural meaning of that word ... the requirement must be regarded as qualified, in the cases where the welfare of more than one child is involved, by the need to have regard to potential detriment for one in the light of potential benefit for the other.”

The House of Lords expressed no view as to the correctness or otherwise of that approach.

5.5.2.2 *Re A (Children) (Conjoined Twins: Surgical Separation)*⁸⁴

This was an appeal in the English Court of Appeal on the separation of conjoined twins, who were referred by the pseudonyms Jodie and Mary. The twins were joined at the pelvis but each had a brain, heart, lungs and other vital organs. However, Mary's heart was non-functional and her brain primitive. Her lungs were also not functioning and she relied on Jodie for circulation and oxygenation of her blood. They shared a common artery, the aorta. If separated, Mary would die instantly since she was incapable of surviving on her own. On the other hand, Jodie could survive and according to medical experts lead a normal life after constructive surgery, save for some reservation as to her

⁸³ [1994] 2 AC 880 at 899.

⁸⁴ [2001] 2 WLR 480, [2000] 4 All ER 961, [2001] Fam 147.

bladder functions. If not separated, there were high chances that they would both die before they were one year old since Jodie's heart would get exhausted and this would lead to other complications including organ failure. The parents, who were staunch Catholics, were opposed to the surgery and preferred that nature took its course. Despite Mary's compromised status, there was general consensus that she was alive and a different person from Jodie. The court grappled with the question of whether carrying out the surgery would amount to the intentional killing of Mary, and if so, whether there were any exceptions that would legalise the surgery. Indeed, the crucial issues considered by the court were.⁸⁵

- Is it in Jodie's best interests that she be separated from Mary?
- Is it in Mary's best interests that she be separated from Jodie?
- If those interests are in conflict can the court balance the interests of one against the other and so allow one to prevail against the other?
- If the prevailing interest favours the operation being performed, can it be lawfully performed?

This was a case that was going to have fatal consequences for one or both of the children, whichever way it was decided. At the first instance, Johnson J had decided that the operation ought to go on, arguing that it would be in Mary's best interests since if she were allowed to live, the quality of her life would be compromised. Their conjoined nature was such that Jodie would drag her along as she attempted to walk, and this would cause considerable discomfort and pain to Mary. It was also in Jodie's best interests since she would lead an almost normal life after the separation.⁸⁶

⁸⁵ [2001] Fam 147 at 192.

⁸⁶ [2001] Fam 147 at 245. [1993] AC 789; In justifying the resultant murder of Mary, Johnson J cited the analogy in *Airedale NHS Trust v Bland*, ([1993] 2 WLR 316; [1993] 1 All ER 821) where the court ruled it was acceptable to withdraw life support in the case of a young man who was in a vegetative state, and whose brain was practically dead. In this later case, the court stated that the withdrawal of food and hydration so that the patient would die slowly was not akin to administering a lethal injection, which would

In justifying the resultant murder of Mary, Johnson J cited the analogy in *Airedale NHS Trust v Bland*,⁸⁷ where the court ruled it was acceptable to withdraw life support in the case of a young man who was in a vegetative state, and whose brain was practically dead. In this later case, the court stated that the withdrawal of food and hydration so that the patient would die slowly was not akin to administering a lethal injection, which would amount to euthanasia and which was criminal at common law. The withdrawal was an act of omission and therefore justifiable.

In his learned and extensive judgment, Ward LJ rejected the analysis that the separation was in Mary's best interests, since the experts had shown that Mary may not have been capable of experiencing any pain. He went further to invoke the concept of self-defence, suggesting that if "Jodie could speak she would surely protest, '*Stop it, Mary, you're killing me*'". According to him, Mary was living on borrowed time, all of it borrowed from her sister.⁸⁸

Brown LJ invoked the defence of necessity while relying on *R v Dudley and Stephens*,⁸⁹ where an army captain was found not guilty of murder after he had ordered that a young man, who was stuck in a ladder which was the only way of saving others from drowning be thrown to the waters, after which the young man himself drowned. He agreed that Mary was a human being; the operation would be a positive act of killing her intentionally and therefore the only way was to seek a defence for murder. He justified the defence of necessity arguing that the operation would avoid an inevitable and irreparable evil, that of the death of both twins. He concluded that the operation would give integrity to the children's life, as required by the doctrine of the sanctity of life.⁹⁰

amount to euthanasia and which was criminal at common law. The withdrawal was an act of omission and therefore justifiable.

⁸⁷ [1993] AC 789; [1993] 2 WLR 316; [1993] 1 All ER 821.

⁸⁸ [2001] Fam 147 at 197.

⁸⁹ (1884) 14 QBD 273.

⁹⁰ [2001] Fam 147 at 207.

Walker LJ focused on the purpose of the surgery and the intention of the surgeons. He concluded that the intention would not be to cause death to Mary but to give Jodie a better chance at life and the integrity that nature had denied them. He further stated that the operation would be in the best interests of Mary since even if she lived, her life would hold nothing for her but pain and discomfort.⁹¹

I must say that I do not envy the judges in this case as they faced a huge legal and moral dilemma. It is clear from the opinions of all the appeal judges that they really sympathised with Mary even as they rendered their judgment, as any reasonable person would. However, with all due respect to the judges, I do not think this case involved the application of the best interests principle. This case is a classical example of the inadequacy of the best interests principle.

These were two innocent children, joined together in such a cruel manner by nature. None would have wished to be born that way, least of all Mary. It may be easy, on the face of it, to say that Jodie had the better chances of living; it was obvious that if anyone of them was to be sacrificed, it would be Mary. That is until one considers that Mary was a human being, with her own right to life like the rest of us. Even as Ward LJ opined that Jodie, were she to speak, would tell Mary to stop killing her, what if Mary was to speak, would she say something like, “please Jodie, let me live even if for a little while?” The interests of Jodie could not be weighed against the interests of Mary, and vice versa. They were all children, and regardless of how one looks at it, it is not for us mortals to state that the death of Mary will be in her best interests, especially on the face of the principle of the sanctity of human life. No wonder the judges went to great lengths to justify any separation.

When the interests of children are pitted against those of other children, the best interests principle is hardly the standard to apply in deciding what action to take. Ward

⁹¹ [2001] Fam 250.

LJ gave a hypothetical situation of a six-year-old boy shooting others in a school's play field.⁹² While it would be necessary to stop the boy, even if in so doing the boy would be killed, it cannot be said to be in the boy's best interests to be killed; rather it would be more appropriate to apply the principle of necessity or self-defence. Ward also acknowledged that it could not be in Mary's best interests to conduct an operation that would kill her, and sought to consider the least detrimental alternative to balance the interests of Mary against Jodie.⁹³

It seems therefore, that since the interests of one child cannot take precedence over the interests of the other, the courts have to ignore the best interests principle and consider the least detrimental alternative available.⁹⁴

This case raised grave moral and ethical questions. Indeed, the judges were quick to point out the uniqueness of this case, so that it will not be said that they preferred the life of Jodie over that of Mary, and in any event, if this case were to be used as a precedent in future, its uniqueness was to be borne in mind.

5.5.3 The interests of a child or a group of children against a broader societal interest

There are many instances when the interests of the child may conflict with those of the society in general. Whether the interests of the children will prevail depends on the circumstances and the will of the society to uphold these interests. The common interests that fall under this category are what Eekelaar calls developmental interests,⁹⁵

⁹² [2001] Fam 147 at 186.

⁹³ [2001] Fam 147 at 248.

⁹⁴ Goldstein *et al* *The Best Interests of the Child – The Least Detrimental Alternative* 53.

⁹⁵ Eekelaar "The importance of thinking that children have rights" in Alston, Parker & Seymour (eds) *Children, Rights and the Law* 222.

or what Wald calls rights against the world,⁹⁶ for instance freedom from poverty, provision of healthcare and adequate standards of living (socio-economic rights). They are hard to enforce for their provision depends on circumstances, economic and social, of the societies in which the children are living.

While the UNCRC provides that state parties are to ensure that resources are allocated to children,⁹⁷ in reality, it is not always done, and many times the interests of children in these circumstances have been sacrificed at the altar of utilitarianism.

The use of children in armed conflicts is another example of an attempt to pit the interests of children against the broader societal interest. While armed conflicts are an everyday occurrence around the world, the fact that the UNCRC⁹⁸ allows for the conscription of children is amazing. Perhaps the drafters were acknowledging the reality of conflict, but they created a major loophole nevertheless. The Convention may have destroyed the notion of the innocent child in need of protection, by allowing this child to kill or be killed in armed conflict. It may be in the interests of the broader society to fight an enemy, but enrolling children in the war is surely detrimental to the interests of the child. The justification that states may use for involving sixteen-year-olds may as well be used to lower the ages to twelve or less. It is my contention therefore that this provision was not in the best interests of children.

⁹⁶ Wald "Children's rights – A framework for analysis" 1979 *UCDLR* 255.

⁹⁷ A 27 & 28 of the UNCRC.

⁹⁸ A 38(2) of the UNCRC provides:

"State parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. Subsection (3) further provides: "State Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, State Parties shall endeavour to give priority to those who are oldest".

But perhaps a classic case of weighing the interests of children vis-à-vis those of the society is represented in *S v M*.⁹⁹ In this case, the supremacy of the best interests principle as stipulated by section 28(2) of the Constitution of the Republic of South Africa, 1996 was upheld. M, a divorced mother of three minors had become a serial offender who had been convicted and sentenced severally for fraud.

She had been convicted of fraud and sentenced to a three-year custodial sentence in 1996. The sentence was suspended for a period of five years on condition that she would not commit a similar offence. She was also to pay compensation amounting to R10 000. However, she breached the conditions of her suspension and committed further offences, upon which she was sentenced to three years correctional supervision and 576 hours of community service. In June 1999, she was again arrested for fraud and released on bail. While on bail between November 1999 and February 2000, she committed further fraud. In 2003, she was charged with 84 counts of fraud and theft and the Wynberg Regional Court convicted her of 83 counts and sentenced her to a four-year custodial sentence. The regional magistrate denied her bail pending appeal; nevertheless she appealed to the High Court and after she had served three months, the High Court granted her bail. The latter court also found that she had been convicted wrongly on one count of fraud, and converted her sentence so that the effect was that after she had served eight months, the Commissioner for Correctional Services was at liberty to authorise her release under correctional supervision.

She applied for leave to appeal in the Supreme Court of Appeal; this was denied and she moved to the Constitutional Court. This Court enrolled her application to appeal against the sentence. The Court appointed a *curator ad litem* while the Centre for Child Law of the University of Pretoria was joined as an *amicus curiae*.

⁹⁹ [2007] ZACC 18, see also ch 6 para 6.2.2.2.

The issues for determination were set out as follows:¹⁰⁰

- What are the duties of the sentencing court in the light of section 28(2) of the Constitution and any relevant statutory provisions when the person being sentenced is the primary caregiver of minor children?
- Whether these duties were observed in this case.
- If it was to hold that these duties were not observed, what order should this Court make, if any?

The applicant, *curator* and *amicus* all argued that section 28(2) required that sentencing courts give adequate consideration to the effect of a custodial sentence on minors where the offender was the primary caregiver.

The Court referred to the classic case for sentencing, *S v Zinn*¹⁰¹ where the Court formulated the triadic sentencing formula and held that what was to be considered was the crime, the circumstances of the offender and the interests of society.

From the outset, the Court was clear that central to this case was how the traditional aims of punishment, viz deterrence, prevention, reformation and retribution had been transformed by the Constitution.¹⁰² The Court noted that although the best interests principle had been applied for a long time especially child custody cases, the Constitution had expanded its scope.¹⁰³ The question was therefore not whether section 28 of the Constitution established enforceable rights, for it did without doubt, but to what extent these rights could be limited with reference to section 36 of the Constitution.¹⁰⁴ Sachs J noted:¹⁰⁵

¹⁰⁰ [2007] ZACC 18 para [5].

¹⁰¹ 1969 (2) SA 537 (A) at 540G-H

¹⁰² [2007] ZACC 18 para [10].

¹⁰³ [2007] ZACC 18 para [12].

¹⁰⁴ S 36 provides as follows:

“The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children ... The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.”

The Court also noted that section 28 required that any breakdown of family life or parental care that would put the children’s lives in jeopardy be avoided.¹⁰⁶ The *curator* contended that a sentencing court, where the offender was the primary caregiver, ought to consider four things:¹⁰⁷

- To establish whether there will be an impact on a child.
- To consider independently the child’s best interests.
- To attach appropriate weight to the child's best interests.
- To ensure that the child will be taken care of if the primary caregiver is sent to prison.

-
- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

¹⁰⁵ [2007] ZACC 18 para [15 & 18].

¹⁰⁶ [2007] ZACC 18 para [20].

¹⁰⁷ [2007] ZACC 18 para [32].

Sachs J agreed that these were suitable considerations, and further averred that:¹⁰⁸

“Specific and well-informed attention will always have to be given to ensuring that the form of punishment imposed is the one that is least damaging to the interests of the children, given the legitimate range of choices in the circumstances available to the sentencing court.”

The Judge pointed out that the court was not to escape sentencing the primary caregiver, for children had a right to be brought up morally. It was not per se the sentencing of the primary caregiver that violated the interests of the children, but rather issuing a sentence without due regard to how such sentence would negatively impact on the children.¹⁰⁹

In this case, the first consideration was the importance of maintaining the integrity of family care, to which the minor children of M were entitled, and the second consideration was the duty of the state to punish offenders in the interests of the society. A majority of the Court found that it was in the interests of the children to continue receiving care from their mother, and that her incarceration would deny them this care. Besides, she was providing for them from her business which would also suffer if she was incarcerated. In addition, a custodial sentence was not the only option available to the court. The court then ordered that she was to pay the persons she had defrauded in person, and she was to serve a correctional sentence.

In dissenting with this judgement, Madala J (with Navsa AJ and Nkabinde J concurring) found that M was a repeat offender who committed offences even when serving a suspended sentence, and even when out on bail. She was not a needy woman as her business would suffice; however she was motivated by a compulsiveness and greed.

¹⁰⁸ [2007] ZACC 18 para [33].

¹⁰⁹ [2007] ZACC 18 para [35].

Madala J saw the following as the issues for consideration:¹¹⁰

- The considerations, duties and approaches of sentencing courts in respect of the best interests of children;
- To what extent a recidivist primary caregiver of minor children can avoid a custodial sentence; and
- Whether in this particular case this Court should interfere with the sentence imposed by the High Court on the applicant?

The dissenting judge was of the opinion that the regional magistrate had advised herself of the circumstances of the offender, and that M herself had admitted that her mother had taken care of the children during her period of incarceration. Besides, the High Court had provided that M was to serve eight months after which the Commissioner for Correctional Services would determine whether she could be released to serve correctional sentence. He also felt that M had not shown remorse, and therefore needed a more deterrent punishment since she had been advanced leniency in the previous sentences and she had abused the past courts' generosity. The judge opined that:¹¹¹

“A primary caregiver does not necessarily escape imprisonment because of the children. There must be other factors precipitating such an outcome. In a situation where the children will not suffer hardship, a primary caregiver may have to be incarcerated if there are aggravating factors justifying such an eventuality. Whilst the best interests of the children may be paramount, they should not be the overriding consideration in determining whether or not a primary caregiver should be sent to prison.”

¹¹⁰ [2007] ZACC 18 para [86].

¹¹¹ [2007] ZACC 18 para [107].

The factors that were to be considered in sentencing the primary caregiver would include the ages and special needs of the minor children, the nature and character of the primary caregiver, the seriousness and prevalence of the offence committed and the degree of moral blameworthiness on the part of the accused.¹¹²

Importantly, the Judge held that rights under section 28 were subject to limitation, and that “section 28(2) of the Constitution provides that a child’s best interests must prevail unless the infringement of those rights can be justified in terms of section 36 of the Constitution”¹¹³ The judge therefore agreed with the High Court decision on the sentence.

That said, this case put the interests of the minor children on a pedestal, despite M’s character of being a perennial fraudster. I do not have the benefit of knowing the reasons why M committed these offences, but I think that if all factors were held constant, she was likely to commit further frauds, and I am uncertain as to whether she was the best suited person to raise her children given her criminal record. I actually see the wisdom of Sachs J when he ordered counseling for her. Nevertheless, despite the fact that the defrauded would perhaps have wanted her imprisoned to teach her a lesson, the interests of the minor children prevailed.

5.6 RESOLVING THE BEST INTERESTS OF THE CHILD CONFLICT

Efforts have been made to provide guidelines for the application of the best interests principle or to provide alternatives to it:

¹¹² [2007] ZACC 18 para [110].

¹¹³ [2007] ZACC 18 Para [112].

5.6.1 Mnookin

Mnookin suggests a more rule-like standard, which would uphold the principle that similar cases ought to be decided in a similar manner, as opposed to the application of a standard which allows for too much discretion. However, Mnookin was not blind to the fact that his solution was not without pitfalls. A rule-like standard would assume that there was a consensus on social values, and this was non-existent. To cure this defect, Mnookin suggested three guidelines: that family autonomy to given a high value; that it was to be assumed that continuity and stability was good for children; and that legal rules ought not to contradict deeply held and widely shared social values.¹¹⁴ Mnookin was therefore for non-interference into family life unless state interference was justified. He believed that the affection and love that a child needed was better provided by the family, where the child would also have a voice. Despite Mnookin's opposition to the best interests principle for its indeterminacy, his solution was not any better as it depended on varied values.

5.6.2 Elster

Elster, despite the criticisms, admitted that the best interests principle could yield better results for the child than those arrived at by way of other cruder principles. He also agreed that his four criticisms¹¹⁵ if accepted would make the best interests principle very difficult to apply. He offered four alternatives to the principle.¹¹⁶

First, he proposed a return to the maternal preference rule (though he noted it would be opposed especially on grounds of equality and gender discrimination). Secondly, he proposed an adoption of the presumption that the primary caretaker would be granted

¹¹⁴ Mnookin 1975 *Law & Contemporary Problems* 264-265.

¹¹⁵ See para 5.4 above.

¹¹⁶ Elster "Solomonic judgments: Against the best interests of the child" 1987 *U.Chi.L.Rev* 29.

custody of the children. This would ensure justice especially for the parent who had invested a lot of time in the children and would also be good for the stability of the child. He admitted this would cause problems when both parents were working and any attempt to modify the presumption would dissipate its greatest advantage, that is, its ease of application. (However, as I will point out later in this discourse,¹¹⁷ the fact that both parents are working does not mean that it is hard to decide who the primary caregiver is; it's just an assumption made that working parents may not be primary caregivers).

Thirdly, he also proposed compromise solutions that would be applied where both parents were deemed unfit, such as joint custody or splitting of siblings (girls to go with the mother, boys with the father). However, Elster noted that while this would ensure that parents shared the burden, splitting of siblings was not in the interests of the children. Finally, he suggested a random selection of one of the two parents, something that if you ask me, is akin to tossing a coin to decide who takes the children. Elster argued that this would be fast and would save time, and that it also ensured equality between the two parents. Elster knew that the greatest objection to this method would be that it lacked an accompanying procedure.

5.6.3 The least detrimental alternative

Goldstein, Freud and Solnit introduced a different view on the analyses of the best interests principle. They based their writings on a psychoanalytic theory in disputes involving child placements. These authors stressed that a child's development depended on the continuity and character of the relationship with the adult that the child perceives as the parent. They looked at placement of children on adoption, at divorce

¹¹⁷ See para 5.6.4 below.

(custody proceedings) and on neglect and abandonment.¹¹⁸ They set out the following placement guidelines:

- Placement decisions should safeguard the child's need for continuity of relationships.¹¹⁹ The child was not to be removed arbitrarily from the established relationship because continuity was essential to his growth and development.¹²⁰ The authors opined that the custodial parents ought to have exclusive rights over the child and the custodial parent, and not the courts, should determine if and when it is desirable to arrange visits for the non-custodial parent. They clarified that what they opposed were forced visits by the non-custodial parent because such visits cast doubt, in the mind of the child, on the custodial parent's authority and capacity to make decisions.¹²¹ For the younger child, this undermines his or her confidence in the custodial parents; for older children, it gives them an opportunity to pit one parent against the other.¹²² They further wrote that what courts fail to recognise is that no parent has sole custody as long as he or she is subject to the rules of visitation, and the courts have no power to recover lost affection between the parents by their decree of joint, divided or split custody.¹²³ As expected, such a suggestion does not augur well for joint custody proponents.¹²⁴
- Placement decisions should reflect the child's sense of time: the authors further stated that a child's sense of time is part of the continuity concept. An

¹¹⁸ Goldstein *et al* *The Best Interests of the Child – The Least Detrimental Alternative* 19.
¹¹⁹ Goldstein *et al* *The Best Interests of the Child – The Least Detrimental Alternative* 19.
¹²⁰ Goldstein *et al* *The Best Interests of the Child – The Least Detrimental Alternative* 38.
¹²¹ Goldstein *et al* *The Best Interests of the Child – The Least Detrimental Alternative* 25.
¹²² Goldstein *et al* *The Best Interests of the Child – The Least Detrimental Alternative* 25.
¹²³ Goldstein *et al* *The Best Interests of the Child – The Least Detrimental Alternative* 26.
¹²⁴ In this era of equality, such a proposition will most likely not pass the constitutional clause. Professor Holly Robinson has argued that since the rights and responsibilities of parents during marriage are equal and exercised jointly, the custody arrangement should reflect the same sharing of rights and responsibilities. (see Robinson "Joint custody: An idea whose time has come" 1982-83 *JFL* 641-44). Sheila Schwartz opines that women's increased participation in the workplace has strengthened calls for joint custody (see Schwartz "Toward a presumption of joint custody" 1984 *18 FLQ* 225-37).

infant can only bear the absence of the parents for a few days, for a child of five years – two months, for a younger school age child – six months and for an adolescent one year, after this period anxiety sets in.¹²⁵ Decision-makers are therefore required to act fast for each child to restore stability to an existing relationship or facilitate the establishment of new relationships. Placement of a child must then be treated as a matter of urgency.¹²⁶

- Placement decisions should take into account the law’s incapacity to make long-range predictions and to manage family relationships – no one can predict what experiences, events or changes a child will encounter. The law cannot do the impossible; therefore making conditional placements bestows an unnecessary burden on the caregiver. The child’s interests would be served better if more discretion was given to the caregiver.¹²⁷
- Placements should provide the least detrimental alternative for safeguarding the child’s growth and development. According to the authors, the least detrimental alternative was proposed because the best interests principle does not in and of itself define what it is that a child needs. The use of the term “least” is to help the courts, legislatures and child care agencies to realise that there is already a detriment in every child’s placement, brought about by the action necessitating the placement, be it divorce, neglect, abuse, rejection et cetera. The authors implied that the use of the word “best” was misleading; in that it purported that the law had greater power to do good than to do bad.¹²⁸ The authors referred to the case of *The Petition of John Doe and Jane Doe, Husband and Wife, To Adopt a Baby Boy, A Minor*¹²⁹ where baby Richard was given up for adoption by his mother to John and Jane Doe, without the knowledge of his father. The mother lied to the father that Richard

¹²⁵ Goldstein *et al* *The Best Interests of the Child – The Least Detrimental Alternative* 41.

¹²⁶ Goldstein *et al* *The Best Interests of the Child – The Least Detrimental Alternative* 42.

¹²⁷ Goldstein *et al* *The Best Interests of the Child – The Least Detrimental Alternative* 46-47.

¹²⁸ The authors refer to the case of *The Petition of John Doe and Jane Doe, Husband and Wife, To Adopt a Baby Boy, A Minor* (1994) 627 N. E.2d 648 (iii App.1993) Revised 638 N. E. 2d 181 (Ill. 1994), Cert denied 115 S.Ct. 499.

¹²⁹ (1994) 627 N. E.2d 648 (iii App.1993) Revised 638 N. E. 2d 181 (Ill. 1994), Cert denied 115 S.Ct. 499.

had died at birth and the father came to know the truth when Richard was two months old. He had been living with the Does since he was four days old. The father applied for a revocation of the adoption order and custody of the child. The court of first instance dismissed the application, the court of Appeal dismissed the appeal by the father but the Supreme Court revoked the adoption order. The entire case took two and a half years, long enough for a firm psychological tie to have developed between Richard and the adoptive parents. Removing him from them, the only parents he knew, was not the least detrimental alternative for Richard.

The major emphasis of these authors was the need to protect the family, recognising that parents raise their children as a labour of love, and that the law recognises family privacy and parental autonomy and safeguards parents' obligation and authority to raise children as they think best.¹³⁰

The least detrimental alternative provides a good compliment to the best interests principle. It acknowledges that by the time the interests of the child are being considered, there is already a real or potential detriment in contemplation, thus the need to pick the alternative that would cause least damage. I think it is a good alternative especially in instances above where I have shown the inadequacy of the best interests principle.

5.6.4 The approximation rule

This is proposed by Professor Elizabeth Scott as an alternative to the best interests principle. Scott argues that the best interests principle permits courts to consider a broad range of factors, and thus dilutes the importance of prior parental roles. The approximation rule proposes a means of measuring the proportion of time parents

¹³⁰ Goldstein *et al* *The Best Interests of the Child – The Least Detrimental Alternative* 153.

spend with their children in performing direct care-giving functions, and attempts to use and reflect upon that time in a custody decision after divorce.¹³¹ Under this rule, custody is to be given to the primary caregiver.

Scott argues that this rule is simplistic and excludes much of the qualitative evidence that is traditionally employed and evaluated in custody proceedings, and thereby reduces the destructive costs of resolving these disputes. In the ordinary case, evidence of each parent's moral character, lifestyle preferences, quality of past care, depth of attachment, and potential capacity to provide care is irrelevant under the approximation approach. Shifting the analysis from a qualitative inquiry into who will be a better parent (or even who has been a better parent) to a quantitative assessment of past participation ameliorates some objectionable features of the best interests inquiry.¹³² For starters, the desire to expose every unsavory detail of a spouse's habits and character as commonly happens in divorce proceedings is minimised, much to the benefit of future interactions between the parties. Second, there is little room for the judge's personal views and biases, and third, the margin for error when applying the approximation rule is minimal as opposed to the traditional inquiry process. The rule also looks at the past behavior as opposed to the best interests principle which has speculative components. Again, information that is acquired at a time of personal and family upheaval concerning character, stability, parenting skills, and the parent-child relationship is highly susceptible to exaggeration. Scott further says that the approximation rule promotes continuity and stability for the child more effectively than other existing rules and encourages parents to invest in both work and family with some assurance that the investment will not be lost.¹³³

However, this rule proposed by Scott can be manipulated by the parties. A party contemplating divorce may put in his or her best behavior just before they divorce,

¹³¹ Scott "Pluralism, parental preference and child custody" 1992 *CLR* 615-72.

¹³² Scott 1992 *CLR* 627.

¹³³ Scott 1992 *CLR* 622.

hoping that it would influence custody in his or her favour. Scott acknowledges this possibility and offers that this defect can be cured by the court investigating any dramatic but otherwise unexplained changes in the level of child care occurring shortly before divorce. One must acknowledge that circumstances in which a party intending to seek divorce puts up such a show would not be that hard to detect, as such a party is not likely to keep up the act for long before he or she tires or before their intentions become clear.

The other shortcoming of this rule is that it is basically applicable to custody cases; whilst these form the bulk and most acrimonious interventions affecting children, they are by no means the only actions where children's interests are in issue. The rule does not contemplate circumstances such as adoption, medical interventions and placement in cases of abuse, abandonment, neglect, children in conflict with the law or children in conflict situations.

The approximation rule has also been criticised as making the time spent with the child as its backbone, and wrongly assuming that time equals secure attachment.¹³⁴ It considers time, physical care and continuity as the only criteria relevant for its application. Riggs¹³⁵ opines that if this was the only criteria to be used, courts would be awarding custody to teachers and day-time caregivers, who spend a lot of time with the children. In addition, it is argued that an abusive parent may be spending time with the child, and while the child may be attached to the parent, the attachment is not secure, and the time is not quality time. The rule is accused of ignoring the characteristics of attachment figures, namely the provision of emotional care, caregiver's emotional investment, and quality of care. The rule is also accused of gender bias since in reality, it is mostly mothers that stay home with the children.¹³⁶

¹³⁴ Riggs "Is the approximation rule in the child's best interests? A critique from the perspective of attachment theory" 2005 *Fam Ct. Rev.* 487. Riggs looks at this rule as proposed by the American Law Institute in their guidelines for custodial responsibility.

¹³⁵ Riggs 2005 *Fam Ct. Rev.* 488.

¹³⁶ Riggs 2005 *Fam Ct. Rev.* 490.

The concept of primary caregiver has been used in the past to award custody to the parent who spends most time with the children. For instance, the Michigan custody statute¹³⁷ lists factors for court consideration which are likely to focus the court's attention on the caretaking role of the parents. They include the love, affection, and other emotional ties existing between the parties involved and the child, the length of time the child has lived in a stable, satisfactory environment and the permanence, as a family unit, of the existing or proposed custodial home.

In *Garska v McCoy*,¹³⁸ the West Virginia Supreme Court of Appeals provided a list of “certain obvious criteria” to which a court should look in determining which parent was the primary caretaker:

- Preparing and planning of meals;
- Bathing, grooming and dressing;
- Purchasing, cleaning, and care of clothes;
- Medical care, including nursing and trips to physicians;
- Arranging for social interaction among peers after school, for instance transporting to friends' houses or, for example, to girl or boy scout meetings;
- Arranging alternative care, for instance babysitting and day-care;
- Putting the child to bed at night, attending to the child in the middle of the night, waking the child in the morning;
- Disciplining, for instance teaching general manners and toilet training;
- Educating, for instance religious, cultural and social;
- Teaching elementary skills, for instance reading, writing and arithmetic.

¹³⁷ Child Custody Act 1970.

¹³⁸ 278 S.E.2d 357 (W. Va. 1981).

Fortunately or unfortunately, the primary caregiver rule almost always favours mothers who are mostly the ones spending more time with the children, and it may be seen to be synonymous with the maternal preference rule.¹³⁹

5.7 CONCLUSION – COMPLEMENTING THE BIC

The authors referred to above are by no means the only ones who have written on the best interests principle, for the principle has elicited a lot of international scrutiny. There is consensus that the principle is wanting, at least because of the wide discretion it gives judges. That said, the best interests principle is not without merit and is a good starting point for the protection of children. Apart from acquiring international acceptance, the best interests principle has been enshrined in many constitutions.¹⁴⁰

The drafters of the UNCRC did not give any elaboration on the best interests principle, perhaps because they did not envisage any conflict, or perhaps because they could not take care of all the requisite circumstances for its application.

The reach of the “best interests” principle has already been viewed as extending beyond the ambit of rights specified in section 28(1). *In Minister of Welfare and Population Development v Fitzpatrick* Goldstone J said:¹⁴¹

“The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).”

¹³⁹ See *In re Marriage of Estelle* 592 S.W.2d 277-78 (Mo. Ct. App. 1979) (“If both parents are employed and equally absent from the home, the mother has no more part in training, nurturing, and helping in the child’s development; and, if everything else is equal, the mother has no better claim to child custody”).

¹⁴⁰ For instance s 28(2) of the Constitution of the Republic of South Africa, 1996.

¹⁴¹ 2007 (7) BCLR 713 (CC) at 17.

In *Du Toit v Minister for Welfare and Population Development*,¹⁴² section 17 of the Child Care Act was held to be unconstitutional and against the best interests principle because it confined the right to adopt children to married couples only. The court held that this restriction denied children the right to family life by barring suitably qualified couples who are not married but live in a longstanding same-sex partnership from adoption.

In *Kotze v Kotze*¹⁴³ the parties to a divorce proceeding entered into an agreement that provided that they both undertook to educate the child in a particular church, and that the child would fully participate in all the religious activities of that church. The court refused to recognise this part of the agreement because it imposed religious constraints on the child and this was not in the best interests of this child and contrary to section 28(2).

*Bannatyne v Bannatyne*¹⁴⁴ concerned the responsibility of the judiciary to ensure that maintenance orders were honoured. Section 28(2) was again in issue because the court was required to decide the question of the competence of the High Court to make an order for contempt against a person who defaulted in complying with the terms of a maintenance order under the Maintenance Act 99 of 1998. Writing on behalf of a unanimous court, Mokgoro J held:¹⁴⁵

“It is a function of the state not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by section 28 of the Constitution.

¹⁴² 2002 (10) BCLR 1006 (CC).

¹⁴³ 2003 (3) SA 628 (T).

¹⁴⁴ 2003 (2) BCLR 111 (CC).

¹⁴⁵ 2003 (2) BCLR 111 (CC) at 119.

Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system.”

This meant that as long as the appellant had proved that the respondent had failed to honour the maintenance order, the court, in its duty to promote the best interests of the child was bound to enforce the order, even if it meant allowing contempt proceedings.

In *C v Department of Health and Social Development*,¹⁴⁶ Skweyiya J referred to section 28(2) in holding that section 152 of the Children’s Act, which provided for the removal of a child to temporary safe care without a court order, was a limitation of the right protected by section 28(2) because it did not provide for adequate consideration of the best interests of the child while removing him from the environment of family and thus denying him the right to family care.

In *AD and DD v DW*,¹⁴⁷ the court dealt with the interpretation and application of the subsidiarity principle, which means that “[i]f a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, inter-country adoption may be considered as an alternative means of providing a child with a family”.¹⁴⁸ Sachs J held that in inter-country adoptions, all parties involved had to interrogate each case meticulously so as to find a solution best suited for the child in question, always bearing in mind section 28(2) and the paramountcy of the best interests of the child.

In *Prinsloo v Bramley Children’s Home*¹⁴⁹ the applicants who were facing charges of indecent assault and possession and production of child pornography wanted the respondents compelled to produce the files they had on the Bramley Children’s Home relating to the children staying at that home. Bertelsmann J observed that such a move

¹⁴⁶ 2012 (4) BCLR 329 (CC).

¹⁴⁷ 2008 (4) BCLR 359 (CC).

¹⁴⁸ 2008 (4) BCLR 359 (CC) at 382.

¹⁴⁹ (2006) JOL 17236 (T).

would infringe on the minors' rights to privacy, to dignity and to integrity. This would be contrary to the "child's best interest" provision in section 28(2).

In *DPP Transvaal v Minister for Justice and Constitutional Development*,¹⁵⁰ Ngcobo J sought to examine how children were to be treated in criminal proceedings in line with section 28(2) when he said as follows:¹⁵¹

"The best interests of the child" demand that children should be shielded from the trauma that may arise from giving evidence in criminal proceedings. Child complainants and witnesses should testify out of sight of the alleged perpetrator and in a child-friendly atmosphere. This means that, when necessary, child witnesses should be assisted by professionals in giving their testimony in court. However, each child must be treated as a unique and valuable human being with his or her individual needs, wishes and feelings respected. Children must be treated with dignity and compassion."

The above cases are just a tip of the iceberg as far as the South African case law on section 28 of the Constitution of the Republic of South Africa is concerned.¹⁵² It has been applied and defended by courts in many instances. However, this does not mean that it doesn't have its demerits.

After consideration of a substantial amount of literature and debate on the best interests principle, I submit the following options as possible ways of complementing it:

¹⁵⁰ (2010) JOL 26189 (CC).

¹⁵¹ (2010) JOL 26189 (CC).

¹⁵² See ch 6 para 6.2.2.2.

5.7.1 The emphasis ought to be on rights

I think too much emphasis has been placed on the best interests principle, treating it as if it is the only principle in actions involving children, yet the legal jurisprudence on children has grown so much so that children's rights are now embodied in constitutions and other statutes.

Friedman and Pantazis give three uses for the best interests principle: first, as an aid to interpret children's rights, second, to determine the scope of other fundamental rights, and third, as a fundamental right itself.¹⁵³ In so doing, they link the principle directly to children's rights, which are sometimes lost in the discussion into its merits and demerits.

Bonthuys¹⁵⁴ adds three other uses of the best interests principle; as a constitutional value similar to the values of equality, dignity and freedom in section 7(1) of the Bill of Rights,¹⁵⁵ as a rule of law similar to the provisions relating to compensation on expropriation of property and rights of arrested persons to be taken before court, or as a general guideline with a meaning and content identical to that in the common law.

I do not necessarily agree with them as far as treating the best interests principle as a fundamental right by itself: the principle is too general to be a fundamental right; the language of rights ought to be more specific. However, I agree to the extent that they view the best interests principle not just as a stand-alone principle, but one that must be debated as part of children's rights jurisprudence.

Perhaps if we placed more emphasis on honouring the rights of children, we would find that we wouldn't have to dwell too much on the best interests principle, for adhering to

¹⁵³ Friedman & Pantazis "Children rights" in Chaskalson *et al Constitutional Law of South Africa* 47.

¹⁵⁴ Bonthuys "The best interests of the child in the South African constitution" 2006 *International Law Journal of Law, Policy and the Family* 25.

¹⁵⁵ Constitution of the Republic of South Africa, 1996 ch 3.

the rights of children would automatically mean it is in their best interests. Perhaps we need to focus more on a rights-based approach.

5.7.2 A rules-based approach

There have been efforts in various jurisdictions to guide in the interpretation of the best interests principle, such as the English Children's Act 1989, which provides the criteria that the court is to use when making, varying or discharging orders relating to residence, contact and other orders with respect to children.¹⁵⁶ In South Africa, there have been at least two widely-referenced instances that seek to help in the application of the best interests principle, one by case law and the other by legislation.¹⁵⁷

In *McCall v McCall*,¹⁵⁸ King J listed 13 factors (which were as comprehensive as possible though not exclusive) to be considered in determining the best interests of the child. They are:

- The love, affection and other emotional ties which exists between parent and child and the parent's compatibility with the child;
- The capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- The ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity of the child's feelings;
- The capacity and disposition of the parent to give the child the guidance which he requires;

¹⁵⁶ S 1(3).

¹⁵⁷ The Children's Act 38 of 2005 s 7.

¹⁵⁸ *McCall v McCall* 1994 (3) SA 201 (C) at 214.

- The ability of the parent to provide for the basic physical needs of the child, the so-called “creature comforts”, such as food, clothing, housing and the other material needs.
- The ability of the parent to provide for the education, well-being and security of the child, both religious and secular;
- The ability of the parent to provide for the child’s emotional, psychological, cultural and environmental development;
- The mental and physical health and moral fitness of the parent;
- The stability or otherwise of the child’s existing environment, having regard to the desirability of maintaining the *status quo*;
- The desirability or otherwise of keeping siblings together;
- The child’s preference, if the court is satisfied that in the particular circumstances the child’s preference should be taken into consideration;
- The desirability or otherwise of applying the doctrine of same sex matching;
- Any other factor which is relevant to the particular case with which the court is concerned.

Even in the face of guidelines such as these, sometimes it is hard to establish the truth, especially in acrimonious divorce cases and this may require time-consuming extensive investigations into the parents’ character. In addition, factors may have to be weighed against one another. A parent may be of a questionable temperament (as in the *McCall* case, where evidence was adduced that the father had a sharp temper) but other factors such as the child’s preference end up taking precedence.

The Children’s Act 38 of 2005, while not completely echoing *McCall*, provided, in section 7, a more detailed list of factors:

- The nature of the personal relationship between-
 - the child and the parents, or any specific parent; and
 - the child and any other care-giver or person relevant in those circumstances;
- The attitude of the parents, or any specific parents, towards-
 - the child; and
 - the exercise of parental responsibilities and rights in respect of the child
- The capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- The likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
 - both or either of the parents; or
 - any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- The practical difficulties and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- The need of the child-
 - to remain in the care of his or her parent, family and extended family; and
 - to maintain a connection with his or her family, extended family, culture or tradition;
- The child's-
 - age, maturity and stage of development;
 - gender
 - background; and
 - any other relevant characteristics of the child;
- The child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- Any disability that a child may have;

- Any chronic illness from which a child may suffer;
- The need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- The need to protect the child from any physical or psychological harm that may be caused by-
 - subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behavior; or
 - exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behavior towards another person;
- Any family violence involving the child or a family member of the child; and
- Which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

The above guidelines are definitely good, but in a world that is not ideal, applying all to a particular case is a herculean task, not to mention that chances that a parent would pass half of them are limited. Notably, unlike the *McCall* criteria, section 7 offers a closed list of factors to be considered.

One thread that runs across most literature on the best interests principle is that there can be no exclusive list of guidelines for its application, for each case is to be determined on its own merit and facts. The authors referred to above seem to coalesce around the stability factor, that in custody matters, consideration be given to the person whom the child has been spending most time with for the sake of stability.

In complementing the best interests principle, I suggest a rule that acknowledges that childhood is a continuum, with different developmental stages characterised by different changes in mental and physical growth and development. What may seem in the

interest of an infant may not be in the best interest of an adolescent. The three main stages, viz early childhood, middle childhood, and adolescence¹⁵⁹ are separated by the primary tasks of development in each stage, though it is noteworthy that these are just the general milestones in each stage for the majority of children, but not all children achieve them at the given time. Science has long established this fact, while child development theorists have posited ways to understand child development. Some of the theories advanced include the Psychoanalytic Child Development Theories,¹⁶⁰ Cognitive Child Development Theories,¹⁶¹ Behavioral Child Development Theories¹⁶² and Social Child Development Theories.¹⁶³ The latter was advanced by amongst others

¹⁵⁹ See ch 4 para 4.5.1. See also Stone & Church *Childhood and Adolescence: A Psychology of the Growing Person* 56.

¹⁶⁰ Erikson "The problem of ego identity" 1956 *Journal of the American Psychoanalytic Association* 56-121, Freud *Three Essays on the Theory of Sexuality* 18. Sigmund Freud and Erik Erikson advanced these theories. Freud described childhood development as a series of psychosocial stages, viz oral, anal, phallic, latency and genital. Each stage involves the satisfaction of a libidinal desire and if a child got fixated at a particular stage, it would influence his or her adult personality and behavior. Erik Erikson looked at development throughout the human life span, not just in childhood. He believed that every stage was focused with dealing with a conflict:

Psychosocial Stage 1 – Trust v mistrust. Birth to one year where an infant's development of trust was based on the dependability and quality of the caregiver.

Stage 2 - Autonomy v shame and doubt. Early childhood, dealing with the development of a sense of control especially over bodily functions.

Stage 3 - Initiative v guilt. Preschoolers asserted their power and control through play and other social interaction.

Stage 4 - Industry v inferiority. 5-11 years, dealing with development of a sense of pride in accomplishments and abilities.

Stage 5 - Identity v confusion. Adolescence, exploration of independence and developing a sense of self.

Stage 6 - Intimacy v isolation. Early adulthood, exploration of personal relations.

Stage 7 - Generativity v stagnation. Adulthood, focusing on career and family.

Stage 8 - Integrity v despair. Old age, reflecting back on life.

¹⁶¹ Piaget "Cognitive development and learning" 1964 *Journal of Research and Training* 176. Theorist Jean Piaget thought that children think differently than adults and described them as "little scientists" who actively construct their knowledge and understanding of the world.

¹⁶² Martin *et al* "Cognitive theories of early gender development" 2002 *Psychological Bulletin* 903. Behavioral theories of child development deal with observable behavior resulting from interaction with their environment. Development is considered a reaction to rewards, punishments, stimuli and reinforcement; these theories disregard emotions. Some of the proponents include John B Watson, Ivan Pavlov and B.F Skinner.

¹⁶³ Martin *et al* 2002 *Psychological Bulletin* 904.

Albert Bandura,¹⁶⁴ Lev Vygotsky¹⁶⁵ and John Bowlby.¹⁶⁶ Bowlby believed that what happened in the early years of childhood had a bearing on one's adult life as far as interpersonal relationships were concerned.¹⁶⁷ He also outlined types of attachments.¹⁶⁸

From the foregoing, it is clear that childhood is affected by biology and socio-cultural norms. Classifying children as if they belong to the same stage has led to the creation of a general principle. Perhaps this principle can be complemented by rule-based norms, which would recognise the dynamic nature of childhood.

¹⁶⁴ Bandura "Social cognitive theory: an agent perspective" 2001 *Annual Review of Psychology* 1-26. Albert Bandura proposed the social learning theory where he opined that children learn new behaviours by observing other people. By observing the actions of others, including parents and peers, children develop new skills and acquire new information.

¹⁶⁵ Vygotsky *Mind and Society: The Development of Higher Mental Processes* 27. Lev Vygotsky proposed a socio-cultural theory, believing that children learn actively and through hands-on experiences, and that parents, caregivers, peers and the culture at large were responsible for the development of higher order functions.

¹⁶⁶ Bowlby "Attachment and loss: retrospect and prospect" 1982 *American Journal of Orthopsychiatry* 664.

¹⁶⁷ Bowlby 1982 *American Journal of Orthopsychiatry* 660.

¹⁶⁸ Secure Attachment: Children who are securely attached were comfortable with their parents or constant caregivers and rejected strangers. They became upset if the caregivers left and were visibly happy to see them back. When threatened, they turned to the parents or caregivers for comfort. As adults, such children had trusting long-term relationships. Ambivalent Attachment: Children who were ambivalently attached were very suspicious of strangers and would exhibit considerable distress when separated from parents or caregivers, and not even the return of the latter would assure them immediately. Some would show anger towards the parent or caregiver upon their return. Avoidant Attachment: As the word suggests, children with avoidant attachment styles tended to avoid parents and caregivers especially if the latter were in the habit of being absent. They showed no particular preference of their parents over strangers, and as adults, they tended to have problems with intimacy and close relationships. Disorganised Attachment: Children with a disorganised attachment lacked any clear attachment behavior. They showed no excitement at the presence of caregivers, and indeed seemed confused or even apprehensive. Bowlby's work was expanded by his research assistant Mary Ainsworth, who provided the empirical frame for over 30 years of productive research supporting the major tenets of attachment theory (see Ainsworth "Attachments and other affectional bonds across the life cycle" in Parkes, Stevenson-Hinde & Marris *Attachment Across the Life Cycle* 33–51).

The division of childhood would also take care of rights-based arguments that call for greater autonomy to be given to children and recognition of their capacity. Children in middle childhood and adolescence would definitely be entitled to different kinds of autonomy. Eekelaar's classification of interests is also very informative for my proposal.¹⁶⁹ According to him, basic interests are for every child and are taken care of by the parents and/or guardians. Autonomy interests on the other hand, which refer to the freedom of the child to choose a lifestyle and to enter into social relations, are largely attained in stages as the child's capacity for rational reasoning increases with age. In addition, Goldstein *et al* in their psychoanalytic theory often classify children and their reactions to various situations according to age. In their first and second guidelines, they show the effect that a lack of continuity has on children of various ages; they also show that children's sense of time varies with age.¹⁷⁰

I would qualify my rule further by incorporating Scott's approximation rule but only in custody proceedings, as this would maintain security and stability especially for infants and children less than five years old, in addition to saving time and both the financial and emotional costs of litigation. The issue of gender bias by the approximation rule will be overtaken by the dynamics of modern society; women have joined the work place and are no longer necessarily the primary caregivers. Besides, if both parents can prove that they have been giving quality time to their children and have been actively involved in their upbringing by sharing duties, then in all fairness they ought to be granted joint custody.

¹⁶⁹ Eekelaar "The importance of thinking that children have rights" in Alston, Parker & Seymour (eds) 221.

¹⁷⁰ Goldstein *et al* *The Best Interests of the Child – The Least Detrimental Alternative* 41. Indeed, Goldstein *et al* argue that where parties in divorce cases have joint custody, it confuses the younger children as to which parent is the final authority, but adolescents may take advantage and pit one parent against the other.¹⁷⁰ While interrogating the past relationship between parents and their children, adolescents are likely to be listened to and their view taken into consideration. In most jurisdictions, they are allowed to choose which parent to stay with. Infants, on the contrary, have no voice and no obvious way of expressing their feelings, and as such their opinion does not count. For children who are able to express themselves sensibly (between 3 and 10 years), judges will more often want to listen to what they have to say, even if they may not give much weight to their views.

While the best interests principle is not a perfect principle, doing away with it completely would take us back to the drawing board for another standard. I think it should remain in force, and be complemented by other rules. If similar kind of guidelines were to be formulated as was done by King J in *McCall*,¹⁷¹ but with focus on the various stages of childhood, the implementation of this principle need not be as ambiguous as stated.

5.7.3 The least detrimental alternative for children in armed conflict situations

Though article 3(1) of the UNCRC states that in all actions concerning children the best interests of the children shall be a primary consideration, it is not always possible to apply the best interests principle. For instance, it is inadequate where the child's interests are conflicting with that of another child or children, as discussed in the case of Jodie and Mary.¹⁷²

Children caught up in armed conflict also present a complicated scenario for the best interests principle. Before the onset of a war, there is usually no contingency planning for mitigation of abuse of rights. When war is raging, whether in cases of internal armed conflicts or conflicts of an international nature, the situation is such that the combatants are bent on defeating the enemy, while the non-combatants, naturally, aim to save themselves and salvage as much of their property as they can. It is only after some time, either during or after the war that stock of the extent of damage is taken, and emergency measures are instituted to mitigate the losses. Only then does any semblance of concern for the interests of children take shape.¹⁷³ Even when state or non-state actors finally get to address the rights of the children, their immediate concern is usually the most basic of rights, such as saving their lives and feeding them.

¹⁷¹ *McCall v McCall* 1994 (3) SA 201 (C) at 214.

¹⁷² See para 5.5.2 above.

¹⁷³ Hamilton "Armed conflict: Protection of children under international law" 1997 *IJCR* 4.

In situations where children are enlisted as soldiers, the best interests principle is suspended for these reasons: first and foremost they are no longer seen as children but as armed combatants. Secondly, there is no one to ensure that their best interests are paramount because the aim of the commanders under whom they serve is to win the war.¹⁷⁴ Indeed, most of the rights under the UNCRC and other instruments do not apply to child soldiers. Most have no parents or families to fall back on or to return to after the war. Besides, those that are conscripted into rebel armies forcefully often face untold cruelty in order to subjugate them, and their captors have no regard for their rights.¹⁷⁵

It is easy to say that in all actions concerning children their best interests should be paramount when the actions being contemplated as such are custody, maintenance, inheritance, or adoption. However, when the actions being undertaken are killing children, recruiting them to fight, abducting them, raping them or burning down infrastructures necessary for their development such as schools and hospitals, there is definitely no regard for their interests. At such times, the notion of best interest of children ceases to have the same meaning applicable in peace time.

In these circumstances, the least detrimental alternative is the possible option. This line of reasoning will be explored later in this discourse.¹⁷⁶

¹⁷⁴ Francis “‘Paper protection’ mechanisms: Child soldiers and the international protection of children in Africa’s conflict zones” 2007 *Journal of Modern African Studies* 212.

¹⁷⁵ Van Bueren “The international legal protection of children in armed conflicts” 1994 *Int & Comp L. Quart* 816.

¹⁷⁶ See para 8.6 below.

CHAPTER SIX

INTERNATIONAL HUMANITARIAN LAW AND THE PROTECTION OF CHILDREN IN ARMED CONFLICT SITUATIONS

6.1 INTERNATIONAL HUMANITARIAN LAW

“[W]ar is not courtesy but the most horrible thing in life; and we ought to understand that, and not play at war ...”¹

These words express the reality of war, which is as old as mankind. Even though it would be desirable that people live together in harmony, human beings have never mastered the art of living together peacefully without fighting for resources, territories, culture and religion amongst other factors. In an attempt to reduce conflicts, the UN Charter provides as follows:²

“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the purpose of the United Nations.”

The main aim of warring parties is to bring the war to an end as speedily as possible on one’s own terms, even if this means the infliction of loss and injury upon “enemy” non-combatants.

International Humanitarian Law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer

¹ Bolkhonsky *Tolstoy’s War & Peace* Book 10.

² A 2(4).

participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war, the law of armed conflict or the *jus in bello*.³ The *jus in bello*, governing how wars are to be fought, is distinct from the *jus ad bellum*, which governs when wars may be fought. The *jus in bello* seeks to reduce the human suffering that is an inevitable consequence of war.⁴ The rules embodied in international humanitarian law impose duties on all parties to a conflict.

The *jus in bello* has also been described as a compromise between the principle of safeguarding humanity and military necessity.⁵

This law has two branches:⁶

- The “law of Geneva”, which is designed to safeguard military personnel who are no longer taking part in fighting and people not actively involved in hostilities.
- The “law of The Hague”, which establishes the rights and obligations of belligerents in the conduct of military operations and limits the means of harming the enemy.

Although these two branches are comprised of treaties, most of the treaty obligations have become customary international law due to *usus* and *opinio juris*, and the International Committee of the Red Cross (hereinafter “the ICRC”) has since codified

³ Shaw 272.

⁴ Shaw 272.

⁵ *Humanitarian Responses to War in Iraq* “Report and Policy Options from a 2003 forum held in Ottawa organised by the Canadian Peace building Coordinating Committee and the Centre for Security and Defence Studies at the Norman Paterson School of International Affairs, Carleton University” www3.carleton.ca/csds/docs/occasional_papers/npsia-36.pdf (Date of use: 28 October 2013).

⁶ Gasser *International Humanitarian Law: An Introduction* 12.

the rules of customary international law.⁷ This means that these obligations bind all states regardless of whether they have ratified the treaties. International humanitarian law was originally developed to regulate the conduct of war between states but with time grew to accommodate non-state actors. Customary international law is also binding on non-state actors.⁸

Most of the non-state actors, though not all, are involved in non-international armed conflict. The law governing non-international armed conflict has, in addition to the APII, largely developed through customary international law. It is noteworthy, however, that many of the customary rules of non-international armed conflicts are derived from treaty law of international armed conflict. Subsequent treaties, especially those dealing with criminal responsibility have dealt with both international and non-international armed conflicts in equal measure.⁹

The Rome Statute of the International Criminal Court treats certain conduct equally regardless of the international or non-international nature of the conflict.¹⁰ The International Committee of the Red Cross concludes that at least 136 of its 161 rules of customary international humanitarian law apply equally to international armed conflicts and non-international armed conflicts.¹¹ Imperatively, the rules of non-international armed conflict are not very detailed. Indeed, the International Committee of the Red Cross faced diverse criticisms after its 2005 collection of customary international rules, including assertions that it may have lost some of its respect among the international community by departing from a traditional definition of customary law.¹²

⁷ ICRC *Customary International Humanitarian Law* 143.

⁸ Petrov "Non-State actors and law of armed conflict revisited: Enforcing international law through domestic engagement" 2014 *Journal of Conflict and Security Law* 290.

⁹ Petrov 2014 *Journal of Conflict and Security Law* 285.

¹⁰ For instance a 8 (2) (e) of the Rome Statute.

¹¹ Henckaerts *Customary International Humanitarian Law* 495.

¹² Nicholls "The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law" 2006 *Duke J Comp and Intl L* 223.

On the flip side, non-state actors usually do not accept the rules of non-international armed conflict mainly because they originate from state agreements, and also because they have a non-reciprocal structure.¹³

6.1.1 Origins of international humanitarian law

The first laws of war were proclaimed by major civilizations several millennia before our era. Hammurabi, the King of Babylon (1795-1750 BC) came up with a set of rules and proclaimed that those laws were to prevent the strong from oppressing the weak.¹⁴

The modern concept of the law of war emerged in 1862, when Henri Dunant witnessed thousands of soldiers left wounded in the battlefield during the battle of Solferino (1859) fought between French-piedmontese and Austrian armies in Northern Italy.¹⁵ The subsequent suffering of 40,000 wounded soldiers left on the field due to lack of facilities, personnel, and truces to give them medical aid moved Dunant into action.¹⁶ Upon his return to Geneva, Dunant proposed a permanent relief agency for humanitarian aid in times of war, and a government treaty recognising the neutrality of the agency and allowing it to provide aid in a war zone. The former proposal led to the establishment of the ICRC founded in 1863, while the latter led to the First Geneva Convention of 1864. This Convention was instituted at a critical period in European political and military

¹³ Petrov 2014 *Journal of Conflict and Security Law* 291.

¹⁴ Claude "Babylonian law – The code of Hammurabi" *Encyclopedia Britannica* 1910-1911 www.Fordham.edu/~hamcode.html (Date of use: 15 October 2013).

¹⁵ Baxter "Human Rights in War" 1977 *Bulletin of the American Academy of Arts and Sciences* 5.

¹⁶ See ch 7 para 7.2.

history. The Italian campaign of 1859¹⁷ had restored order after Napoleon's 1815 Battle of Waterloo.¹⁸ However, with conflict in the Crimea,¹⁹ war had returned to Europe.

After Dunant, the ICRC has been the driving force behind the development of the International Humanitarian Law. The ICRC has been mandated by the international community to work for:²⁰

“the faithful application of international humanitarian law applicable in armed conflicts [and for] the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare for any development thereof.”

6.1.2 Sources of International Humanitarian Law

International Humanitarian Law is contained in many sources, both in treaties and in customary international law. Indeed, the general opinion is that violations of International Humanitarian Law are not due to the inadequacy of its rules, but due to a lack of willingness to adhere to them, uncertainty as to its application at certain times

¹⁷ The 1859 Italian campaign was part of the unification of Italy and involved the Piedmontese and the French against Austria (see Duquet “Italian Campaign of 1859” July 1859-Oct 1859 *Edinburg Review of Critical Journal*).

¹⁸ The Battle of Waterloo took place in 1815 between the French army led by Napoleone Bonaparte and the Prussian army and Anglo-allied army. It brought an end to Napoleone's rule (see www.battleofwaterloo.org (Date of use: 15 October 2013)).

¹⁹ The Crimean war was fought by an alliance of France, Britain and Turkey against Russia, largely due to control of influence in the Middle East which was under the control of Turkey's Ottoman Empire (see www.nationalarchives.gov.uk (Date of use: 15 October 2013)).

²⁰ Statutes of the International Red Cross and Red Crescent Movement adopted by the 25th International Conference of the Red Cross, Geneva, 23-31 October 1996, a 5(2)(c) and (g) respectively. This mandate was first given to the ICRC by a 7 of the Statutes of the International Red Cross adopted by the 13th International Conference of the Red Cross, The Hague, 23-27th October 1928.

and a lack of a proper enforcement mechanism.²¹ Universal codification of International Humanitarian Law began in the nineteenth century. The earliest form of codification was by Professor Francis Lieber when he drafted instructions for the Government for Armies of the United States in the Field, promulgated as General Order No 100 by President Lincoln in 1863 (hereinafter “the Lieber Code”).²² In 1864, Dunant instigated the adoption of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (this treaty was revised in 1906, 1929 and 1949). This was followed by the Declaration of St Petersburg of 1868. The authors of this declaration provided as follows:²³

“Considering: ... that the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable ...”

In so doing, they formulated, both explicitly and implicitly, the principles of distinction, military necessity and prevention of unnecessary suffering. All these formed the basis of the draft of an International Convention on the Laws and Customs of War presented to the Brussels Conference in 1874. Though this draft did not attain the binding force of law, it was used in the subsequent development of the 1899 and 1907 Hague Conventions. A major part of international humanitarian law is contained in the four Geneva Conventions of 1949, their Additional Protocols I & II of 1977 and their predecessor the Hague Conventions of 1899 and 1907.

The following are the main International Humanitarian Law treaties in chronological order of adoption:

²¹ ICRC *Customary Humanitarian International Law* xxvii.

²² ICRC *Customary Humanitarian International Law* xxix.

²³ The preamble to the St Petersburg Declaration.

- 1864 The First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1864.
- 1868 The Declaration of St Petersburg (prohibiting the use of certain projectiles in war).
- 1899 The Hague Conventions Respecting the Laws and Customs of War on Land and the Convention for the Adaptation of Maritime Warfare of the Principles of the Geneva Convention 1864.
- 1906 The Review and development of the 1864 Geneva Convention.
- 1907 The Review of The Hague Conventions of 1899.
- 1925 The Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare.
- 1929 The Geneva Convention relating to Treatment of Prisoners of War.
- 1949 Four Geneva Conventions
- I Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.
 - II Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.
 - III Treatment of Prisoners of War.
 - IV Protection of Civilian Persons in Time of War.
- 1954 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.
- 1972 The Biological Weapons Convention.
- 1977 Protocol I relating to the Protection of Victims of International Armed Conflicts. It reaffirms the international laws of the original Geneva Conventions of 1949, but adds clarifications and new provisions to

accommodate developments in modern international warfare that have taken place since the Second World War.

- 1977 Protocol II relating to the Protection of Victims of Non-International Armed Conflicts. It defines certain international laws that strive to provide better protection for victims of internal armed conflicts that take place within the borders of a single country.
- 1980 The Conventional Weapons Convention and its three protocols on (I) non-detectable fragments, (II) restrictions on the use of mines, bobby traps and other devices, (III) restrictions on the use of incendiary weapons.
- 1993 The Chemical Weapons Convention.
- 1995 The Protocol relating to Blinding Laser Weapons (Protocol IV to the 1980 Convention).
- 1996 The Protocol on the Prohibition or Restrictions on the use of Mines, Booby traps and other devices.
- 1997 The Ottawa Convention on Anti-personnel Mines.
- 1998 The Rome Statute of the International Criminal Court.
- 2000 The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.
- 2005 Protocol III relating to the Adoption of an Additional Distinctive Emblem (for medical services).

Most provisions of these treaties have since become customary international law, and have been summarised by the ICRC into 161 rules that govern the conduct of war in both international and non-international conflicts.

6.1.3 Principles of International Humanitarian Law

International Humanitarian Law is based on two principles, that of distinction and proportionality. The principle of distinction obligates parties to a conflict to distinguish between civilians and combatants at all times, and bars attacks directed at civilians. The principle of proportionality prohibits military attacks expected to cause civilian casualties in excess of the concrete and direct advantage anticipated from the attack.²⁴ International Humanitarian Law covers two areas, viz the protection of those who are not, or no longer, taking part in fighting and restrictions of the means of warfare.

6.1.3.1 *Principle of Distinction - Civilian protection*

The principle of distinction between civilians and combatants was first set forth in the preamble to the St Petersburg declaration.²⁵ Civilian protection has been an ancient and widely accepted rule of the *jus in bello*, being the rule not to attack the civilian population or civilian objects *per se*, and not to attack indiscriminately.

During the time of Dunant's intervention in 1864, conventional armies faced off in battle fields with clearly drawn frontlines. It was the suffering of the wounded combatants that needed to be alleviated. However, subsequent wars became more and more asymmetrical causing massive civilian casualties, such that protection of civilians became of utmost importance.

²⁴ A 3, 51 & 57 Additional Protocol II; a 3 Amended Protocol II to the Convention on Certain Conventional Weapons (1980); a 8(2)(b) Rome Statute of the International Criminal Court (1998), Rules 1 & 2 ICRC Rules.

²⁵ "The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy".

In 1899, Fyodor Martens laid down the following principle to take care of cases that may not have been envisaged by the existing International Humanitarian Law.²⁶

“Civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.”

This became known as the “Marten’s clause” and was incorporated in the preamble of the 1899 Hague Convention II. The Marten’s clause effectively put the protection of civilians and combatants under the realm of customary international law and brought humanity into humanitarian law. Indeed, it was considered a standard part of customary international law when it was incorporated in Article 1, paragraph 2 of the Additional Protocol I of 1977 (hereinafter API). The protection of civilians is so strong a tenet of International Humanitarian Law that in the event that there is a dispute as to whether one is a civilian or not, he or she is to be treated as a civilian.²⁷

In the 1899 Hague Convention No II²⁸ and the 1907 Hague Convention No IV,²⁹ prohibition of indiscriminate attacks appeared in the form of the prohibition of attacks directed towards undefended or unfortified towns. The obligation of belligerents to spare the lives of unoffending non-combatants was also accepted in rules of naval warfare. There was an obligation to provide safe passage to innocent passengers and crews of merchant ships.³⁰

²⁶ Cassese “*The Marten’s clause: Half a loaf or simply a pie in the sky?*” 2000 EJIL 187.

²⁷ Additional Protocol to the Geneva Conventions related to the Protection of Victims of International Armed Conflict 1977.

²⁸ A 25 Convention with respect to the Laws and Customs of War on Land (Hague Convention No. II): “The attack or bombardments of towns, villages, habitations or buildings which are not defended is prohibited”.

²⁹ A 25 Hague Convention 1907.

³⁰ Roach “The law of naval warfare at the turn of two centuries” 2000 *AJIL* 64.

International humanitarian law protects those who do not take part in the fighting, such as civilians, medical and religious military personnel. Article 4 of the Fourth Geneva Convention (hereinafter “GCIV”), which is the treaty dealing with civilian protection, provides that persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals.

The categories of civilians who are protected are:³¹

- Foreign civilians on the territory of parties to the conflict, including refugees.
- Civilians in occupied territories.
- Civilian detainees and internees.
- Medical and religious personnel or civil defence units.

API³² represented an unprecedented change for the protection of civilians in *jus in bello*.

Article 48 stated:

“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between civilian populations and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”.

Common article 3(1)³³ of the Geneva Conventions specifically outlines provisions meant to protect those persons taking no active part in hostilities, but does not expressly

³¹ Article 4 of the 4th Geneva Convention, rules 6, 25, 27 ICRC *Customary International Humanitarian Law*.

³² Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-international Armed Conflicts.

prohibit indiscriminate attacks. It is applicable to armed conflict of a non-international nature. Provisions of article 3 were reinforced by Additional Protocol II of 1977(hereinafter APII).³⁴ Article 13(1) provides:

“The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.”

Article 13(2) provides that the “civilian population as such, as well as individual civilians shall not be the object of attack.” However, APII’s deficiency is that states themselves determine whether the requirements of applicability are satisfied or not.³⁵ Practice has

³³ “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- 1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
 - a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - b) taking of hostages;
 - c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
 - d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- 2) The wounded and sick shall be collected and cared for.
An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.”
The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict”.

³⁴ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-international Armed Conflicts.

³⁵ A 4.

shown that states still disregard these Protocols especially when dealing with internal armed conflicts, and as such the rule is not supported by state practice.

In the *Legality of Nuclear Weapons Case*,³⁶ the International Court of Justice (hereinafter “the ICJ”) identified two cardinal principles constituting the fabric of humanitarian law, namely the principle of civilian protection and restrictions on means of warfare. According to the ICJ, the principle of civilian protection means that states must never make civilians the objects of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.

In the *Nicaragua case*,³⁷ the ICJ held that common article 3 of the Geneva Conventions was customary in nature, and that it was a minimum requirement relevant for both international and internal armed conflict.

In addition to being part of customary international law, civilian protection rules have been accepted in the military community.³⁸ Indeed, in the *Kassem Case*,³⁹ Israeli’s military court at Ramallah recognised the immunity of civilians from direct attack as one of the basic rules of International Humanitarian Law.

³⁶ 1996 I.C.J. 226 www.icj-icj.org (Date of use: 19 September 2013).

³⁷ Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v USA)(1986) ICJ Rep.14 www.icj-icj.org (Date of use: 19 July 2011).

³⁸ Roach 2000 *AJIL* 70.

³⁹ *Military Prosecutor v Omar Mahmud Kassem & Other* 109 (1971) 42 *ILR* 470-483.

6.1.3.1.1 Direct participation in hostilities

Civilians lose their protection if they directly engage in hostilities; they are considered “unlawful” or “unprivileged” combatants and may be prosecuted under the domestic law of the detaining state for such action.⁴⁰

In the case concerning the events at *La Tablada*⁴¹ in Argentina, the Inter-American Commission on Human rights held that civilians who directly take part in fighting, whether singly or as members of a group, thereby become legitimate targets but only for such time as they actively participate in combat.

The ICRC, being concerned with this loss of protection, has published its views on direct participation of hostilities and has recommended that war-sustaining activities such as providing food to armed forces should not result to loss of protection. Therefore, civilians involved in war-sustaining activities out not to be attacked.⁴²

According to ICRC, direct participation in hostilities is not defined in international law and is left to the good faith of the parties to the conflict. During armed conflict, not all conduct amounts to direct participation; direct participation in hostilities does not refer to a person’s status, function, or affiliation, but to his or her engagement in specific hostile acts.⁴³

Modern internal armed conflicts have blurred the line between civilians engaging and not engaging in hostilities, sometimes making civilians acquire a quasi-guerilla status.

⁴⁰ Bugnion “Jus ad bellum, jus in bello and non-international armed conflict” 2003 *Yearbook of International Humanitarian Law* 189.

⁴¹ (1997) Inter-American Commission on Human Rights 11.137 (Argentina) 810.

⁴² Melzer “Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law” www.icrc.org (Date of use: 22 September 2014).

⁴³ Melzer www.icrc.org (Date of use: 22 September 2014).

This jeopardises protection of civilians.⁴⁴ States' armed forces have accused civilians of collaboration with insurgents due to close interaction between the two, sometimes brought about by circumstances beyond the civilians. The Ugandan forces accused the Acholi people of being rebel collaborators, even when the Acholi were coerced into interacting with the LRA by the latter's brute force.⁴⁵

Nevertheless, civilians are still targeted in many wars whether or not they take direct part in the hostilities. Most combatants will not stop at anything to achieve their military objective, and will attack civilians at will if they are perceived as standing in the way of achievement of this objective. Singer notes that while there was a time when civilians had no place in the battlefield, they currently comprise majority of casualties in the modern day battles, such that the battlefields are almost incomplete without them.⁴⁶

In 1921, a commission of jurists nominated by the Washington Naval Conference drew up rules concerning air warfare (the 1923 Hague Rules), and article 24 provided:

“An air bombardment is legitimate only when directed against a military objective.”

Many states raised concern over the narrow definition of “legitimate” and as such these rules never obtained the force of law.⁴⁷

Fenwick describes the situation during the First World War as follows.⁴⁸

⁴⁴ Maher “The protection of children in armed conflict: a human rights analysis of the protection afforded to children in warfare” 1989 (9) *B. C. Third World L. J.* 306.

⁴⁵ Ch 2 para 2.2.1.2.

⁴⁶ Singer “Children at War” 5.

⁴⁷ Hensel *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force* 105.

⁴⁸ Fenwick *International Law* 28.

“Belligerent merchant ships were sunk by German submarines without warning ... Poisonous gases were devised; aerial warfare put an end to the rules regulating the bombing of unfortified towns; and intimidation was resorted to as a means of breaking the spirit of the civilian population.”

The atomic bombing of the Japanese towns of Hiroshima and Nagasaki was the culmination of the total disregard of the civilian protection principle. The two world wars stripped this noble principle of any validity, save on paper. Indeed, Lauterpacht acknowledged that the practice of the Second World War “reduced to the vanishing point the protection of the civilian population from aerial bombardment.”⁴⁹

The “carpet bombing” of North Vietnam in the early 1970s was a violation of International Humanitarian Law, as was the massacre in the village of My Lai in 1968 where 300 civilians were killed by US soldiers, which led to the designation of certain villages as fire-free zones.⁵⁰ In Falluja (Iraq) four US contractors were killed and mutilated in April 2004. What followed was an indiscriminate attack, where almost every house was struck by US tanks, machine gun or rifle fire. No reasonable measures were taken to avoid harming civilians.⁵¹

The principle of civilian protection was so ignored in the two world wars that the post-war writers seemed to see no relevance for those rules at all. In particular, Fenwick was categorical that any discussions concerning the future law of war made no sense in the face of such violations.⁵² Lauterpacht commented that the existing recognised principles of immunity of non-combatants proved to be unpersuasive in recent wars, and it could not ensure future compliance. As such, when formulating new rules that were to be obeyed, they were not to be represented as being recognised rules of international

⁴⁹ Lauterpacht “The problem of the law of war” 1952 *BYIL* 360.

⁵⁰ Hunt *Inventing Human Rights: A History* 18.

⁵¹ Hunt 18.

⁵² Fenwick 551.

law, because they risked being disregarded.⁵³ The excuses given for the total disregard of the rule were that there were new weapons incapable of discriminate attacks, and that it was hard to tell who were non-combatants since every man, woman or child, whether in uniform or not, could be used in belligerent efforts.⁵⁴

However, not everybody was of the view that the principle of civilian protection had been extinguished by the world wars. The principle was defended on two grounds:

- That a violation of a rule does not negate its existence. Just like in national laws, the existence of murder and rape does not extinguish the criminal legislations that prohibit these crimes. Therefore, the obligations of the *jus in bello* such as distinguishing between the civilian populations and civilian objects at all times were not affected by the violations, in the sense that their existence was not identical to their actual efficacy.⁵⁵
- That the violations were justified reprisals, which were actions which, though prohibited by *jus in bello*, were in response to a violation of the *jus in bello* by the offending side to the conflict. An example is the use of prohibited weapons in retaliation for their prior use by an adversary.⁵⁶ For instance, in the First World War, France indicated that its bombardment of Freiberg was a reprisal to a similar indiscriminate bombardment that had been carried out by Germany.⁵⁷ Italy claimed that its indiscriminate attack on Austro-Hungarian Trieste was a reprisal to a similar Austrian attack on Venice.⁵⁸

⁵³ Lauterpacht 379.

⁵⁴ Hensel 110.

⁵⁵ Kunz "The chaotic status of the laws of war and the urgent necessity for their revision" 1951 *AJIL* 32.

⁵⁶ Greenwood "The twilight of the law of belligerent reprisals" 1989 *NYIL* 38.

⁵⁷ Garner *International Law and the World War* 462.

⁵⁸ Garner 463.

6.1.3.1.2 *Hors de combat*

International Humanitarian Law also protects those who have ceased to take part in active fighting (*hors de combat*), such as wounded, shipwrecked and sick combatants, and prisoners of war. *Hors de combat*, literally meaning “outside the fight,” is a French term used in diplomacy and international law to refer to soldiers who are incapable of performing their military function. Examples include a downed fighter pilot, as well as the sick, wounded, detained, or otherwise disabled. Soldiers *hors de combat* are normally granted special protections according to the laws of war, sometimes including prisoner of war status.⁵⁹

API (a 41(2)) provides as follows:

“A person is *hors de combat* if:

- (a) He is in the power of an adverse party;
- (b) He clearly expresses an intention to surrender; or
- (c) He has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.”

Indeed, in the 18th century, Jean-Jacques Rousseau made the following comment regarding the soldiers that were no longer involved in actual fighting:⁶⁰

“War is in no way a relationship of man with man but a relationship between states, in which individuals are enemies only by accident; not as men, nor even as citizens, but as soldiers ... Since the object of war is to destroy the enemy

⁵⁹ Bouchet-Saulnier *The Practical Guide to Humanitarian Law* 326.

⁶⁰ “Modern History Sourcebook: Jean Jacques Rosseau: The Social Contract 1762” <http://www.fordham.edu/alsal/mud/rousseau-contract2.html> (Date of use: 20 July 2011).

state, it is legitimate to kill the latter's defenders as long as they are carrying arms; but as soon as they lay them down and surrender, they cease to be enemies or agents of the enemy and again become mere men, and it is no longer legitimate to take their lives.”

These categories of persons are entitled to respect for their lives and for their physical and mental integrity. They also enjoy legal guarantees and must be protected and treated humanely in all circumstances, with no adverse distinction.⁶¹

There are detailed rules governing the conditions of detention for prisoners of war and the way in which civilians are to be treated when under the authority of an enemy power. This includes the provision of food, shelter and medical care, and the right to exchange messages with their families.⁶² Medical personnel, supplies, hospitals and ambulances must all be protected.⁶³

The law sets out a number of clearly recognisable symbols which can be used to identify protected people, places and objects. The main emblems are the Red Cross, the Red Crescent and the symbols identifying cultural property and civil defence facilities.⁶⁴

Persons *hors de combat* are protected even in non-international armed conflicts. Common article 3 of the four Geneva Conventions provides minimum applicable provisions for each party to a conflict which is not of an international character:

⁶¹ Common a 3 & a 20 of the 3rd Geneva Convention.

⁶² Rules 53, 87-108 of ICRC *Customary International Humanitarian Law*.

⁶³ A 17 of the 4th Geneva Convention.

⁶⁴ Annex I (to the Protocol I of the Geneva Conventions: Regulations Concerning Identification).

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

However, the reality in regard to *hors de combat* reflects a grim picture. Kurt Schork,⁶⁵ the famous war reporter killed in Siera Leone in 2000, explained the situation in October 1991 when Iraqi armies and Kurdish Peshmerga fought in the city of Sulaymaniyah. On a certain day, the Iraqi soldiers were overcome and many knelt down and laid down their weapons in surrender. They were pleading for mercy, while many others were dead. In essence, the battle was over; however, the Kurds with Kalashnikovs emptied magazine after magazine into the kneeling soldiers. Other Kurdish non-combatants joined the affray and used rocks to crash the heads of the Iraqi soldiers that were still alive but wounded. Within thirty minutes, all Iraqi soldiers, in the hundreds, were dead.

6.1.3.2 *Proportionality and restrictions on the means of warfare*

The reality of war dictates that sometimes civilian casualties will be incurred as collateral damage even when the target is a legitimate military objective; however, the issue of proportionality then comes to play when determining whether the collateral damage caused by the attack is enough to render the attack unlawful. It is thus illegal to launch an attack which is expected to cause death to civilians, injury or damage to

⁶⁵ Schork www.crimesofwar.org/thebook/hors-de-combat (Date of use: 21st July 2011).

civilian objects if such loss would be excessive in relation to the concrete and direct military advantage anticipated from the attack.⁶⁶

International Humanitarian Law prohibits all means and methods of warfare which fail to discriminate between those taking part in the fighting and those who are not, those that cause superfluous injury or unnecessary suffering and those that cause severe or long-term damage to the environment. International Humanitarian Law has therefore banned the use of many weapons, including exploding bullets, chemical and biological weapons, blinding laser weapons and anti-personnel mines.⁶⁷

6.1.4 Implementation of International Humanitarian Law

Given that this body of law applies during times of extreme violence, implementing the law will always be a matter of great difficulty. That said, striving for effective compliance remains as urgent as ever.

Common article 1 of the 1949 Geneva Conventions places an obligation upon states to ensure respect for International Humanitarian Law. This obligation is also found in the API (a 1(1)), and is also part of the customary international law as provided for in rule 139 of Customary International Humanitarian Law. The obligation by states to ensure compliance is not limited to the state's armed forces but extends to ensuring respect by other persons or groups acting under instructions, direction or control of the state.⁶⁸ The obligation to ensure respect does not depend on reciprocity, thus, even if the other party to the conflict does not abide, the obligation persists.⁶⁹ Common article 1 of the Geneva Conventions states that the high contracting parties are to ensure respect and

⁶⁶ Hayashi "The principle of civilian protection and contemporary armed conflict" in Hensel 119.

⁶⁷ Rules 70-86 ICRC *Customary International Humanitarian Law*.

⁶⁸ Rule 139 ICRC *Customary Humanitarian International Law*.

⁶⁹ Rule 140 ICRC *Customary Humanitarian International Law*.

compliance in all circumstances. In the *Namibia Case*⁷⁰ the United Nations Security Council resolved that the continued presence of South Africa within Namibia's territory was illegal, and that it was incumbent upon non-member states to give assistance in the action that the UN had taken with regards to Namibia.

The duty to implement International Humanitarian Law lies first and foremost with States. States are obliged to take practical and legal measures, such as adopting legislation to ensure compliance with International Humanitarian Law,⁷¹ translating the text of the Conventions for ease of understanding,⁷² spreading knowledge of the Conventions, training qualified personnel to facilitate the implementation of International Humanitarian Law, and appointing of legal advisors to the armed forces.⁷³ In particular, they must enact laws to punish the most serious violations of the Geneva Conventions and Additional Protocols, which are regarded as war crimes. The States must also pass laws protecting the Red Cross and Red Crescent emblems.⁷⁴

API article 89 provides that in the event of serious violations of the Protocol, state parties undertake to act, jointly or individually, in cooperation with the United Nations Organisation and in conformity with the United Nations Organisation Charter. International conferences have also appealed to states to ensure respect and compliance of International Humanitarian Law. In 1968, the International Conference on Human Rights in Tehran adopted a resolution noting that state parties to the Geneva Conventions sometimes failed:⁷⁵

⁷⁰ *Legal consequences for states of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion of 21 June 1971.*

⁷¹ A 49, 50, 129 & 146 common to all the four Geneva Conventions.

⁷² A 48, 49, 128 & 145 common to all the four Geneva Conventions.

⁷³ A 82 Protocol I.

⁷⁴ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005.

⁷⁵ ICRC *Customary International Humanitarian Law* (Vol.1) Rules, 510.

“... to appreciate their responsibility to take steps to ensure respect of these humanitarian rules in all circumstances by other states, even if they are not themselves directly involved in an armed conflict.”

In *Nicaragua Case (Merits)*,⁷⁶ the ICJ held that the duty to respect and ensure respect did not derive only from the Geneva Conventions, but from the general principles of humanitarian law, which the Conventions had merely expressed. The court thus concluded that the United States was under an obligation not to encourage the groups in the conflict in Nicaragua to violate the provisions of common article 3 of the Geneva Conventions. Similarly, the trial chamber of the International Criminal Tribunal for Former Yugoslavia in its judgments in the *Furundzija Case*⁷⁷ and *Kupreskic Case*⁷⁸ stated that the norms of international humanitarian law were norms *erga omnes* and therefore all states had a legal entitlement to demand their observance.

The implementation of International Humanitarian Law also suffers from attempts by some states to deactivate common article 3 by not recognising that hostilities on their own territories amount to non-international armed conflict. Conflicts in the Gaza strip, Indian Kashmir and Russia’s Chechnya have often been downgraded by the states concerned.⁷⁹

International Humanitarian Law provides for several specific mechanisms that help its implementation. Notably, states are required to ensure respect also by other states. Provision is also made for an enquiry procedure, a protecting power mechanism, and

⁷⁶ Case concerning military and paramilitary activities in and against Nicaragua (*Nicaragua v USA*) (1986) ICJ Rep.14 (Jun 27) www.icj-icj.org (Date of use: 16 October 2013).

⁷⁷ *Prosecutor v Anto Furundzija* (2002 121) International law reports 213.

⁷⁸ *Prosecutor v Kupreskic & others Case* (1998) ICTY IT-95-6 www.icty.org (Date of use: 20 July 2011).

⁷⁹ Cullen “Key developments affecting the scope of internal armed conflict in International Humanitarian Law” 2005 *Mil. L. Rev.* 82.

the International Fact-Finding Commission.⁸⁰ In addition, the ICRC is given a key role in ensuring respect for the humanitarian rules.⁸¹

6.1.5 Non-international armed conflict

Non-international armed conflicts are those restricted to the territory of a single state, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other. Internal armed conflicts are a rather complicated affair. While international armed conflict are usually fought between recognised international actors with territorial integrity, internal armed conflicts are fought between states and armed groups, sometimes very amorphous in nature. They vary from isolated but sporadic acts of violence to guerilla warfare and sometimes ultimate civil war. With such an uneven landscape, it has been difficult to come up with a coherent legal framework to govern such internal conflicts.⁸²

While the *jus in bello* originated from conflicts between states, it ended up admitting certain basic rules to be applied in internal armed conflicts.⁸³ The preamble to API provides for the application of the *jus in bello* in all circumstances:⁸⁴

“...the provisions of the Geneva Conventions... and of this protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the conflict or on the causes espoused or attributed to the parties to the conflict.”

⁸⁰ A 90 API.

⁸¹ ICRC *Customary International Humanitarian Law* (Vol 1) Rules, 505-510, a10, Geneva Conventions I, II & III, a 11, Geneva Convention IV.

⁸² Hensel 33.

⁸³ Bugnion 2003 *Yearbook of International Humanitarian Law* 167.

⁸⁴ API Para 5 of the preamble.

The 10th International Conference of the Red Cross held in Geneva in 1921 mandated the Red Cross to organise relief operations in non-international armed conflicts.⁸⁵ At the same time, the ICRC sought a legal framework to deal with internal armed conflicts. The 17th International Conference of the Red Cross meeting in Stockholm in 1948⁸⁶ first resolved to apply the entire Geneva law to internal armed conflicts, but the complexity of the situation soon made the conference realise that it was impossible to do so. International armed conflicts belonged to the same homogenous group, being fought between state actors, but the same could not be said of internal armed conflicts. The Conference resolved to adopt minimum rules that could be applied to internal armed conflicts, whatever the magnitude, duration or organisation of the insurgent party. This gave birth to common article 3 of the four Geneva Conventions regulating internal armed conflicts.

Article 3 is regarded as the minimum yardstick of treatment of civilians and those who are *hors de combat* in internal armed conflict. It has been accepted as part of customary international law. In *Prosecutor v Akayesu*, the International Criminal Tribunal for Rwanda (hereinafter “the ICTR”) stated as follows:⁸⁷

“It is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalised acts which if committed during internal armed conflict, would constitute violations of Common Article 3.”

Importantly, the Geneva Conventions are silent on what constitutes an armed conflict not of an international character. There have been arguments for and against this lack of definition. Some argue that defining this sort of conflict in the Conventions would

⁸⁵ Resolution IXV: “The Red Cross and civil war” 1921 *Tenth International Red Cross Conference* 217.

⁸⁶ A 4(2) of the Stockholm *Draft Revised and New Draft Conventions for the Protection of War Victims: Texts Approved and Amended by the XVIIth International Conference of the Red Cross* 1949 173.

⁸⁷ ICTR-96-4-T www.unictr.org (Date of use: 10 October 2013).

have resulted in confusion because no definition would exhaustively cover all imaginable manifestations of this type of conflict.⁸⁸ Any definition may also have led to a restrictive interpretation.⁸⁹

This non-definition has allowed states to evade their responsibility, more so because applying article 3 to insurgents is tantamount to recognising their authority, and states fighting such insurgents will not want to do so. For instance, during the civil wars in Russia, China and Spain, the governments concerned refused blatantly to recognise the belligerents, resulting in the massacre of countless prisoners.⁹⁰ While this may be politically understandable, it is worth noting that the recognition of the existence of an internal armed conflict does not lie on the state involved in the conflict, indeed ICRC has stated as follows:⁹¹

“The ascertainment whether there is a non-international armed conflict does not depend on the subjective judgment of the parties to the conflict; it must be determined on the basis of objective criteria”

Despite its shortcomings, article 3 has been hailed as a step in the right direction.⁹² APII attempted to cure the malady of non-definition by providing that it was to apply to situations not covered by API, which covered international armed conflicts.⁹³ Article 1(1) of APII states that it applies only to armed conflicts which take place in the territory of a state party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory so as to enable them to carry out sustained and concerted military

⁸⁸ Moir *Law of Internal Armed Conflict* 345.

⁸⁹ Castren *Civil War* 85.

⁹⁰ Bugnion 2003 *Yearbook of International Humanitarian Law* 181.

⁹¹ ICRC *Working Paper* 1999.

<http://www/occmpw/prg/documents/precom/papersonprepcomissues/ICRCWorkPaperArticle8Para2e.pdf> (Date of use: 30 October 2013).

⁹² Higgins “Internal War and International Law” in Black & Falk *Future of the International Legal Order* 88.

⁹³ A 1(1).

operations. The Protocol also provides that it will not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”⁹⁴ For instance, a small number of individuals attacking a police station would not be considered an armed conflict.

It is noteworthy however that sometimes the line between internal disturbances and internal armed conflict is very thin. Wars of national liberation against colonial domination, alien occupation and racist regimes are considered international armed conflicts,⁹⁵ and the ICRC considers this a closed list.⁹⁶ Indeed, Green says as follows:

“So long as an internal conflict is directed towards self-government, the Protocol provides for its recognition as an international conflict governed by the Conventions and the Protocol, as well as the ordinary law regarding international armed conflicts.”⁹⁷

The ICTY in the *Tadic* case acknowledged that the concept of serious violations of laws and customs of war applied even for non-international armed conflicts. It defined non-international armed conflict as “protracted armed violence between governmental authorities and organized armed groups or between such groups”.⁹⁸ This definition has influenced subsequent jurisprudence on internal armed conflicts, including the formulation of the Rome Statute 1998. This statute allows the International Criminal

⁹⁴ A 1(2).

⁹⁵ A 1(4) Additional Protocol I.

⁹⁶ ICRC *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* 54.

⁹⁷ Green “Strengthening legal protection in internal conflicts: Low-intensity conflict and the law” 1997 *Ilsa J. Int'l & Comp. L.* 503.

⁹⁸ *Prosecutor v Dusko Tadic* “Decision on the defence motion for interlocutory appeal on jurisdiction” (1995) ICTY IT-94-1 para 134.

Court (hereinafter “the ICC”) to impose penalties for war crimes committed during an internal armed conflict.⁹⁹

Cullen contends that the ICTY definition summarised four reasons for extension of International Humanitarian Law to cover insurgencies. One is that civil wars are now more frequent because of increasing tension amongst populations over decreasing resources and easy access to arms. Secondly, these conflicts have become more cruel and protracted, involving larger segments of the population of a state. Thirdly, states have become so interdependent that conflict in one state will be felt by other states. Therefore the affected states cannot afford to be indifferent. Finally, the growth of the international human rights regime means that a state’s sovereignty is not a bar to intervention when there is evidence of gross abuse of rights, even if it is within that state’s borders.¹⁰⁰

In non-international armed conflict, combatant and prisoner of war status are not provided for, because states are not willing to grant members of armed opposition groups immunity from prosecution under domestic law for taking up arms. Members of organised armed groups are entitled to no special status under the laws of non-international armed conflict and may be prosecuted under domestic criminal law if they have taken part in hostilities.¹⁰¹ However, the International Humanitarian Law of non-international armed conflict – as reflected in common article 3 of the Conventions and the APII, where applicable, and customary international humanitarian law – as well as applicable domestic and International Human Rights Law all provide for rights of detainees in relation to treatment, conditions and due process of the law. Imperatively, article 3 does not deal with the situation prevailing at the end of the hostilities.

⁹⁹ A 8(2) (c).

¹⁰⁰ Cullen 2005 *Mil. L. Rev.* 105.

¹⁰¹ Bugnion 2003 *Yearbook of International Humanitarian Law* 184. See also a 8(2)(c), Statute of the International Criminal Court.

6.2 THE INTERPLAY BETWEEN INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

International Human Rights Law and International Humanitarian Law are two distinct regimes of protection rights, with different origins. As discussed in chapter three above, modern human rights have their origin in the natural rights era of attributing rights to a supernatural being, and the social contract theories.¹⁰² International Humanitarian Law on its part derives from the reciprocal behavior of warring parties and their desire for chivalry and civilisation during war. The main motivation was not rights, but that of humanity even in the midst of raging conflict.¹⁰³ Meron aptly describes International Humanitarian Law thus:¹⁰⁴

“Derived as it is from the medieval tradition of chivalry, it guarantees a modicum of fair play. As in a boxing match, pummeling the opponent's upper body is fine; hitting below the belt is proscribed. As long as the rules of the game are observed, it is permissible to cause suffering, deprivation of freedom, and death.”

The development of International Humanitarian Law has been predicated on armed conflict atrocities and the attendant pain and suffering. The post-war analysis of the effects is what led International Humanitarian Law players to question whether there was balance between military necessity and restraint, in line with the preamble to the Hague Convention (No. IV) on the Laws and Customs of War on Land, which acknowledged “the desire to diminish the evils of war, as far as military requirements permit”.

¹⁰² See ch 3 para 3.4.1 above.

¹⁰³ Droege “The interplay between international humanitarian law and international human rights law in situations of armed conflict” 2007 (40) *Isr. L. Rev.* 313.

¹⁰⁴ Meron “The humanization of humanitarian law” 2000 *Am. J. Int'l L.* 240.

International Human Rights Law deals with the inherent rights of persons, the governed, to be protected from the arbitrariness of the governor. International Humanitarian Law on the other hand deals with the conduct of armed conflict. However, the two branches of law have inevitably had their meeting points. They both share a common ideal of upholding the integrity and dignity of the human person though at different times.¹⁰⁵

Unlike International Human Rights Law which protects human dignity and physical integrity under all circumstances, the International Humanitarian Law tolerates killing of combatants and other innocent persons even though they are not directly taking part in the armed conflict, such as civilians caught up as collateral damage, subject to principle of proportionality. It also allows deprivation of certain freedoms, by allowing for internment of persons by an occupying power,¹⁰⁶ which can also limit freedoms of expression and assembly.

Humanitarian law was developed for emergency situations and therefore no derogation is allowed.¹⁰⁷

6.2.1 Points of convergence

There have been many instances where the International Humanitarian Law and the International Human Rights Law have complimented each other in a symbiotic relationship. Indeed, the International Criminal Tribunal for the Former Yugoslavia (hereinafter “ICTY) commented on this relationship in *Furundijja* case, where the ICTY emphasised that the general principle of respect for human dignity was the “basic underpinning” of both International Human Rights Law and International Humanitarian Law. The court further said that the essence of both bodies of law was the protection of

¹⁰⁵ Droege 2007 *Isr. L. Rev.* 311.

¹⁰⁶ A 42 & 43 GCIV.

¹⁰⁷ Meron 2000 *Am. J. Int'l L.* 267.

the human dignity of every person, to shield human beings from outrages upon their personal dignity directed at the physical body, the honour or mental well being of the person.¹⁰⁸

Heintz opines that International Human Rights Law provides a more exact formulation of state obligations of International Humanitarian Law, thus strengthening the latter.¹⁰⁹

Both International Human Rights Law and International Humanitarian Law recognise the right to life, the prohibition of torture and cruel, inhuman, or degrading treatment or punishment; arbitrary arrest or detention; discrimination on grounds of race, sex, language, or religion; and due process of law.¹¹⁰

The first three Geneva Conventions dealt with ameliorating the suffering of injured combat forces and prisoners of war. The treatment to be accorded to persons under the Conventions was not necessarily seen as creating a body of rights to which those persons were entitled.¹¹¹ However, the GCIV brought human rights close to humanitarian law by providing for civilian protection. Article 3 common to the four Geneva Conventions dealing with non-international armed conflicts also sought to protect those not taking active part in hostilities.

Common article 3(1)(d) makes reference to “a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples” with regard to treatment of persons not actively taking part in armed hostilities in non-international armed conflict. This must envisage courts established by International

¹⁰⁸ *Prosecutor v. Furundija* No. 1T-95-17/1-T Judgment Para. 183 (10 December 1998).

¹⁰⁹ Heintz “On the relationship between human rights law protection and international humanitarian law” 2004 *IRRC* 795.

¹¹⁰ Droege 2007 *Isr. L. Rev.* 317.

¹¹¹ Meron 2000 *Am. J. Int'l L.* 251.

Human Rights Law. The same standard of judicial process is used in article 84 of the Third Geneva Convention (hereinafter “GCIII”) in treatment of prisoners of war.

In cases of prolonged military occupation, International Humanitarian Law is to be applied alongside International Human Rights Law.¹¹² Both bodies of law were applied during the armed conflict in Kuwait, and this application has been argued to have been both “feasible and meaningful”.¹¹³

There have also been instances when the UN Security Council have advocated for application of both branches of law. In 1967, during the Israeli-Egyptian war, the Security Council stated that “essential and inalienable human rights should be respected even during the vicissitudes of war.”¹¹⁴ In 1996, the Council via resolution 1041 called on all factions in Liberia to respect both Humanitarian Law and Human Rights Law.¹¹⁵

One of the fundamental human rights documents, the UDHR, was born out of atrocities of war, namely the Second World War. The unprecedented death of civilians brought about the need to come up with an instrument immortalising the basic rights of every human being. The United Nations awoke to the reality that human rights were relevant even during armed conflict. It started invoking the respect of human rights during and after armed conflicts. By resolution 2765, the UN General Assembly recognised as part of the basic principles for protection of human rights during armed conflict that “fundamental human rights, as accepted in international law and laid down in

¹¹² Heintz 2004 *IRRC* 796.

¹¹³ Kälin (ed.) *Human Rights in Times of Occupation: The Case of Kuwait* 27.

¹¹⁴ SC Res. 237 of 1967 http://www.un.org/depts/dhl/resguide/r25_en.shtml (Date of use: 16 September 2014).

¹¹⁵ SC Res. 1041 of 1996 http://www.un.org/depts/dhl/resguide/r25_en.shtml (Date of use: 16 September 2014).

international instruments, continue to apply fully in situations of armed conflict.”¹¹⁶ The UN has been investigating breach of human rights during armed conflict in many countries.¹¹⁷

The two Additional Protocols to the Geneva Conventions also brought out the nexus between these two branches on international law. Indeed, Droege says the following of this nexus:¹¹⁸

“The two Additional Protocols of 1977 owed an undeniable debt to human rights, in particular by making some rights which are derogable under human rights law non-derogable as humanitarian law guarantees. Both Additional Protocols acknowledge the application of human rights in armed conflict... Since then, the application of human rights in armed conflict is recognised in international humanitarian law.”

International human rights law has influenced the development of customary rules of international humanitarian law. Courts and tribunals have permanently embedded these rules into the international legal realm. The ICTY and the ICTR are examples of how criminal tribunals have decided otherwise humanitarian law issues by relying on human rights law.¹¹⁹

The enforcement of International Humanitarian Law has always been problematic, partly because breaches of this law are well assessed once the effects of the war, such as displacement of populations, start manifesting themselves. Human rights bodies have sought to fill in the inadequacies of humanitarian law. Indeed, it has been said that the

¹¹⁶ GA Res. 2675 (XXV), “Principles for the Protection of Civilian Populations in Armed Conflict” http://www.un.org/depts/dhl/resguide/r25_en.shtml (Date of use: 16 September 2014).

¹¹⁷ Droege 2007 *Isr. L. Rev.* 315.

¹¹⁸ Droege 2007 *Isr. L. Rev.* 316.

¹¹⁹ Meron 2000 *Am. J. Int'l L.* 244.

development of International Humanitarian Law had stalled until it was revived by the influence of human rights movements.¹²⁰

Many international and regional human rights instruments have incorporated both International Human Rights and the International Humanitarian Law in their provisions. To mention but a few, the UNCRC provides in article 38 that parties are to respect and ensure respect for rules of International Humanitarian Law applicable to them in armed conflicts which are relevant to the child. The Rome Statute 1998 in many of its provisions effectively marries provisions of International Humanitarian Law and International Human Rights Law in dealing with individual criminal responsibility. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000 (hereinafter “OPAC”) provides in its preamble that states are obligated to abide by International Humanitarian Law.

Article 72 of API also provides that the rules in that section are additional to applicable rules of international law relating to the protection of fundamental human rights during international armed conflict. Article 15 of the European Convention of Human Rights (hereinafter “the ECHR”) provides clearly that cases of death as a result of legal acts of war are not to be regarded as a violation of the right to life spelled out in Article 2 of the Convention.

The ICCPR obligates states that declare an emergency to inform the UN Secretary General of the human rights law obligations that they are derogating from, and the reasons for so doing.¹²¹ The ICCPR is deemed to apply to situations of armed conflict.¹²²

¹²⁰ Meron 2000 *Am. J. Int'l L.* 247.

¹²¹ A 4(3).

¹²² General Comment of the Human Rights Committee UN Doc. CCPR/C/74/CPR.4/Rev.6.

Article 27 of the American Convention on Human Rights provides for derogation of rights in times of war, in accordance with set rules of international law.

There are many other provisions of International Humanitarian Law which can be said to impliedly lean on International Human Rights Law. For instance, article 55 of the GCIV provides that the occupying power must provide food and medical supplies to the population. The standards that the occupying power would be expected to abide by are those set out in the International Covenant on Economic, Social and Cultural Rights. In the same thread, prohibition of rape, (article 27 of the GCIV) and the separation of rape from torture must be seen against the provisions of the UN Convention against Torture, which is also a human rights treaty.¹²³

International Humanitarian Law has been said to be *lex specialis*; if it provides more detailed and appropriate provisions to address a situation during armed conflict, then it overrides the norms of International Human Rights Law. In any other situation, the latter standards fill the inadequacy of former.¹²⁴

The International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion dealt with the nature of the relationship between International Humanitarian as *lex specialis* and Human Rights Law in an international armed conflict when it ruled:¹²⁵

“[T]he protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of article 4 of the Covenant whereby certain provisions may be derogated from in a time of national

¹²³ Kälin (ed) *Human Rights in Times of Occupation: The Case of Kuwait* 27.

¹²⁴ Knäble “The relationship between international humanitarian law and international human rights law in situations of armed conflict
<https://cdn.auckland.ac.nz/assets/nzpgjournal/Subscribe/Documents/2006-2/1-PatrickHRHL.pdf> (Date of use: 23 September 2014).

¹²⁵ *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion ICJ Rep 1996 (1), 226, 240, para 25.

emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”

The ICJ in *Wall Advisory Opinion* demonstrated the principle of *lex specialis* in dealing with the right not to be arbitrarily deprived of one's life in article 6(1) ICCPR:¹²⁶

“In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”

The Court in this case reaffirmed the decision in the *Legality of the Threat or Use of Nuclear Weapons* case though in a different way, by stating that it had to take into consideration both these branches of international law, namely Human Rights Law and, as *lex specialis*, International Humanitarian Law.¹²⁷

The ICJ also stated that there were three possible situations as regards the relationship between International Humanitarian Law and International Human Rights Law:¹²⁸

“Some rights may be exclusively matters of [humanitarian law]; others may be exclusively matters of [human rights law]; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international

¹²⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004) 43 ILM 1009 para 75.

¹²⁷ *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* para 106.

¹²⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* para 113.

law, namely human rights law and, as *lex specialis*, international humanitarian law.”

The two branches of law have been used hand in hand so many times that it was said that finally the two bodies of law had fused, and that the human rights regime was setting general directions and objectives for the revision of the law of war.¹²⁹

Scobbie adequately sums up the relationship between the two branches when he says:¹³⁰

“[T]here are no general axiological principles that can determine this relationship ... the extent to which human rights apply during an armed conflict essentially depends on context and circumstances. Nevertheless the rulings by the International Court of Justice have legally entrenched the idea that there is some normative relationship between these two branches of law.”

Interestingly, some authors have faulted what they call the humanisation of the law of war. Meron thinks that humanisation may not be completely possible because to genuinely humanise humanitarian law, it would be necessary to extinguish all types of conflict,¹³¹ a rather ideal situation. He further opines that though progress has been made in bringing humanity to the law of war in areas such as the movement from an interstate to an individual-rights perspective, the decline of reciprocity, the growing concept of the inalienability of rights, personal autonomy, the redefinition of “protected persons”, thresholds of applicability, crimes against humanity, and due process, there is

¹²⁹ Draper “The Relationship between the Human Rights Regime and the Laws of Armed Conflict” 1971 (1) *Isr. Y.B. Hum. Rts.* 191.

¹³⁰ Scobbie “Human rights protection during armed conflict: What, when and for whom?” in De Wet & Kleffner (eds) *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* 8.

¹³¹ Meron 2000 *Am. J. Int'l L.* 241.

still pending work, such as expanding the notion of proportionality in the *jus ad belum*, and providing for better and broader protections for combatants.¹³²

Meron has singled out four areas of difficulty in application of humanitarian and human rights norms as follows: (1) where the threshold of applicability of international humanitarian law is not reached or is disputed; (2) where the state in question is not a party to the relevant treaty or instrument; (3) where derogation from the specified standards is invoked; and (4) where the actor is not a government, but some other group.¹³³

The desire to cure this difficulty, especially for armed conflicts that did not reach the minimum threshold of either AP II or common article 3, led to a debate on the possibility of coming up with minimum irreducible norms from which no derogation was allowed. This culminated in the Turku Declaration on Minimum Humanitarian Standards, adopted by an experts meeting in Finland in 1990, in recognition of the fact that “international law relating to human rights and humanitarian norms applicable in armed conflicts do not adequately protect human beings in situations of internal violence, disturbances, tensions and public emergency.”¹³⁴ The UN took over the debate on these minimum standards in 1995.¹³⁵

That said, the reality of our world is that despite the expansion of humanitarian law into the human rights arena, conflicts are still raging, most of them characterised by intimidation, brutalisation, torture and killing of helpless civilians in situations of armed conflict. Terrorism is currently testing the limits of the law of war, especially because these non-clandestine groups have no regard for humanitarian war. The displacement of Yazidis and the possibility of genocide by the newly declared Islamic State in Iraq and

¹³² Meron 2000 *Am. J. Int'l L.* 276.

¹³³ Meron 2000 *Am. J. Int'l L.* 274.

¹³⁴ Crawford “Road to nowhere? The future for a declaration on fundamental standards of humanity” 2012 <http://ssrn.com/abstract=1987842> (Date of use: 20 September 2014).

¹³⁵ Crawford <http://ssrn.com/abstract=1987842> (Date of use: 20 September 2014).

Syria (hereinafter “ISIS”) in Iraq, killing of minority Christians in Syria and the brutal beheading of journalists (who are civilians according to International Humanitarian Law) kidnapped in the field¹³⁶ is a testament of non-state actors who pose the greatest challenge of our time as far as implementation of the law of war is concerned.

6.3 THE PROTECTION OF CHILDREN UNDER INTERNATIONAL HUMANITARIAN LAW

“To kill the big rats, you have to kill the little rats”. This statement was reported by Radio Mille Collines during the 1994 Rwanda genocide.¹³⁷ It is just a reflection of the fact that children are targeted in many conflict situations, sometimes specifically, other times as secondary targets.

Under International Humanitarian Law, children are protected first and foremost as civilians, and therefore rules of proportionality and distinction apply to them as well. When the Geneva Conventions and other instruments that form the *jus in bello* were enacted, there was no specific mention of children, and thus children are protected by these instruments by their inclusion amongst other civilians. The four Geneva Conventions¹³⁸ codified requirements of distinguishing between civilians, combatants and persons who were *hors de combat*.¹³⁹ Article 3 common to all four Conventions deals with the treatment of persons not taking part in the hostilities. This article has been hailed as a beacon for the protection of children in conflicts of a non-international nature.

¹³⁶ CNN “Why is ISIS so brutal” <http://edition.cnn.com/2014/09/04/opinion/ghitis-isis-brutality/index.html> (Date of use: 20 September 2014).

¹³⁷ www.unicef.org/sowc96/1cinwar.htm (Date of use: 30 October 2013).

¹³⁸ These are the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Third Geneva Convention relative to the Treatment of Prisoners of War, and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, all of August 12, 1949.

¹³⁹ See para 6.1.3.1.2 above.

Predominantly women and children are the ones who retain the status of non-combatants, and who remain in the territory of conflict. Since World War II, eighty percent of war casualties have been women and children.¹⁴⁰ Protection of children during armed conflict has however risen above that of other non-combatants, and they have been given special mention in International Humanitarian Law.

This section will confine itself to some of the instances when children have been mentioned as such. The discussion will obviously overflow to the International Human Rights Law rules that overlap with International Humanitarian Law in the protection of children. International Humanitarian Law seeks to protect children from the effects of combat and to prevent involvement of children under 15 years in armed hostilities.¹⁴¹

6.3.1 Protection of children from effects of combat

The GCIV, which deals specifically with the protection of civilians, has in several articles provided for the protection of children caught up in armed conflict. Article 14 of the GCIV encourages parties in occupied territories to establish hospitals and safety zones to protect children and mothers of children below seven years from the effects of war. Article 17 provides for the evacuation of children and pregnant women, amongst other non-combatants. Article 23 obligates parties to allow passage of medical supplies, food and clothing for children below 15 years and pregnant women, among others. Article 24 provides that children below 15 years who are orphaned or separated from their families are not to be left alone but are to be provided for as far as possible; educational tasks for such children must be entrusted to persons of the same cultural tradition as the parents. Article 38(5) provides that children below 15 years, pregnant mothers and mothers of children below seven years are to be given preferential treatment similar to that given to nationals of states concerned during repatriation. Article 50 obligates

¹⁴⁰ Maher 1989 *B. C. Third World L. J.* 297.

¹⁴¹ Vite "Protecting children during armed conflict: International humanitarian law" 2011 *Hum. Rts. & Int'l Legal Discourse* 20.

occupying powers to provide institutions for children. Article 82 provides that in case of internment, children are to be interned with their parents and families, and are not to be separated. Article 89 provides that children under 15 and pregnant mothers are to be given additional food according to their physiological needs. Article 94 provides that the detaining power is to ensure education of children under its care, while article 94 obligates states to look at the recreational needs of children. Article 132 obligates detaining powers to give priority to children, mothers of infants and pregnant mothers in concluding agreements for their release or accommodation in a neutral country.

While allowing for placement of children in a neutral country, the protecting power must give consent and must be able to provide maintenance and education of the children. Children are best protected if they remain with their parents, but when families have been separated, the law requires that those in the conflict area or in an occupied territory be allowed to send news of a strictly personal nature to members of their families.¹⁴² Parties to international armed conflicts must also facilitate individual enquiries aimed at renewing family contacts.¹⁴³

GCIV mainly deals with children in occupied territories but API and APII expanded that scope. Article 48 of API obligates distinction between civilians and military targets. Article 76 of API, while dealing with the protection of women, gives special reference to pregnant mothers and women with infants as persons requiring utmost priority while in detention. In addition, the death penalty on this class of women is prohibited. The death penalty is also prohibited for children.¹⁴⁴

Article 77(1) of API provides that children are to be the object of special respect and are to be protected against any form of indecent assault. Parties to the conflict are obligated to provide them with the care and aid they require. Article 78 provides for the

¹⁴² A 25 GCIV.

¹⁴³ A 26 GCIV.

¹⁴⁴ A 77(5) AP I.

protection of children during evacuation, and provides that children are not to be evacuated to a foreign country unless temporarily, and that they shall be reunited with their parents as soon as possible. Even when in a protecting state, their needs such as education are to be met.

Article 4(3) of APII provides that children are to be provided with the care and aid they require during non-international armed conflicts. Article 6(4) prohibits the death penalty for children below 18 years and mothers of young children. This is a departure from GCIV and API which peg protection of children to the age of 15 years.

The two APs have been criticised as not affording sufficient protection for children. Robinson concurs with Hamilton and El-Haj,¹⁴⁵ who concluded that the value of article 77 of API for children is minimal for the following reasons:¹⁴⁶

- Article 77(1) does not define the meaning of children being the objects of special respect.
- The term “protection” as used in article 77 of API reflects a compromise between humanitarian ideals and military necessity, and is not in tandem with the “protection” given in international children’s instruments. Article 77 would, therefore still allow for loss of civilian life, provided it is not excessive in relation to the anticipated advantages. This article therefore does not uphold a child’s fundamental right to life.

¹⁴⁵ Hamilton and El-Haj “Armed conflict: The protection of children under international law” 1997 *The International J of Children's Rights* 22.

¹⁴⁶ Robinson “Children in armed conflict: An overview of relevant humanitarian law and human rights law” 2002 *J. S. Afr. L.* 699.

- The drafters of the APs did not make any reference to the 1959 Declaration on the Rights of the Child despite them knowing of its existence, and its preambular provision that mankind owes the child the best it has to give. Article 77 does not seem to uphold this notion.

APII is described as a watered down version of API because, although article 4(3) requires children to be provided with the care and need they require, it makes no mention of children's need for special respect and protection as does article 77 of API.¹⁴⁷

When children are evacuated to a foreign country for medical or security reasons, API requires states parties to ensure their education with the greatest possible continuity.¹⁴⁸ In the case of non-international armed conflicts, the pertinent legal framework is less detailed. APII stipulates that children must "receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care".¹⁴⁹

In addition, APII¹⁵⁰ does not apply to situations of internal disturbance and tensions such as riots, isolated and sporadic acts of violence and other acts of similar nature. This means that children caught up in a conflict that does not meet the international threshold have no recourse under the International Humanitarian Law and are left to the same state to protect them under their domestic laws.

For instance, the 2007-2008 post-election violence in Kenya affected many children, but it is as though the number of children affected by this violence did not count. The subsequent reports and narratives talked of a specific number of adults (or youths) and

¹⁴⁷ Robinson 2002 *J. S. Afr. L.* 700

¹⁴⁸ A 78 API.

¹⁴⁹ A 4(3) APII.

¹⁵⁰ A 1(2).

unnumbered children. It was as if their death was just peripheral. The reports mentioned an “unknown number of children was killed”, “unknown number of children was unaccounted for” among other such phrases.¹⁵¹ Schools were closed and children followed their parents to temporary camps. They began new life as internally displaced persons (“IDPs”), living in make-shift camps unable to afford even their basic needs. The government mechanisms for obtaining and distributing relief to them were very slow. They languished in camps for a long time before efforts to resettle them bore fruits.

6.3.2 Prevention of the involvement of children in armed conflict

The two APs impose an obligation on state parties to refrain from recruiting children below 15 years, and to accord special treatment to any children below 15 who have engaged in hostilities.¹⁵² Article 38(3) of the UNCRC provides that state parties are to take all feasible measures to ensure that persons below 15 years do not take direct part in hostilities, and they are to refrain from recruiting any person below 15 years into their armed forces.¹⁵³ OPAC raises the minimum age to 18 for compulsory recruitment¹⁵⁴

¹⁵¹ On New Year’s Day of 2008, the violence was escalating in an area called Kiambaa, situated on the outskirts of Eldoret town. This is a settlement scheme predominantly occupied by members of the Kikuyu community. According to eye witness accounts, houses were torched and residents sought refuge in a church, the Kenya Assemblies of God church. On the morning of 1 January 2008, the attackers approached the church, armed with bows, arrows, clubs and machetes. They doused blankets and mattresses with petrol and burnt the church. The few men around the church tried to protect the women and children holed up inside the church but were overpowered and killed. The raiders kept watch so that no one escaped from the burning inferno; anyone who tried to escape was shot with arrows and thrown back into the fire. In what must have looked like a scene from hell, women threw out their children to save them from the fire, but the raiders grabbed them and threw them back into the fire. 35 women and an unaccounted number of children died in the inferno; about 50 were badly injured. This incident became known as the Kiambaa tragedy (KNCHR [www.knchr.org/Portals/0/Reports para \[247\]](http://www.knchr.org/Portals/0/Reports%20para%20247.pdf) (Date of use: 18 September 2014)).

¹⁵² A 77(2) API, A 4(3)(c) APII.

¹⁵³ A 38(3).

¹⁵⁴ A 2.

and provides that those below 18 years are not to take direct part in hostilities.¹⁵⁵ Under OPAC, state parties are given a leeway to raise their minimum age for voluntary recruitment from 15 years.¹⁵⁶ The UNCRC, OPAC and API deal with direct involvement of children below 15 years in hostilities, but the APII, which deals with non-international armed conflict prohibits all participation in hostilities of children below the age of 15 years.

Regionally, the African Charter on the Rights and Welfare of the Child provides for state parties to refrain from recruiting children below 18 years.¹⁵⁷ In the context of international criminal law, the Statute of the International Criminal Court (1998) defines as a war crime the conscripting or enlisting and use for active participation in hostilities of children under the age of 15.¹⁵⁸ The ILO Convention No. 182 on the Worst Forms of Child Labour (1999) defines the forced or compulsory recruitment of children under 18 for use in armed conflict as one of the worst forms of child labour.¹⁵⁹

Rules 136 and 137 of ICRC Customary International Rules¹⁶⁰ provide that children must not be recruited into the armed forces, and they must not be allowed to take part in armed hostilities. ICRC has contended that these rules are binding on state and non-state parties to international instruments since they are part of customary international law; they apply to international and non-international armed conflict, and they do not distinguish between direct and indirect participation of children.¹⁶¹ Imperatively, customary law does not provide an age limit due to the varied state practice and arguments.

¹⁵⁵ A 1.

¹⁵⁶ A 3.

¹⁵⁷ A 2 & 21.

¹⁵⁸ A 8(2)(b)(xxvi).

¹⁵⁹ A 3(a).

¹⁶⁰ Henckaerts & Doswald-Beck (eds) *Customary International Humanitarian Law* Rules 136 & 137.

¹⁶¹ Vite 2011 *Hum. Rts. & Int'l Legal Discourse* 28.

Persistent conflicts all over the world and the effect they have on children have led to judicial recognition of the fact that children need specific protection in armed conflict situations. In one of its first pronouncements, the Special Court for Sierra Leone in *Prosecutor v Samuel Hinga Norman*¹⁶² (the Appeals Chamber) ruled that the recruitment of children under fifteen into armed forces or using them in combat is prohibited in customary international law, and also the subject of individual criminal responsibility.

Though the UNCRC has been hailed as a cross-breed of International Human Rights Law and International Humanitarian Law, it has been criticised many times as encouraging the recruitment of child soldiers. Article 1 defines a child as one below 18 years while article 3 provides that the best interests of the child must be a paramount consideration. However, article 38 (2) allows, implicitly, children between 15 and 18 years to take part directly in hostilities. Heintz opines that this standard counters the progressive codification of international public law and the goal of article 3, since it is not in the interests of the child to engage in hostilities.¹⁶³ Of course the passage of this Convention was accompanied by vigorous debate about the recruitment of children into armed forces, and the age when a child should be allowed to take part in hostilities. This led to a compromise situation of 15 years, though this appears to decrease the actual protection of children.¹⁶⁴

There has been an argument that the discourse on the prohibition of child recruitment has been advanced by NGOs who have an image of the child as a pure being incapable of evil and therefore entitled to protection, much like the philosophies that gave birth to the principle of the best interests of the child.¹⁶⁵ Children may not necessarily join armed groups out of coercion or poverty, they may join to fight injustice, or to enjoy new

¹⁶² Case No. SCSL-2004-14-AR72 (E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (Appeals Chamber, May 31, 2004) www.sc-sl.org (Date of use: 9 October 2013).

¹⁶³ Heintz 2004 *IRRC* 792.

¹⁶⁴ Maher 1989 *B. C. Third World L. J.* 309.

¹⁶⁵ See ch 5 para 5.3 above.

socio-economic status and other benefits of recruitment. The idea that the child soldier had no say in his recruitment is being challenged. Indeed, developmental psychology advocates for consideration of the cognitive and emotional abilities of children in considering their role in the recruitment.¹⁶⁶ Besides, domestic legislation confers criminal liability on children before the attainment of 18 years, and as such international law needs to take into account some of these realities especially in the face of traditional justice and for purposes of rehabilitation and re-integration.¹⁶⁷

Lee says as follows:¹⁶⁸

“What may seem to an outsider an abhorrent violation of rights may have been understood by the participants as a life-adventure and even a once-in-a-lifetime opportunity.”

However, although I am a proponent of the recognition of developmental differences in childhood, I would rather not dwell on this argument because of the deleterious effects it can have on the progress made so far in enforcing the prohibition of recruitment of child soldiers. I submit that recruiting a child to kill or be killed cannot be compared to deciding whether or not to avail contraceptives to the child.

¹⁶⁶ Vandenhole, Parmentier & Derluyn “International law on children and armed conflict: The interface between various normative frameworks” 2011 *Hum. Rts. & Int'l Legal Discourse* 5.

¹⁶⁷ Vandenhole, Parmentier & Derluyn 2011 *Hum. Rts. & Int'l Legal Discourse* 2.

¹⁶⁸ Lee “Understanding and addressing the phenomenon of ‘Child Soldiers’: The gap between the global humanitarian discourse and the local understandings and experiences of young people’s military recruitment” Working Paper Series No. 52, Refugee Studies Centre Oxford, Department of International Development, January 2009 www.rsc.ox.ac.uk (Date of use: 14 September 2014).

6.4 THE RELEVANCE OF THE BEST INTERESTS PRINCIPLE DURING CONFLICT

As stated earlier, International Humanitarian Law was originally designed to mitigate the effects of armed conflict; its philosophy is not that of protection of children's rights. The major principle in the children's rights philosophy of the "best interests of the child as a primary consideration in all actions" is not spelt out anywhere in International Humanitarian Law. The fact that killing is allowed in International Humanitarian Law subject to distinction and proportionality means that the best interests of the child is not the focal point of International Humanitarian Law.¹⁶⁹ When war breaks out, persons charged with the protection of civilians generally and children specifically do not focus on what is best for them, rather they focus on what is workable in the circumstances of conflict.

International Humanitarian Law directs states towards the protection of civilians (and imprisoned or wounded soldiers) of the enemy, rather than its own population. The logic is that states should protect their own population at any time in all circumstances, whether at war or not. This is customarily obvious and does not need special mention in war law conventions. Much of the benefit that has accrued to children in International Humanitarian Law has been as a result of the convergence between humanitarian and human rights norms.

Article 3(1) of the UNCRC addresses itself to all public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. They are bound to ensure that the best interests of a child are a primary consideration in all actions affecting the child. This requirement is relatively workable during peacetime, when the society is functioning normally. However, in times of armed conflict, the paradigm shifts, often to great disadvantage of children.

¹⁶⁹ Robinson 2002 *J. S. Afr. L.* 710.

The success of the application of the best interests principle is largely attributable to the courts that have unequivocally ordered parties to apply it, and the parties, well-aware of the threat of sanctions have no choice but to abide. However, when war sets in, the judicial system of government suffers alongside other government institutions, as there is often no one to issue or enforce court orders. For instance, In Somalia, institutions of proper governance were completely destroyed by civil war and it is only now that the Federal Government is seeking to re-establish them. In the case of armed conflict of a non-international nature, the belligerents often have no regard for the judicial system of the government that they are fighting. Further, many of them escape arrest by these governments; although in reality the motive of the government is not so much to arrest them but to kill them and suppress the insurgency. The international justice system, in the form of international courts, has tried to bridge this lacuna by providing for prosecution of these belligerents. However, these courts can only prosecute a few of them, and even then, it depends on their successful arrest.

Robinson¹⁷⁰ opines that the wording of article 3 of the UNCRC (“the best interests of the child shall be a primary consideration”) dilutes the spirit of the best interests principle. In essence it means that the best interests of the child are not the only parameter for consideration, but may be weighed against others. The Convention also lacks a derogation clause. This leaves a lacuna as to whether state parties are bound by the provisions in the event of an outbreak of hostility; and whether article 38 is the only relevant provision to be applicable during armed conflict. In addition, the different thresholds in various instruments dealing with children create uncertainty which is not in the best interest of the child. Robinson also proposes specific provisions for dealing with children affected by internal disturbances which do not qualify to be internal armed conflicts.¹⁷¹

¹⁷⁰ Robinson 2002 *J. S. Afr. L.* 709.

¹⁷¹ Robinson 2002 *J. S. Afr. L.* 710.

The drafters of the UNCRC must have intended that it would be in effect in peace times and during armed conflict. Ideally, a child has a right to political and socio-economic rights at all times. However, this is a romantic ideal; the very nature of armed conflict portends loss of life and disruption to well established social and cultural systems.

For child soldiers, there can be no consideration of best interests, when a soldier in the battle is facing a child combatant, keen on killing the soldier. As Dallaire puts it, a soldier in the heat of battle may not contemplate the humanity of his targets, even through the reality of death.¹⁷²

The graphic narrations of the suffering children in the two areas of the case studies highlighted in chapter two,¹⁷³ while painful, bring to the fore the reality of the dire situation children face during armed conflict. Scholars may engage in debates on the interpretation and application of the best interests principle, but for the suffering masses of children, the debates would just pass for mere rhetoric. For them, their best interests would dictate that they are not dragged into conflict and were allowed to grow up in normal environments to their full capacities.

The LRA, Al Shabaab and many other insurgents do not care about the UNCRC or other domestic and international instruments that deal with children's rights. In fact, I doubt whether they see "children" in the many innocents they abduct and convert to war robots. In their twisted minds, they see victory against their enemies, whatever they perceive that to be. They see pleasure in the girls that they abduct and make sex slaves.

One may argue that these instruments address themselves to conventional armies in armed conflict. However, it is hard to reconcile the best interests of a child with

¹⁷² Dallaire *They Fight Like Soldiers They Die Like Children* 187.

¹⁷³ See ch 2 para 2.2.1 & 2.2.2 above.

recruitment of children into the armed forces. Armed forces are designed for combat, it is either they kill or be killed. It is therefore not in the best interests of a child to be enlisted in a position that potentially portends death for this child; the best interests of a child dictate that the child must be allowed to live. The thin shroud that these armies use to justify the recruitment of children is that the child will not be allowed to take direct part in any hostility. Well-intentioned perhaps, but what happens in a situation where the army unit where the child is resident is attacked: would the child not get directly involved?

When a war is raging, everybody is concerned with their own survival. In many situations, it is deemed preferable to save the adult and leave the child, when one is confronted with such a choice. It may be argued that saving the adult is better because he or she may be relied upon by more members of the society than a child. It is only when the conflict has subsided and humanitarian agencies have stepped in that the child hopes to receive any consideration, and even then, the situation may be so dire that his or her interests count for nothing.

I conclude therefore that while the best interests principle may have been intended to protect all children, it does not count in armed conflict situations. Killing civilians even out of military necessity, occupying territories, interring children and recruiting them to fight does not speak of having their best interests as a primary consideration.

6.5 CONCLUSION: EMERGING TRENDS

From the mid 20th century, internal armed conflicts and the threat of terrorism have brought challenges of implementation of the law of war, and have introduced a new meaning to war. Terrorism has brought to the fore the doctrine of military necessity, which had been thought to be fading in the mid 20th century. This doctrine has been struggling for space in the *jus in bello*. It was invoked in 1854 by the United States to

defend the bombardment of Greytown, Nicaragua, by Great Britain to justify mining the North Sea during the First World War and by Germany to excuse the devastation of the Somme region during the retreat of 1917.¹⁷⁴

The terrorist attacks of 11 September 2001 against the United States have made the latter invoke a military stance of anticipatory self-defence and strategic necessity, whereby they combine preemption with preventive military action. A preemptive attack entails the use of force to quell or mitigate an impending strike by an adversary. Preventive action entails the use of force to eliminate any possible future strike, even when there is no reason to believe that aggression is planned or the capability to launch such a strike is operational.¹⁷⁵ For global actors like the United States, the fear that terrorists may lay their hands on weapons of mass destruction makes the defence of necessity even more urgent.¹⁷⁶

The logic behind preventive military action can be traced as far back as 150 BC. The Romans and the Greeks preferred fighting decisively, meeting the enemy head-on in the hope that a looming threat could be eliminated with a single blow. The Romans distinguished between *bellum* and *guerra*; *bellum* was conducted against states according to rudimentary laws of warfare, *guerra* was waged against non-state actors, including irregular armed forces of barbarian tribes, pirates and brigands, and *guerra* had little restraint if any.¹⁷⁷

What makes the war against terrorism so asymmetrical is the fact that terrorists are clandestine non-state actors who have absolutely no regard for international humanitarian law. It entails the deliberate use or threat of violence against noncombatants, calculated to instill fear, alarm and ultimately a feeling of helplessness

¹⁷⁴ Rodick *The Doctrine of Necessity in International Law* 46.

¹⁷⁵ Kegley "Global terrorism and military preemption: Policy problems and normative perils" 2004 *International Politics* 37.

¹⁷⁶ Hensel 13.

¹⁷⁷ Hensel 11.

in an audience beyond the immediate victims. An act of terrorism leaves people feeling that this threat is unpredictable, unavoidable and unpreventable.¹⁷⁸

The Committee on the Use of Force¹⁷⁹ in its final report on the meaning of armed conflict in international law presented to the Hague Conference 2010 submitted that war on terrorism cannot be considered as armed conflict, but it opened possibilities of new instruments to govern it. This however was in the backdrop of the 2001 terrorist attacks in the US and the position taken by the US government that it was in armed conflict with Al Qaida and its allies wherever they were to be found. The Committee observed that the 2001 attacks were similar in character to the London attacks (2005), Madrid attacks (2004) and the Bali attacks (2002), which were responded to by police officers.¹⁸⁰ However, with the emerging scenarios of ISIS establishing a caliphate and having an armed force, this definition by the Committee is likely to change. Indeed, terrorism is opening new frontiers that International Humanitarian Law will definitely have to wade in. Terrorism is challenging not just the laws of war, but the very democratic principles on which many nations are founded. However, this is a discussion for another day.

This strategic necessity has been justified by statements such as “the circumstances left no choice but action X.” Moral duty is therefore totally ignored. Unfortunately, history has shown that the behavior of the powerful impacts heavily on international law norms. Therefore, if the United States pleads necessity, other states are likely to do the same

¹⁷⁸ Hensel 11.

¹⁷⁹ The Committee was established in 2005 by the International Law Association (ILA). ILA was founded in 1873, with objectives to study, clarify and develop public and private international law, and to further international understanding and respect of international law. It has consultative status, as an international non-governmental organisation, with a number of the United Nations specialised agencies
<http://www.ila-hq.org/en/committees/index.cfm/cid/1022> (Date of use: 23 September 2014).

¹⁸⁰ Vasiliauskiene “Armed conflict in the fight against terrorism” 2011 *Baltic Y.B. Int'l L.* 200.

even when dealing with lesser adversaries. As Hoffman has observed, “rules of behaviour tend to become rules for behaviour”¹⁸¹

States may not only reduce their restraint when responding to provocation, they may also return to a permissive interpretation of military necessity on how to use force. One can only hope that the rules of war are still going to be adhered to, as Taylor stated:

“Violated or ignored as they are, enough of the rules are observed enough of the time so that mankind is very much better off with them than without them”.¹⁸²

Besides, international humanitarian law has protected its subjects many times, and as Baxter said, “A little less talk about the obsolescence of the laws of war might be welcomed by the victims of war.”¹⁸³

¹⁸¹ Hoffman “International systems and the control of force” in Deutsch & Hoffman (eds) *The Relevance of International Law* 34.

¹⁸² Taylor *Nuremberg and Vietnam: An American Tragedy* 40.

¹⁸³ Baxter “A wearied word on the law of war” 1965 *Am. J. Int'l .L.* 920.

CHAPTER SEVEN

INTERNATIONAL MECHANISMS FOR PROTECTING CHILDREN AFFECTED BY ARMED CONFLICT

7.1 INTRODUCTION

One of the paradoxes of life is that despite how horrific something is, there is always some good that comes out of it. The same can be said of children affected by armed conflict. The last century has seen many people of goodwill come up with ideas to stop wars or ameliorate the suffering caused by war, though unfortunately, conflicts seem to multiply by the day. This chapter looks at the institutions dealing with enforcement and oversight of implementation of International Humanitarian Law for the protection of children caught up in armed conflict situations.

There are different enforcement mechanisms arising from the various efforts to deal with children affected by armed conflict. They include the International Criminal Court (hereinafter “the ICC), treaty monitoring bodies (the Committee on the Rights of the Child and the ILO Committee of Experts on the Application of Conventions and Recommendations), the Special Representative of the Secretary-General for Children and Armed Conflict and the Security Council Working Group.

The International Committee of the Red Cross (hereinafter “the ICRC”) is the main watchdog overseeing the implementation of humanitarian law. It visits detainees, promotes protection of civilians and restores families.¹ This chapter will focus on the

¹ This role was recognised in the Geneva Conventions (common A 3, common A 126 GCIII and 143 GCIV), as well as in the Statutes of the International Red Cross and Red Crescent Movement (A 5).

ICRC oversight duties, the ICC and the mechanisms put in place by the UN, by way of overview.

7.2 THE INTERNATIONAL COMMITTEE OF THE RED CROSS

Henry Dunant,² after publishing his book on Solferino³ founded the “Committee of the Five” together with four other influential figures in Geneva as an investigatory commission of the Geneva Society for Public Welfare in 1863.⁴ The committee was later renamed “International Committee for Relief of the Wounded” and organised its first conference in Geneva the same year. The conference adopted resolutions on the founding of national relief societies for wounded soldiers and the introduction of a common distinct protection symbol for medical personnel in the field. The adoption of the “red cross” symbol later led to the current name, the International Committee of the Red Cross (hereinafter “the ICRC”).⁵

The ICRC is credited with the law of war since it was during its conferences that the Geneva and Hague Conventions⁶ were formulated. The ICRC is an independent, impartial and neutral organisation with an exclusively humanitarian mission to protect

² See ch 6 para 6.1.

³ Dunant *A Memory of Solferino* 9.

⁴ Baxter 1977 *BAAAS* 6.

⁵ www.icrc.org (Date of use: 8 October 2013.)

⁶ They include the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1864, the Declaration of St Petersburg (prohibiting the use of certain projectiles in war) 1868, the Hague Conventions Respecting the Laws and Customs of War on Land 1899, the Convention for the Adaptation of Maritime Warfare of the Principles of the Geneva Convention 1864, the 1906 Review and Development of the 1864 Geneva Convention, the 1907 Review of The Hague Conventions of 1899, the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare 1925, the Geneva Convention relating to Treatment of Prisoners of War 1929, and the Four Geneva Conventions 1949.

the dignity of victims of armed conflict and other situations of violence.⁷ It has indeed played a significant role in the development of International Humanitarian Law.

In 1919, representatives of the Red Cross national societies from Britain, France, USA, Italy and Japan formed the League of Red Cross Societies whose main aim was to expand humanitarian relief to other disasters in addition to armed conflict. They later combined with other national societies who were using the symbol of the Red Crescent. In 1991, the name of the League was changed to International Federation of the Red Cross and Red Crescent Societies. In 1997, the Federation and ICRC signed the Seville Agreement,⁸ which specified the definite roles of the two groups in order to bring an end to the controversy that had lingered since the inception of the League. The Federation, the ICRC and National Societies have been involved in lobbying for the minimum age of recruitment to armed forces to be 18 years.⁹

The ICRC is guided by seven principles: humanity, impartiality, neutrality, independence, voluntary service, unity and universality.¹⁰ Humanity is the supreme of the principles, in recognition of the equality of all human beings and the need to alleviate suffering. The ICRC has earned recognition as one of the neutral humanitarian organisations that is allowed into areas of armed conflict without much ado. In accomplishment of its vocation, it uses four approaches:¹¹

- The protective approach, aimed at protecting the lives and dignity of victims of armed conflict and other violent situations. It focuses on causes and consequences

⁷ www.icrc.org (Date of use: 8 October 2013).

⁸ Forsythe *The Humanitarians: The International Committee of the Red Cross* 124.

⁹ The twenty-sixth international Conference of the Red Cross and Red Crescent in December 1995 recommended, *inter alia*, that parties to conflict take every feasible step to ensure that children under the age of 18 years do not take part in hostilities.

¹⁰ Preamble to the Statutes of the Movement.

¹¹ www.icrc.org (Date of use: 8 October 2013).

of the conflict and aims at ensuring that the perpetrators stop further assault on lives and persons of victims.

- The assistance approach, aimed at assisting the victims so as to restore their dignity.
- The cooperation approach, aimed at directing and coordinating international relief efforts by increasing operational capacities of national societies.
- The preventive approach, aimed at preventing suffering by promoting, reinforcing and developing international humanitarian law and universal humanitarian principles. They seek to influence people who have a direct or indirect impact on the lives of those suffering as a result of armed conflict.

It is a solid fact that the ICRC has become synonymous with relief during armed conflict and natural disasters. Indeed, in its 2012 annual report, it indicated that it was involved in 80 countries, with the bulk of its work based in Afghanistan, Syria, Somalia, the DRC, the Central African Republic and Iraq amongst others. Most of these countries are not yet out of the woods, they are still a work in progress. Sadly, it was also noted that the ICRC and national societies had lost some of its workers in Afghanistan, Syria and Somalia.¹² This is in spite of having an internationally recognised emblem which is protected under International Humanitarian Law.¹³ These losses are a clear indication that some parties to conflict do not obey the laws of war.

Unfortunately, the ICRC also has its limits, for example, it cannot publicly condemn those responsible for violations of International Humanitarian Law so that it retains its neutrality, except in very confidential bilateral dialogue with all parties to the conflict. In

¹² www.icrc.org/eng/resources/documents/news-release/2013/06-27-annual-report-2012.htm (Date of use: 8 October 2013).

¹³ A 38 of GCI, a 41 of GCII.

addition, for non-international armed conflict, the ICRC can only offer services subject to the consent of the parties involved.¹⁴

The ICRC has opined that there is an urgent need for legal development in areas of implementation of humanitarian law and reparation of victims, and that insufficient respect for the existing rules is the major cause of suffering during armed conflict.¹⁵

7.3 THE UNITED NATIONS EFFORTS

The international community, especially under the leadership of the United Nations Organisation (hereinafter “the UN”) deserve credit for their efforts in child protection. They have carried out extensive research and facilitated the making of international instruments to ensure the observance of children’s rights. They have set up mechanisms to engage states in mitigating the effects of armed conflict on children; have sought to stop recruitment of child-soldiers and to reintegrate the child soldiers back into the society.¹⁶

The UDHR and the UN Declaration on the Rights of the Child 1959 heralded a positive regime for the protection of children rights. Article 25(2) of the UDHR provides that motherhood and childhood are entitled to special care and assistance. The

¹⁴ Vite 2011 *Hum. Rts. & Int'l Legal Discourse* 37.

¹⁵ Kellenberger “Strengthening legal protection for victims of armed conflicts: The ICRC study on the current state of international humanitarian law” (2010) www.icrc.org/eng/resources/documents/statement/international_humanitarian_law-development-statement-210910.htm (Date of use: 14 September 2014).

¹⁶ Office of the Special Representative of the Secretary-General for Children and Armed Conflict
<http://childrenandarmedconflict.un.org/our-work/role-of-the-security-council-working-group/> (Date of use: 8 September 2014).

paramourcy of the best interests of the child was first enunciated in the 1959 Declaration.¹⁷

In relation to children involved in armed conflict, the API states that parties to the conflict are to ensure that children below 15 years do not take direct part in hostilities and are not recruited into armed forces.¹⁸ The UNCRC cemented this position in article 38. The debate surrounding article 38 of the UNCRC regarding the 15-year limit for children to be recruited into the armed forces refused to die away even after the UNCRC was ratified by all countries with the exception of the United States of America and Somalia. Stating that a child is anyone below 18 years, and then allowing conscription of children below 18 years, was deemed as granting rights with one hand and taking them away with the other hand.¹⁹

Article 43 of the UNCRC establishes the Committee on the Rights of the Child, which is an oversight body to ensure that member states comply with their obligations under the UNCRC. The Committee is supposed to receive reports from member states on the steps they have undertaken to actualise the Convention. The Committee then makes concluding observations on the reports received from member states. These observations are included in the Committee's reports to the UN General Assembly.

In 1994, the UN Commission on Human Rights (hereinafter "the UNCHR") set up a working group to draft an optional protocol to the UNCRC to deal with the involvement of children in armed conflict. The working group proposed the raising of the minimum age for participation in hostilities to 18 years but some countries who enlist children below 18 years in their military opposed the move.²⁰

¹⁷ Principle 2.

¹⁸ A 77.

¹⁹ Breen 2007 *HRR* 73.

²⁰ Breen 2007 *HRR* 74.

In 1996, the UN Secretary-General appointed the former minister of education in Mozambique, Graca Machel, to undertake a study on the impact of armed conflict on children.²¹ The report was released in 1997 and the Security Council had its first briefing on the situation of children in armed conflict. This resulted in the 1997 establishment of the office of the Special Representative for Children and Armed Conflict under the office of the Secretary-General (hereinafter “the SRSG”). Its mandate was to promote the rights, protection and well-being of children in every phase of armed conflict.²² This office has done extensive work in fulfillment of its mandate, as shall be enunciated later in this chapter. The special representative makes annual progress reports on children and armed conflict to the major organs of the UN, that is the UN Human Rights Council, the Security Council and the General Assembly.

In 1998, some leading non-governmental organisations formed a lobby group dubbed “Coalition to Stop the Use of Child Soldiers” in a bid to generate pressure for the speeding up of the optional protocol which was taking a relatively long time.²³ This coalition was behind the 1999 Conference held in Maputo, Mozambique, that resulted in the adoption of the Maputo Declaration on the Use of Children as Soldiers. This declaration called on all African states to stop deployment of children below 18 years into their armed forces, not to support armed groups that used children below 18 years and to do their best to stifle armed groups that used children aged below 18 years.

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict finally came to force in 2000. This instrument sought to cure the shortcomings of article 38 of the UNCRC, which prohibited recruitment of children below 15 years for involvement in armed hostilities, and reconcile it with article 1 of the UNCRC which states that a child is anyone below 18 years. Article 1 of this

²¹ Machel “Impact of armed conflict on children” www.childrenandarmedconflict.un.org (Date of use: 8 October 2013).

²² Office of SRSG www.childrenandarmedconflict.un.org (Date of use: 8 October 2013).

²³ Coomaraswamy “The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict – Towards universal ratification” 2010 *IJCR* 537.

protocol requires state parties to ensure that members of their armed forces that have not attained 18 years do not take direct part in hostilities. The protocol also outlines measures that states should take to ensure that recruitment of those above 15 years but below 18 years is voluntary, including proof of age, consent of legal guardians and the right to be informed of the nature of their duties in the armed forces.²⁴ State parties are also urged to raise their recruitment age to above 15 years as set out in article 38 of the UNCRC. Article 4 of the Protocol prohibits armed groups (distinct from armed forces of state parties) from recruitment of children below 18 years. The Protocol also provides that states must ensure the re-integration of child-soldiers into society.²⁵

However, this Protocol suffered from the same malady that affected the drafting of the UNCRC: representatives of states who conscript children below 18 years into their armed forces fought very hard to stop a complete ban on such recruitment.²⁶ The Protocol only managed to ban compulsory recruitment of under-18s, and managed to require state parties to raise their minimum age for recruitment.

7.3.1 Security Council resolutions

Since armed conflict is at the heart of global peace and security, the UN Security Council has been deeply concerned with the involvement of children in armed conflict. The 1996 Machel report was the catalyst that propelled this movement of the protection of children in armed conflict.

In 1998, the issue of children and armed conflict was formally placed on the agenda of the Security Council for the first time, which called for strict adherence to international law dealing with children and conflict. In addition, in October of the same year, the UN

²⁴ A 3.

²⁵ A 4 & 6.

²⁶ Breen 2007 *HRR* 75.

Secretary-General set a minimum age requirement for UN peacekeepers at no less than 18 years, though the preferable age was 21 years.²⁷ Later that year, the UN Secretary-General's Representative on Internally Displaced Persons released a set of Guiding Principles on Internal Displacement.²⁸

In August 1999, child protection officers were included in the mandate of the UN Observer Mission for Sierra Leone ("UNOMSIL"), which was the first time such an officer was included in a peace-keeping mission.²⁹ In the same year, the Security Council adopted resolution 1261, which condemned the violation of children's rights in armed conflict and urged parties to conflicts to respect international law. It also requested the Secretary-General to submit a global report on children and armed conflict within one year. A month later, it adopted resolution 1265 on the Protection of Civilians in Armed Conflict.³⁰

In 2000, the Security Council in its resolution 1314 acknowledged that violations of international humanitarian and human rights law, including that relating to children in situations of armed conflict, constitute a threat to international peace and security. It also recognised the need to incorporate the disarmament, demobilisation and re-integration (DDR) programs for former child soldiers in its peace-building efforts. It also noted that deliberate targeting of civilians and children constituted a threat to peace and security and the Security Council was willing to take measures to remedy the situation.³¹

In February 2000, the Secretary-General released child-focused guidelines on the Role of United Nations Peacekeeping in Disarmament, Demobilization and Reintegration. In August of the same year, the UN Security Council passed resolution 2000, which

²⁷ www.childrenandarmedconflict.un.org (Date of use: 8 October 2013).

²⁸ <http://childrenandarmedconflict.un.org/library/documents/publications/#pubgroup5024> (Date of use: 8 October 2013).

²⁹ www.childrenandarmedconflict.un.org (Date of use: 8 October 2013).

³⁰ www.childrenandarmedconflict.un.org (Date of use: 8 October 2013).

³¹ www.childrenandarmedconflict.un.org (Date of use: 8 October 2013).

condemned recruitment of child soldiers and recommended that those who carried out such recruitment be prosecuted. It also urged for incorporation of children's interests in peace negotiations, special protection against rape and other abuses, and training of peace-keeping forces in child protection.³² Indeed, the peace-keeping United Nations Mission in the Democratic Republic of the Congo ("MONUC") has child protection specified as part of its mandate.³³ In September 2000, an international conference on war-affected children was held in Winnipeg and it urged, *inter alia*, for the universal ratification of the ILO Convention 182 and the Optional Protocol to the UNCRC on Children in Armed Conflict. It also urged blanket amnesty for children involved in armed conflict and special emphasis on demobilisation and reintegration of girl soldiers.³⁴

Resolution 1379 of 2001 requested the "naming and shaming" of persistent violators of International Humanitarian and Human Rights Law with regard to children in armed conflict.³⁵ Resolution 1379 was significant in that among other things, it encouraged international and regional financial and development institutions to set aside funds to help in the rehabilitation and protection of children affected by armed conflict.³⁶

Security Council Resolution 1460 of 2003 on Children and Armed Conflict noted that conscription or enlistment of children below 15 years, or the use of children below 15 years to participate in hostilities, was a war crime under the Rome Statute 1998.

In 2004, in resolution 1539, the Security Council condemned grave violations against children, which have become the pillar of the UN Monitoring and Reporting Mechanisms on children and armed conflict. The resolution also provided for punitive measures for

³² Vachachira "Report 2002: Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict" 2001-2002 *NYJHR* 545.

³³ Vachachira 2001-2002 *NYJHR* 545.

³⁴ www.childrenandarmedconflict.un.org (Date of use: 8 October 2013).

³⁵ www.childrenandarmedconflict.un.org (Date of use: 8 October 2013).

³⁶ [www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1379\(2001\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1379(2001)) (Date of use: 8 October 2013).

all those violating international humanitarian and human rights law on children in conflict situations.³⁷

In July 2005, the Security Council adopted resolution 1612 and recognised that while there was progress in drafting guidelines to protect children, the violation of children's rights was still going on with impunity. This resolution established mechanisms of reporting and monitoring children in armed conflict (hereinafter "the MRM") which included gathering information on child-soldier recruitment, collaboration with relevant authorities and UN agencies, strengthening of protective roles of governments and engaging armed groups for peace. The resolution also established a working group to monitor the reports of these mechanisms and recommend a way forward.³⁸

In 2008, the Security Council held an open debate on children and armed conflict and adopted four grave violations.³⁹ In 2009, the Security Council added one more grave violation in resolution 1882, namely the killing and maiming of children and/or sexual violence against children, and in 2011, in resolution 1998, added attacks on hospitals and schools, making a total of six grave violations. Resolution 1882 also strengthened and expanded the MRM.⁴⁰

In 2010, the SGSR prepared a paper entitled *The Rights and Guarantees of Internally Displaced Children in Armed Conflict*, dealing with concerns of internally displaced children and aimed at ensuring that such children are given utmost consideration in emergency and peace building efforts. Security Council Resolution 2068 of September 2012 noted that perpetrators of violence against children during armed conflict

³⁷ www.childrenandarmedconflict.un.org (Date of use: 8 October 2013).

³⁸ www.childrenandarmedconflict.un.org (Date of use: 8 October 2013).

³⁹ See para 7.3.2 below.

⁴⁰ Resolution 1882 para. [3] requests the UN Secretary-General to include in his reports on Children and Armed Conflict a list of those parties to armed conflict that engage in any of the grave violations (www.childrenandarmedconflict.un.org (Date of use: 8 October 2013)).

continued to commit atrocities and called on states to bring those responsible to justice.⁴¹

The SGSR works closely with the UN Children’s Educational Fund (“UNICEF”) and the Department of Peace-keeping Operations (“DPKO”) to ensure compliance with the law. The working group has come up with various reports dealing with children in conflict and post-conflict situations, as well as children in conflict with the law.⁴²

The protection of children in armed conflict by the UN is still a work in progress. In April 2013, the working group on children and armed conflict presented to the Security Council a report on the situation of children and armed conflict affected by the LRA. In the same month, General Assembly Resolution 67/152 outlined the rights of the child. On 15 May 2013, the UN Secretary-General presented to the Security Council a report on 22 country-situations where grave violations are ongoing, including Afghanistan, Chad, the Central African Republic and the Democratic Republic of the Congo.⁴³

In addition to the Security Council resolutions, there have been other international efforts aimed at dealing with children in conflict situations. They include the following:

- The 1997 conference held in Cape Town, South Africa to further discuss child protection during and after armed conflict. It came up with Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa, popularly referred to as the “Cape Town Principles”. Although they are not

⁴¹ www.childrenandarmedconflict.un.org (Date of use: 8 October 2013).

⁴² www.childrenandarmedconflict.un.org (Date of use: 8 October 2013).

⁴³ www.childrenandarmedconflict.un.org/countries/maps (Date of use: 8 October 2013).

binding, the Cape Town Principles provide an all encompassing definition of a child soldier as:⁴⁴

“Any person under eighteen years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers ... including girls recruited for sexual purposes and forced marriage.”

- The adoption of Convention 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour in June 1999 by the International Labor Organisation. The Convention defines child soldiering as one of the worst forms of child labour and sets 18 as the minimum age for forced or compulsory recruitment.⁴⁵
- The enactment of the African Charter on the Rights and Welfare of the Child in November 1999, which expressly prohibited the involvement of children in armed conflict and defined a child as anyone below the age of 18 years.⁴⁶
- The 2006 production by Machel of a follow-up to the 1996 report, dubbed *Children and Conflict in a Changing World*. Recommendations included ending impunity for violations against children, prioritising children’s security and integrating children’s rights in peace-making and peace-building.⁴⁷
- The International Conference dubbed “*Free Children from War*” in February 2007, when 58 governments gather in Paris to commit to protecting children from unlawful recruitment and use by armed forces or groups. They adopted a refined

⁴⁴ [www.unicef.org/emerg/files/Cape_Town_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf) (Date of use: 9 October 2013).

⁴⁵ A 2 & 3.

⁴⁶ A 2 & 22.

⁴⁷ www.childrenandarmedconflict.un.org (Date of use: 8 October 2013).

version of the Cape Town principles as the Principles and Guidelines on Children Associated with Armed Forces or Armed groups (hereinafter “the Paris Principles”). States committed to spare no effort to stop the recruitment of children into armed forces or groups.⁴⁸ The principles also addressed the issue of the detention of children in conflict with the law, and disarmament, demobilisation and re-integration planning (“DDR”), all in accordance with the UNCRC.⁴⁹ The principles acknowledge that successful DDR depends on child participation, non-discrimination against child-soldiers (including not stigmatising them), and consideration of the best interests principle, whether during or after the conflict.

7.3.2 The six grave violations

The six grave violations are acts that constitute a grave breach of the four Geneva Conventions and their Additional Protocols; they violate customary norms of international law, amount to war crimes or crimes against humanity under the 1998 Rome Statute, or violate the obligations in the UNCRC or other international and regional human rights instruments.⁵⁰

7.3.2.1 *Grave violation 1: The killing and maiming of children*

The right to life is one of the non-derogable rights universally recognised and reflected in international and regional instruments. It is guaranteed by the UDHR,⁵¹ the UNCRC⁵²

⁴⁸ Principle 1.

⁴⁹ Principles 10 & 19.

⁵⁰ SRSG-Children and Armed Conflict Working Paper No. 1 “The six grave violations against children during armed conflict: The legal foundation” <http://childrenandarmedconflict.un.org/library/documents/publications/#pubgroup5024> (Date of use: 8 October 2013).

⁵¹ A 3.

⁵² A 6.

and the International Covenant on Civil and Political Rights (1966) (hereinafter “the ICCPR”).⁵³ All regional instruments also protect this right, including the ACRWC.⁵⁴ In addition, the prohibition of torture has attained the status of a *jus cogens* and is part of customary international law.⁵⁵

Customary international law has established two major fundamental principles of civilian protection during armed conflict, that of “distinction” and that of “proportionality”.⁵⁶ These apply to all parties to a conflict, whether states or non-state actors. Children are protected together with other civilians by international humanitarian law.

In *Prosecutor v Kunarac, Kovac and Vukovic*,⁵⁷ the ICTY recognised that torture, maiming and murder are very serious offences; but when children are the victims, the offences are aggravated and therefore warrant severe punishment such as longer prison sentences.

7.3.2.2 *Grave violation 2: The recruitment and use of child soldiers*

In addition to Article 38 of the UNCRC and its Additional Protocol, the prohibition of the use of children in armed conflict is part of the rules of customary international law binding upon states and non-state actors.⁵⁸ In addition, the non-binding Paris Principles require states to ensure that armed groups within their territories do not recruit children aged below 18 years.⁵⁹

⁵³ A 6(1).

⁵⁴ A 5.

⁵⁵ Rule 90 ICRC Rules.

⁵⁶ See ch 6 para 6.1.3.

⁵⁷ Case IT.96-23 and IT-96-23/1 www.un.org/icty/foca/rialUjudgeant/kun-tj0!0222e-6.htm (Date of use: 9 October 2013).

⁵⁸ Customary Rule 136 and 137 *Customary International Humanitarian Law* 482.

⁵⁹ Para [4] of Paris Commitments to protect children from unlawful recruitment or use by armed forces or armed groups (2007).

The African Charter on the Rights and Welfare of the Child 1999 defines a child as anyone below 18 years⁶⁰ and further provides that state parties shall take measures to ensure that no child shall take a direct part in armed conflict.⁶¹ It became the first instrument to prohibit the recruitment of children below 18 years into armed forces.

The Rome Statute establishing the ICC in articles 8(2)(b) and 8(2)(e) also declares that the recruitment of children is a war crime. Indeed, this is one of the grounds that led to the indictment of the LRA leader Joseph Kony and some of his associates,⁶² and also one of the grounds that led to the recent conviction of Thomas Lubanga Dyilo,⁶³ the Congolese war lord convicted in 2012 in the first conviction by the ICC. This followed closely the conviction of Alex Tamba Brima, Bazzy Kamara and Santigie Borbor Kanu by the Special Court for Sierra Leone (hereinafter “the SCSL”) for the recruitment and use of child soldiers.⁶⁴

In 2010, the SGSR launched an online two-year programme dubbed “Zero Under Eighteen” aimed at promoting the universal ratification of the Optional Protocol to the UNCRC by the tenth anniversary of its entry into force, that is 2012. However, this goal remains unachieved. The SRSG has been actively involved in negotiating with rebels in the DRC, Sierra Leone, Sri Lanka and Colombia to stop use of child soldiers. Between 1994 and 2000, a concerted effort of major international humanitarian organisations saw the reunification of more than 67000 children with their families in the Great Lakes Region.⁶⁵

⁶⁰ A 2.

⁶¹ A 22.

⁶² The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen ICC-02/04-01/05 www.icc-cpi.int (Date of use: 9 October 2013).

⁶³ *Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06 www.icc-cpi.int (Date of use: 9 October 2013).

⁶⁴ *Prosecutor v Alec Tamba Brima, Brazzy Camara and Borbor Kanu* SCSL-04-16-T www.sc-sl.org (Date of use: 9 October 2013).

⁶⁵ Machel “The Impact of Armed Conflict on Children: A critical review of progress made and obstacles encountered in increasing protection for war-affected children” www.childreninarmedconflict.un.org (Date of use: 9 October 2013).

7.3.2.3 Grave violation 3: Rape and other form of sexual violence against children

Article 4(2)(e) of Additional Protocol II to the Geneva Conventions expressly prohibits rape amongst other offences. Article 27 of the Fourth Geneva Convention prohibits rape against women and by implication, girls. Customary Rule 93⁶⁶ also prohibits rape. Most regional and international human rights instruments also prohibit rape and sexual exploitation.⁶⁷ The UNCRC⁶⁸ and the African Charter on the Rights and Welfare of the Child⁶⁹ also forbid the rape and sexual exploitation of children.

The International Criminal Tribunal for Rwanda (“ICTR”) made a landmark ruling in *Prosecutor v Akayesu*⁷⁰ when it held the defendant guilty of rape amongst other charges. In *Prosecutor v Furundzija*⁷¹ and *Prosecutor v Kunarac, Kovac and Vukovic*⁷² the ICTY also held the defendants guilty of rape, torture and enslavement. The SCSL has also held that forced marriage is an offence under international criminal law in *Prosecutor v Alec Tamba Brima, Brazzy Camara and Borbor Kanu*.⁷³

Jean Pierre Bemba,⁷⁴ a former leader of the Congolese Liberation Movement, is currently facing charges at the ICC for crimes against humanity resulting in acts of rape amongst other abuses of rights by his troops. He is charged under the ICC Rome

⁶⁶ ICRC *Customary International Humanitarian Law* 323.

⁶⁷ Article 1 of the Convention against Torture (1984), Article 1 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949) and Part 5 of the Vienna Declaration of the World Conference on Human Rights (1993)

⁶⁸ A 19.

⁶⁹ A 16.

⁷⁰ ICTR-96-4-T, also see para 7.4.2 below.

⁷¹ Case No. IT-95-17/1-T www.un.org/icty (Date of use: 9 October 2013)

⁷² Case IT.96-23 www.un.org/icty/foca/rialUjudgeanent/kun-tj0!0222e-6.htm (Date of use: 9 October 2013).

⁷³ SCSL-04-16-T www.sc-sl.org (Date of use: 9 October 2013)

⁷⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*
www.icc-cases%20prosecutor%20v_%20jean_pierre%20bemba%20gombo.aspx (Date of use: 9 October 2013).

Statute,⁷⁵ which provides that rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilisation or “other forms of sexual violence of comparable gravity” may constitute war crimes and crimes against humanity.

7.3.2.4 *Grave violation four: The abduction of children*

Article 1 of the International Convention against the Taking of Hostages 1979 prohibits any form of hostage taking. Rule 96 of the ICRC rule also prohibits the taking of hostages. In addition, common article 3 of the Geneva Conventions requires humane treatment of all civilians in non-international armed conflict, and this includes children.

Since abducting children takes them away from their families, it violates a child’s right to family under the UNCRC.⁷⁶ Abduction also negates the right to liberty, which is contrary to article 9 of the ICCPR.⁷⁷ The ICC Rome statute provides that unlawful confinement, forcible transfers and enforced disappearances amount to crimes against humanity.⁷⁸ In *Prosecutor v Kordic & Cerkez*,⁷⁹ the defendants faced charges of unlawfully confining populations of Muslims in detention camps, amongst other charges. They were each found guilty of the offence.

7.3.2.5 *Grave violation 5: Attacks against schools and hospitals*

Schools and hospitals are protected under customary international law and under the Fourth Geneva Convention.⁸⁰ Deliberate targeting of schools and hospitals amounts to

⁷⁵ A 7(1)(c), 7(1)(g), 8(2)(b), 8(2)(c), 8(2)(e) Rome Statute.

⁷⁶ A 8.

⁷⁷ “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

⁷⁸ A 7 (d), (e), (i).

⁷⁹ IT-95-14/2 <http://www.un.org/icty> (Date of use: 9 October 2013).

⁸⁰ Customary Rules 10 – 22, a 50 Geneva IV (for occupying powers).

a breach of international humanitarian law, unless the schools or hospitals are used for military purposes.⁸¹ In fact, the law states that if there is doubt whether the school or hospital is used for military purpose, it shall not be attacked.⁸²

Medical personnel, aid workers such as ICRC workers and hospitals are protected under customary international law; indeed, they have been the subject of protection since the 1864 Geneva Conventions and the Hague Conventions of 1899 and 1907 and must not be attacked even in a war zone when the war is raging.⁸³ Additionally, the first two Geneva Conventions deal with ameliorating the conditions of the sick and wounded at war, and therefore the safety of the persons seeking to lessen their suffering was given utmost consideration. The ICC has jurisdiction over those that target schools and hospitals.⁸⁴

7.3.2.6 Grave violation 6: The denial of humanitarian access to children

The Fourth Geneva Convention and the two additional Protocols prohibit the denial of humanitarian services to children and protect the humanitarian workers assisting them.⁸⁵ Customary international law requires that civilians in need during an armed conflict must be helped and parties to the conflict must allow access to them.⁸⁶ Denial of this access may entail a lack of basic needs amongst the civilian population resulting in loss of life which is protected by customary international law and all international and regional instruments. The UNCRC⁸⁷ provides that children in need must be facilitated to receive humanitarian help, and children seeking refugee status must be assisted and protected. In addition, the non-binding *Guiding Principles on Internal Displacement*

⁸¹ A 52 Additional Protocol I.

⁸² A 15, 52 AP I, a 9 -11, 18 AP I.I.

⁸³ A 1 – 3 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1964), aa 15 and 27, Hague Convention (1907).

⁸⁴ A 8(2)(b), 8(2)(e) Rome Statute.

⁸⁵ A 23, 142 Geneva IV, a 54, 70, 77 AP I, a 14, 18 AP II.

⁸⁶ ICRC *Customary Rule* 55.

⁸⁷ A 22.

provide that national authorities have a duty to provide humanitarian needs to internally displaced persons within their territory, and if not able to, must allow international humanitarian organisations access to such persons.⁸⁸

7.3.3 Criminal tribunals established vide Security Council resolutions

The atrocities of the Second World War jolted the community of nations to the need to have a court that would hold aggressors accountable, and therefore minimise conflicts. The greatest tragedy of this World War is that civilians were directly targeted, and were killed in astronomically large numbers. The annihilation of six million Jews and the indiscriminate bombing of the Japanese towns of Nagasaki and Hiroshima are just some of the horrendous marks of this war.

The subsequent setting up of the International Military Tribunal of Nuremberg to try those most culpable for the holocaust proved the determination of the international community led by the allied forces (USA, Britain, France and the then USSR) to ensure that such atrocities would not be committed again.⁸⁹ It became common practice that at the end of conflicts with gross human rights abuses, tribunals were formed to try those with the greatest responsibility for the human rights abuse.

7.3.3.1 *The Special Court for Sierra Leone (“SCSL”)*

The SCSL was set up jointly by the Government of Sierra Leone and the UN following a request by the Sierra Leone President Ahmed Tejan Kabbah in 2000. In resolution 1315, the UN Security Council authorised the Secretary-General to work with the Sierra Leone government to set up the court. The court was officially opened in 2004 with a

⁸⁸ Principle 25, 30 *Guiding Principles on Internal Displacement* OCHA 2004.

⁸⁹ Werle & Jessberger *Principles of International Criminal Law* 157.

mandate to prosecute those that bore the greatest responsibility for violations of humanitarian law committed within the territory of Sierra Leone since 30 November 1996.

Article 7 of the Court's Statute provides for jurisdiction for persons above 15 years, in essence allowing prosecution of children, making it the only international court with such jurisdiction. This led to an intense debate about the legality of this article vis-à-vis other provisions of international law. However, the Court decided not to prosecute children, for they were not the ones who bore the greatest responsibility for the offences committed.⁹⁰ This decision was not without criticism by some, who argued that some children were guilty of serious violations of international law, and that society regarded them as criminals, not as children.⁹¹

Despite the challenges encountered, especially the budgetary constraints, the Special Court handled cases involving leaders of three major armed groups, namely the Revolutionary United Front ("RUF"), the Armed Forces Revolutionary Council ("AFRC") and the Civil Defence Forces ("CDF").⁹²

In the RUF cases, an indictment was issued against the leader Foday Saybana Sankoh, Sam Bockarie, Issa Hassan Sesay and Morris Kallon. Charges against Sankoh and Bockarie were withdrawn when they died in 2004. Sesay, Kallon and Gbao were tried together.⁹³

The RUF case contributed immensely to the jurisprudence of child participation in armed conflict. The activities deemed to be active participation included combat,

⁹⁰ Rosen "Who is a child? The legal conundrum of child soldiers" 2009-2010 *Conn JIL* 92.

⁹¹ Rosen 2009-2010 *Conn JIL* 93.

⁹² Jalloh "Special Court for Sierra Leone: Achieving justice?" 2010-2011 (32) *Mich JIL* 450.

⁹³ *Prosecutor v. Sesay, Kallon & Gbao* Case No. SCSL-04-15-T www.sc-sl.org (Date of use: 9 October 2013).

burning houses and cars, mounting an ambush against troops attached to the United Nations Mission in Sierra Leone, armed patrols, crimes against civilians, guarding military objectives, spies, and bodyguards. On the other hand, activities such as domestic labour, supervised work on farms and engaging in food finding missions were not deemed to have actively participated in hostilities.⁹⁴

Waschefort aptly puts the facts right when he says that the RUF cases brought clarity on the concept of active participation in hostilities by analysing the specific capacities under which the children acted and deciding whether they amounted to active participation in hostilities. The Court also refined the law on abduction by providing that abduction with mere knowledge that the child may undergo military training, even if this does not happen, was sufficient to constitute a crime of conscription.⁹⁵

In the AFRC case, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu⁹⁶ were indicted in 2003 for war crimes, crimes against humanity, murder, extermination, rape, acts of terrorism, collective punishment, sexual violence and most importantly for the purposes of this thesis, the use of child soldiers. They were found guilty of what the court called “some of the most heinous, brutal and atrocious crimes ever recorded in human history.”⁹⁷ Brima and Kanu were sentenced to fifty years each while Kamara was sentenced to forty five years.

⁹⁴ *Prosecutor v Sesay, Kallon & Gbao* Case No. SCSL-04-15-T paras 1730, 1739, 1743 www.sc-sl.org (Date of use: 9 October 2013).

⁹⁵ Waschefort “Justice for child soldiers? The RUF trial of the Special Court for Sierra Leone” 2010 *International Humanitarian Legal Studies* 202.

⁹⁶ SCSL-04-16-T www.sc-sl.org (Date of use: 9 October 2013).

⁹⁷ *Prosecutor v. Brima, Kamara & Kanu* Case No. SCSL-04-16-T, Sentencing Judgment, 134

www.scsl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/AppealsChamberDecisions/tabid/197/Default.aspx (Date of use: 9 October 2013).

In the CDF cases, Sam Hinga Norman was first indicted alone; later his indictment was amended to include Moinina Fofana and Allieu Kondewe.⁹⁸ They were charged with war crimes, crimes against humanity and other serious violations of international law, including child recruitment. Hinga died before the completion of the case but his co-accused⁹⁹ were found guilty by the trial chamber and the conviction was upheld on appeal. All the convicts were moved to Mpanga prison in Rwanda to serve their sentences.

The indictment of Hinga caused discontent among his supporters, who felt that the CDF was largely acting to counter the atrocities of the rebels. The CDF membership was drawn from a traditional age-set system that included traditional “warriors” called “kamajor” (Mende language of Southern Sierra Leone meaning “hunter”). They actually used to be initiated as warriors to guard the community.¹⁰⁰

The SCSL was instrumental as far as children in armed conflict were concerned because it successfully prosecuted cases of child recruitment and forced marriages.¹⁰¹ In addition, it successfully indicted a head of state, the former Liberian President Charles Taylor, whose case was later moved to the ICC.

7.3.3.2 *The International Criminal Tribunal for Rwanda (“ICTR”)*

The ICTR was established in the aftermath of the 1994 genocide in Rwanda, which shocked the world and made the international community berate itself for its failure to act to stop the genocide. In barely three months, over 800 000 Tutsis and moderate

⁹⁸ *Prosecutor v. Norman, Fofana & Kondewa* Case No. SCSL-04-14 www.sc-sl.org (Date of use: 9 October 2013).

⁹⁹ *Prosecutor v. Fofana & Kondewa* Case No. SCSL-04-14-T www.sc-sl.org (Date of use: 9 October 2013).

¹⁰⁰ Rosen 2009-2010 *Conn JIL* 107.

¹⁰¹ Jalloh 2010-2011 (32) *Mich JIL* 445.

Hutus were killed in the most bizarre of ways. The tribunal was thus a response so that those who bore the greatest responsibility would be punished.

In *Prosecutor v Jean Paul Akayesu*,¹⁰² Akayesu was charged with seven counts of genocide, complicity in genocide, crimes against humanity and serious violations of Common article 3 to the Geneva Conventions. He was the mayor of the region of Taba during the genocide. At first, Akayesu watched as people were being killed and did nothing to stop the killing. However, he later joined the killers and directly participated in the killing. About 2000 people were killed in this town of Taba. Others were tortured and raped under his watch. While convicting Akayesu for genocide and for encouraging the raping of Tutsi women, the tribunal defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”, and “sexual violence” as “any act of a sexual nature which is committed on a person under circumstances which are coercive.”¹⁰³

The tribunal set a precedent in prosecuting rape and sexual violence.

7.3.3.3 *The International Criminal Tribunal for the former Yugoslavia (“ICTY”)*

The ICTY was established by the UN under Chapter VII of the Charter of the United Nations, pursuant to resolution 827 of 1993, to prosecute persons responsible for serious violations of international humanitarian law committed within the territory of

¹⁰² ICTR-96-4-T www.unict.org (Date of use: 10 October 2013).

¹⁰³ ICTR-96-4-T Judgment paragraph 6.4 & 7.7 www.unict.org (Date of use: 10 October 2013).

former Yugoslavia since 1991.¹⁰⁴ The Tribunal gave impetus to the definition of rape and sexual violence as war crimes.¹⁰⁵

In *Prosecutor v Dusko Tadic*,¹⁰⁶ Tadic was the president of the Bosnian Serb Democratic Party in Bosnia and Herzegovina. Evidence presented to the court included horrific incidents of sexual violence after the Serb forces confined thousands of Muslims and Croats in camps. In Omarska camp, one of the detainees was forced by Tadic and his fellow soldiers to bite off the testicles of another detainee. The trial chamber convicted him of violation of customs of war through cruel treatment, and inhuman acts amounting to crimes against humanity, although charges of rape against him were withdrawn. On appeal, the appellate chamber added another sentence for war crimes. The court noted that such acts of sexual violence amounted to torture.

Still, in *Prosecutor v Anto Furundzija*,¹⁰⁷ Anto was convicted, entirely on charges of sexual violence by the ICTY for crimes committed during the conflict in Yugoslavia where he was the commander of a special unit of the military police of the Croatian Defence Forces known as the “jokers”. He was charged under article 3 of the ICTY Statute (violations of customs of war) for rape and torture. He had tortured victims and had witnessed the rape of victims by members of the jokers squad. Imperatively, the Trial Chamber expanded the definition of rape in addition to that given by the International Criminal Tribunal for Rwanda in the *Akayesu* case to include penetration, however slight, of the vagina or anus, using the penis or any other object used by the perpetrator, and also to include oral sex. Anto was sentenced to ten years imprisonment.

¹⁰⁴ Preamble to the Statute of the Court 1993.

¹⁰⁵ Maravilla “Rape as a war crime: The implications of the International Criminal Tribunal for the Former Yugoslavia’s decision in *Prosecutor v Kunarac, Kovac & Vukovic* on international humanitarian law” 2000-2001 *Fla J. Int’ L* 339.

¹⁰⁶ Case IT-94-1-AR72 www.un.org/icty (Date of use: 9 October 2013).

¹⁰⁷ Case IT-95-17/1-T www.un.org/icty (Date of use: 9 October 2013).

In *Prosecutor v Kunarac, Kovac & Vukovic*¹⁰⁸ the defendants were convicted of systematic rape of Bosnian Muslim women so as to cleanse the Foca region of Muslim inhabitants. The Serb soldiers confined Muslim men and women in different places. They would then rape the women repeatedly in a bid to make them break during interrogations, or to merely quench their desires. They raped girls as young as 12 years. The rape was meant to attack the women and humiliate the men since chastity of women in the Balkans was a sign of honour, and men who could not protect their women were not regarded as honourable. Rape was used as a means to drive Muslim inhabitants out of the region. The trial chamber held that the rape in the Foca region amounted to a war crime, and an outrage against personal dignity contrary to article 3(c) of the Geneva Conventions. The tribunal gave rape a gender-neutral definition; it was recognised that men as well as women can suffer the indignity of rape.

7.4 THE INTERNATIONAL CRIMINAL COURT (ICC)

The idea of a permanent criminal tribunal existed since the beginning of the 20th century. However, after the Second World War, it dawned on the community of nations that there was a need to hold accountable the perpetrators of the atrocities, mainly individuals in the Nazi regime. The subsequent cold war intrigues saw the idea shelved until the 1990s when the conflict in the Balkans and in Rwanda brought to the fore the need for the court once again. In 1994, the International Law Commission presented a draft statute to the UN General Assembly on the establishment of the ICC. The General Assembly appointed an ad hoc committee to lead in the efforts of establishing the court, which culminated in the Rome Statute of 1998.¹⁰⁹

The ICC was established by article 1 of the Rome Statute of the International Criminal Court, 1998. The preamble to the statute recognises that in the 20th century, millions of

¹⁰⁸ Case IT.96-23 www.un.org.icty/foca/rialUjudgeanent/kun-tj0!0222e-6.htm (Date of use: 9 October 2013).

¹⁰⁹ Schabas *An introduction to the International Criminal Court* 16.

children, men and women have been the victims of “unimaginable atrocities that deeply shock the conscience of humanity”.

The ICC has jurisdiction with respect to the most serious offences of concern to the international community, namely genocide, crimes against humanity, war crimes and the crime of aggression.¹¹⁰

The Rome Statute has elaborated on each of these offences.¹¹¹ Crimes against humanity have been described as grave breaches of human rights,¹¹² or acts that trample on the laws of God and humanity.¹¹³ The term “crimes against humanity” first appeared in the 1915 Declaration concerning the massacre of Armenians by agents of the government of Turkey, in which it had been stated that these agents would be held responsible, although no one was ever punished for this massacre. However, the term adopted its positive law status when it was incorporated into the Charter of the International Military Tribunal at Nuremberg in 1945.¹¹⁴ During the trials by the International Criminal Tribunal for former Yugoslavia, the offence was used for the first time in the aftermath of an internal conflict.¹¹⁵

The Rome Statute considers *inter alia* murder, rape and forced pregnancy as crimes against humanity,¹¹⁶ the forcible transfer of children from one group to another as genocide,¹¹⁷ and the willful killing, the intentional directing of attacks at civilian populations, villages and towns, the taking of hostages and the enlisting of children

¹¹⁰ A 5 of the Rome Statute.

¹¹¹ A 6-9 of the Rome Statute.

¹¹² Freeman “Genocide and gross human rights violations in comparative perspective” 1999 *Ethnic and Racial Studies* 1072.

¹¹³ Birkett “International legal theories evolved at Nuremberg” 1947 *International Affairs* 317.

¹¹⁴ Hirsh *Law Against Genocide: Cosmopolitan Trials* 22.

¹¹⁵ A 3 of the ICTY Statute.

¹¹⁶ A 7 of the Rome Statute.

¹¹⁷ A 6(e) of the Rome Statute.

aged below 15 years to armed forces or armed groups as war crimes.¹¹⁸ The ICC has no jurisdiction over persons aged below 18 years at the time of the alleged commission of the crime.¹¹⁹

Currently, the ICC has cases pending before it involving situations in the DRC, the Central Africa Republic (hereinafter “the CAR”), Sudan (for conflict in Darfur), Libya, Kenya, Cote d’Ivoire and Uganda with regard to the LRA.

As far as obtaining justice for the children affected by armed conflict is concerned, the ICC is a major milestone. This is conspicuously so following the first conviction by the ICC of Thomas Lubanga.¹²⁰ This matter was referred to the ICC by the DRC following the non-international armed conflict in the DRC. Lubanga was charged with, *inter alia*, conscripting children into armed groups and using children to actively participate in hostilities, which amounted to a war crime. Lubanga was the founder member and president of the *Union des Patriotes Congolais* (hereinafter “the UPC”), an organised armed group involved in the internal conflict in the DRC. The UPC had a military wing called the *Force Patriotique Pour la Libération du Congo* (hereinafter “the FPLC”).

Between 2002 and 2003, the UPC-FPLC was involved in the massive recruitment of children below 15 years into their ranks and in fact formed a unit known as “the kadogo unit” (Kiswahili for a unit for small ones) comprised of children below 15 years. These children were used in hostilities in different parts of the conflict area. Evidence tendered also indicated that Lubanga used these children as his body guards.

He was found guilty of the war crime of enlisting and conscripting children under the age of fifteen years and using them to participate actively in hostilities in the Democratic

¹¹⁸ A 8 of the Rome Statute.

¹¹⁹ A 26 of the Rome Statute.

¹²⁰ *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 www.icc-cpi.int (Date of use: 9 October 2013).

Republic of the Congo between September 2002 and August 2003. He was sentenced to thirteen years' imprisonment for conscripting children under the age of fifteen to join the UPC, twelve years imprisonment for enlisting children under the age of fifteen to join the UPC, and fourteen years' imprisonment for using children under the age of fifteen to participate actively in hostilities.¹²¹ He was to serve fourteen years, being the highest number of years in the sentences, and six years were deducted from the time he had already stayed in custody pending finalisation of the case.

Importantly also, the Court distinguished active participation in hostilities from direct participation when it stated:¹²²

“Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an 'indirect' role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. In the judgment of the Chamber these combined factors—the child's support and this level of consequential risk—mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them. Given the different types of roles that may be performed by children used by armed groups, the Chamber's determination of whether a particular activity constitutes 'active participation' can only be made on a case-by-case basis.”

However, the chamber refused to address the question as to whether acts of sexual violence can be counted as using children to participate actively in hostilities. The court

¹²¹ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision at 11.

¹²² *Prosecutor v Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, JGC-01/04-01/06 2012 para 628 (www.icc-cpi.int (Date of use: 9 October 2013)).

decided not to address itself to this question because the prosecution had not charged Lubanga with rape or acts of sexual violence as separate charges.¹²³ Dissenting Judge Odio Benito thought that the court ignored a critical aspect of the crime of actively using children in hostilities making the sexual aspect of this crime invisible.¹²⁴

Though this conviction was a milestone in its own right, it has faced its fair share of criticisms. The Rome statute provides for a total of thirty years;¹²⁵ however the sentence has been deemed too lenient, especially because the court did not give a proper rationale for the fourteen years other than the fact that the total sentence would have amounted to thirty nine years, above the limit imposed by statute. The court was also accused of putting too much weight on the mitigating circumstances (the fact that Lubanga had been cooperative), and less weight on the gravity of the crime and the aggravating circumstances.¹²⁶ The court considered that the crime was very serious affecting the whole community,¹²⁷ and that the recruitment was compulsory in addition to the vulnerability of the targeted population group, children. The prosecutor proffered the punishment inflicted on the child soldiers and instances of sexual violence as aggravating circumstances, but the Court did not admit them as such because they were not proven beyond reasonable doubt.¹²⁸

More importantly, the trial chamber issued a decision on principles to be followed in the reparation of the victims, whereby proposals from the victims themselves were to be collected by the Trust Fund for victims and submitted to the Court for approval before implementation.

¹²³ *Prosecutor v Thomas Lubanga Dyilo* Judgment para 629 (www.icc-cpi.int (Date of use: 9 October 2013)).

¹²⁴ *Prosecutor v Thomas Lubanga Dyilo* Judgment para 630 (www.icc-cpi.int (Date of use: 9 October 2013)).

¹²⁵ Art 77 (1) (a) of the Rome Statute.

¹²⁶ Steyn "Reforming the sentencing regime for the most serious crimes of concern: The International Criminal Court through the lens of the Lubanga trial" 2014 *Brook. J. Int'l L.* 536.

¹²⁷ A 78 of the Rome Statute

¹²⁸ *Prosecutor v Lubanga*, Case No. ICC-01/04-01/06 Judgment at 12 (www.icc-cpi.int (Date of use: 9 October 2013)).

Some of the other pending cases from the situation in the DRC include cases against Germain Katanga,¹²⁹ accused of leading his militias (Front for Patriotic Resistance in Ituri) in attacking civilian populations, rape and outrages upon personal dignity amongst others. Bosco Ntaganda,¹³⁰ the third highest-ranking officer of the FPLC is also facing trial for conscripting children into his armed group and attacks on civilians.

As for the Uganda situation, in 2005 the Ugandan government invited the ICC to investigate crimes committed by the LRA with a view to prosecuting persons bearing the greatest responsibility in the Northern Uganda conflict involving the LRA. Subsequently, the ICC indicted and issued warrants against Joseph Kony, the leader of the LRA, his deputy Vincent Otti and other top commanders including Raska Lukwiya, Okot Odhiambo and Domonic Ongwen.¹³¹ Lukwiya has been confirmed dead and the ICC has declared the warrant of arrest against him ineffective.¹³² Dominic Ongwen has since been arrested and has made his first appearance before the ICC.¹³³

The LRA indictees present a classical case for the ICC: having been involved in attacks against civilians, hostage taking, pillaging villages and camps, the abduction of children and conscripting them into their ranks, using children directly in hostilities, sexual slavery, forced impregnation amongst other crimes. Indeed, I think that the tragedy of the LRA situation is that the international community took too long to act, as a result of which Kony is still free and he cannot be charged before the ICC for offences that he committed before 2002 when the Rome Statute came into force. However, some of the incidents that the ICC investigated include the February 2004 attack on IDP camp at

¹²⁹ *Prosecutor v Germain Katanga* ICC-01/04-01/07 www.icc-cpi.int (Date of use: 9 October 2013).

¹³⁰ *Prosecutor v Bosco Ntaganda* ICC-01/04-02/06 www.icc-cpi.int (Date of use: 9 October 2013).

¹³¹ *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05.

¹³² www.icc-cpi.int/en_menus/.../icc%200204%20010 (Date of use: 8 October 2013).

¹³³ www.icc-cpi.int/en.../icc/.../otp-stat-21-01-2015.aspx (Date of use: 2 February 2015).

Abia, Lira district where the LRA killed 50 civilians, and the Barlonyo IDP camp attack in the same year, where over 200 people were killed.

The Rome Statute has expressly indicated that official positions, including being head of state or government, are not a bar to prosecution for offences admissible before the court.¹³⁴ In 2009, it indicted a sitting head of state, President Omar El Bashir of the Republic of the Sudan on five counts of crimes against humanity and two counts of war crimes for offences committed in the Darfur region. In 2010, it added three counts of genocide. The Court has already issued warrants of arrest against the President, making him largely confined to his own country for fear of arrest.¹³⁵

It is also currently hearing cases involving the Kenyan Deputy President William Samoei Ruto and journalist Joshua Arap Sang, though the Deputy President was indicted before their 2013 election to office. The President, Uhuru Kenyatta, was facing five counts of crimes against humanity for his alleged role in controlling members of an organised gang to commit murder, rape and other forms of sexual violence, persecution and other inhuman acts against civilians during the 2007-2008 post-election violence. However the charges against him have since been withdrawn. His deputy William Ruto faces four counts of crimes against humanity for allegedly being the leader of a Kalenjin group that was responsible for the murder, deportation, torture and persecution of civilians.¹³⁶

¹³⁴ A 27 provides as follows:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this statute, nor shall it, and in itself, constitute a ground for reduction of a sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person.”

¹³⁵ *Prosecutor v Omar Hassan Ahmed Al Bashir* ICC-02/05-01/09 www.icc-cpi.int (Date of use: 9 October 2013).

¹³⁶ *Prosecutor v William Samoei Ruto & Joshua Arap Sang* ICC-01/09-01/11 & *Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-02/11 www.icc-cpi.int. (Date of use: 9 December 2014).

In the CAR situation, Jean-Pierre Bemba¹³⁷ is alleged to have led a Congolese militia called Movement for the Liberation of the Congo (“MLC”) into the CAR after the CAR’s president, Ange-Felix Patasse, enlisted his help in suppressing a rebellion led by Francois Bozize. Bemba was indicted on 23 May 2008 on two counts of crimes against humanity and five counts of war crimes including rape, torture and murder committed against civilians in CAR.

The ICC is also hearing cases involving the situation in Cote d’Ivoire in which the former president, Laurent Gbagbo and his wife Simone Gbagbo are charged with crimes against humanity for murder, persecution, rape and other sexual violence acts committed after the elections in 2010-2011.¹³⁸

7.5 CONCLUSION

Although not discussed in this chapter, other international actors have also been instrumental especially in the rehabilitation of children affected by armed conflict. International organisations such as the United States Agency for International Development (hereinafter “the USAID”), the Christian Children’s Fund (hereinafter “the CCF”) and the World Bank have also been instrumental in assisting children of war. In Liberia for instance, USAID and UNICEF established support programs for youth affected by war so as to help in their rehabilitation. UNICEF operates transit centres for the demobilisation of child soldiers in various countries. In Angola, the CCF has undertaken programs for demobilised child soldiers.¹³⁹ In March 1998 Rädä Barnen,

¹³⁷ *Prosecutor v Jean Pierre Bemba Gombo* ICC-01/05 -01/08 www.icc-cpi.int (Date of use: 9 October 2013).

¹³⁸ *Prosecutor v Laurent Gbagbo* ICC-02/11-01/11 & *Prosecutor v Simone Gbagbo* ICC-02/11-01/12 www.icc-cpi.int (Date of use: 9 October 2013).

¹³⁹ Wessells “Do no harm: Toward contextually appropriate psychosocial support in international emergencies” 2009 *American Psychologist* 846.

the Swedish section of Save the Children International launched a database on child soldiers.¹⁴⁰

As in any situation, the UN efforts have not been without hiccups. Some of the pitfalls in the DDR strategy include the fact that the former child-soldiers are well taken care of in the process of disarmament, demobilisation and reintegration. Because of this, they become the envy of other children and villagers, and their return is greeted with hostility for being the privileged ones. This is made worse if the villagers know of atrocities committed by these former child-soldiers, for it will be seen as if they are benefitting from their wrongdoing. The Paris Principles recommend that all war-affected children be dealt with fairly, as opposed to focusing on former child-soldiers only. Indeed, Pintar notes as follows:¹⁴¹

“Men, women and children in traumatized communities must heal together, if they are to heal at all, because their lives are bound up with one another”.

However, challenges notwithstanding, the aforementioned international efforts are indicative of a global movement to free children from the effects of war. A blot in these efforts is the worrisome trend of religious extremism in the use and targeting of children in the name of God. Indeed, as shown in chapter two, the Al Shabaab of Somalia have no regard for the international community and their efforts to stop child recruitment. A conflict is currently raging in Syria and Iraq, in which children have been so adversely affected that the rebels and/or government soldiers are guilty of most of the six grave violations. The full extent of the suffering by these children will only be known after the war, when it is safe for post-conflict analysis. Afghanistan also remains a major theatre

¹⁴⁰ www.savethechildren.se/Where-we-work/Sweden/ (Date of use: 10 October 2013).

¹⁴¹ Pintar “Anticipating consequence: What Bosnia taught us about healing the wounds of war” 2000 *Human Rights Review* 64.

of children rights violations.¹⁴² The grim reality is that for as long as there are conflicts, children will always be caught in the middle.

¹⁴² UN Secretary-General Report to the Security Council during the 67th Session of the Council on 15th May 2013 www.childrenandarmedconflict.un.org (Date of use: 9 October 2013).

CHAPTER EIGHT

CONCLUSION

8.1 INTRODUCTION

“War! War! War! Who created you? Where did you come from? What do you want from us? Oh! How I hate you. You bring sickness, sadness, darkness and disaster. What do you want from the world? Why do you want to fight against peace? Oh! How I hate you. What do you gain from the fights and death? One day we shall unite and put you to an end.”¹

This is an expression by a former LRA child-soldier at the Gulu World Vision Children of War Rehabilitation Centre in Northern Uganda. It is an affirmation of just how much trauma war brings.

War is a detestable thing, always drawing in those who were involved in advocating for it and those who were not. When war sets in, it displaces the comfortable status quo that those affected are used to and brings a lot of suffering.

Wars are fought for many reasons, but Goodman summarises the main causes of war as territorial claims, claims that involve a conflict with a state’s foreign policy, claims in respect to a state’s change of government and disputes over the type of government or current regime.² Vasquez notes that “wars grow out of a long-term political relationship that has become increasingly intractable, conflictive, and hostile.”³ In the sunset years

¹ Cheney “Our children have only known war’: Children’s experiences and the uses of childhood in Northern Uganda” 2005 *Children’s Geographies* 42.

² Goodman “Humanitarian intervention and pretexts for war” 2006 *AJIL* 117.

³ Vasquez *The War Puzzle* 155.

of the last century and in the dawn of the 21st century, Africa has been beleaguered by internal conflicts and *coup de tats*, mostly over political control and the sharing of resources.

In this chapter, I contend that the very act of engaging in war disapproves the best interests principle and that the players hardly take time to think of the effects of war on civilians generally. In addition, the consequent actions are dependent on other dynamics but not on the interests of the child.

8.2 WAR NEGATES THE BEST INTERESTS OF THE CHILD

War can never be in a child's best interests, because it leads to death, destruction and the shattering of families, livelihoods and dreams. Even for starters, the word "best" is a superlative form of "good", suggesting that it is the "finest" of the "fine". Yet there is nothing good about war because it undermines the very existence of human beings. It is therefore paradoxical to mention the best interests of the child in an armed conflict situation, when those best interests have been made redundant by the conflict itself. If indeed the parties fanning and responding to the conflict had thought about the best interests of children, they would not have engaged in the war in the first place. In the same breath, the some of the responses to armed conflict, such as placing children in refugee or IDP camps, cannot be in their best interests but are just a means to save them from further harm. That said, the world we live in is far from ideal, and therefore part of our everyday realities is confrontation of armed conflict.

Ideally, when the war being fought is between two or more conventional armies, they are likely to observe international humanitarian law, though cases of violations may be present. The involved states at least know that they are likely to face possible sanctions if they breach these laws, and this would make them have some restraint. This does not hold true for non-state actors.

When states are preparing for war, there is hardly any preparation to protect the civilian population caught up in the war. Combatants are just expected to be aware of the laws of war and abide by them. History will bear me witness that there is hardly any war (even that fought with the utmost care by “civilised” states) that lacked civilian casualties, mostly women and children. Tragically, all terminologies are coined to justify the deaths of civilians, including “collateral damage”⁴ and “military necessity”.⁵

During the First World War, civilian casualties were estimated at 5 per cent, but this rose sharply to about 50 per cent during the Second World War.⁶ Indeed, during the Second World War, civilians were the soft underbelly, which if attacked, would force governments to take certain policies that would favour the opposition. There were deliberate strategies to target the civilians of the enemy country as a way of getting to the enemy soldiers. Indiscriminate bombing was a favourite *modus operandi*; basic infrastructure was targeted to deny the enemy the advantage of such infrastructure. In Germany for instance, towns and villages would be bombed so that civilians could clog roads and railway lines, thus preventing movement and supply to the German troops. In July and August of 1943, Hamburg had been so bombarded that there were firestorms which made the temperatures rise as high as 800 degrees Celsius, obviously destroying all life.⁷ The nuclear bombing of Nagasaki and Hiroshima to break a resolute Japanese government caused hundreds of thousands of civilian deaths, and after-effects that were felt for a long time. The Americans were targeting the Japanese military establishments in Hiroshima so as to cripple their resistance; it was as though

⁴ Collateral damage is defined as the “unintentional or incidental injury to persons and objects that would not be lawful military targets, but the damage is not unlawful so long as it is not excessive in light of the overall military advantage anticipated from the attack”. See *US Department of Defence Dictionary of Military and Associated Terms* 93.

⁵ Military necessity is a legal concept justifying attacks that although directed on military targets, may have adverse effects on civilians and civilian objects www.crimesofwar.org (Date of use: 11 October 2013).

⁶ Reynolds “Collateral damage on the 21st century battlefield: Enemy exploitation of the law of armed conflict and the struggle for a moral high ground” 2005 *AFLR* 7.

⁷ Reynolds 2005 *AFLR* 8.

the civilians were just collateral damage.⁸ Indeed, the Second World War literally undid all the gains achieved on civilian protection.⁹ However, due to the atrocities committed on civilians, there sprang a strong movement advocating for the protection of civilians in general.

8.3 THE BEST INTERESTS OF THE CHILD AND THE NOTION OF THE WESTERN CHILD

The best interests principle has its origins in Romantic and Christian traditions underlining the sinless status of childhood. The Romantics and Christians¹⁰ viewed children as innocent beings with the status of angels. Archard describes this imagery as follows:¹¹

“Children are seen as nearest to God ... Children have a purity which derives from their having arrived only recently in the world ... The child is without fault or sin, innocent of evil”

The Romantic child represented humanity’s original imaginative enthusiasm for the world and passage into adulthood corrupted this enthusiasm.¹² This glorification of childhood became embedded in the European and the American legal fabric, with a belief that childhood should be happy and a hope that if the qualities of childhood were extended into adulthood, the world would be a better place.¹³

⁸ Roberts “The equal application of the laws of war: a principle under pressure” 2008 *IRRC* 947.

⁹ Schaffer *Wings of Judgment: American Bombing in World War II* 95.

¹⁰ See ch 5 para 5.3 above.

¹¹ Archard *Children: Rights and Childhood* 37.

¹² Archard 39.

¹³ Cunningham *Children and Childhood in Western Society since 1500* 77-78.

Breen notes that the Romantic ideology influenced public action on children in the 18th century with the emergence of philanthropic concern to save children. The 19th century saw the institutionalisation of child offenders, with the aim of returning them to the innocent stage.¹⁴ The realisation that this was not necessarily the perfect system brought about the growth of foster homes, the child justice system and eventually compulsory schooling for children. The notion of the romantic child has nevertheless persisted and contributed greatly to the growth of the best interests principle. The principle is therefore an Anglo-American family-law concept. It has largely been applied in matrimonial proceedings involving children, in adoption, fostering and guardianship of minors.¹⁵ Its enforcement depends on the existence of judicial and law enforcement institutions which can impose and implement sanctions respectively against any non-adherents.

The best interests principle is a value-based principle; indeed, Mnookin concluded that “deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself”.¹⁶

The standardisation of the best interests principle has led to universal models of dealing with childhood, which assume that children everywhere have the same basic needs and they can be met with a standard set of responses.¹⁷ However, different values and cultures mean that the principle has to be a subjective one. Breen compares the romantic child with what she calls the “other child”, who is faced by difficult realities that are alleged by their proponents to be in the best interests of that child. She looks at the practice of female genital mutilation, which, in some cultures, defines the entry into “womanhood”. The proponents of this practice contend that removal of part of the female genitalia suppresses sexual desire in a woman and therefore protects the

¹⁴ Breen *Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* 41.

¹⁵ Breen 44.

¹⁶ Mnookin *In the Interests of Children* 260.

¹⁷ Boyden 1994 *Disasters* 265.

virginity and integrity of a woman. However, in some cultures, mothers ensure that their own daughters undergo the practice to bring honour to their families and so as to be considered marriageable in the community.¹⁸

The notion of the innocent child has been tested by child-soldiering. As indicated earlier,¹⁹ when confronted by an armed child soldier, an adult soldier sees an enemy out to kill him, not a child. The rehabilitation of the child soldier has also raised moral questions, especially when the child is freed to the same society that he fought, even though he has been rehabilitated. Some members of the society may still ostracise him because to them, he is that soldier that killed or destroyed property. It is no wonder then that the statute of the Special Court for Sierra Leone²⁰ provided for prosecution of children above 15 years. A society whose age-set system inducted children of 15 years and below as community warriors was not likely to view children above 15 years as children but as soldiers.²¹

It has also been argued that response mechanisms in armed conflict such as evacuations are biased towards this romanticised western idea of childhood where children are perceived as “blameless, passive and vulnerable, the reluctant victims of malevolent forces and never perpetrators”.²² In reality however, some circumstances may make child-soldiering seem a better alternative for a child. When aid workers expressed their ire at President Museveni’s National Resistance Movement for recruiting child soldiers, the children considered it a lifeline for their survival, since they came from devastated rural areas where they had been living in abject poverty and had been separated from their parents. The army provided not just their basic necessities but also a sense of belonging.²³

¹⁸ Wakabi “Africa battles to make female genital mutilation history” 2007 *The Lancet* 1069.

¹⁹ See para 6.3.3.2.2 above.

²⁰ A 7.

²¹ See ch 7 para 7.3.3.1.

²² Boyden “Children’s experience of conflict-related emergencies: Some implications for relief policy and practice” 1994 *Disasters* 265.

²³ Boyden 1994 *Disasters* 266.

Other commentators have challenged methods used in the rehabilitation of child soldiers. Drumbl seeks to challenge widely held views that child soldiers are vulnerable, frail and victims without capacity. He calls this a reflexive response to child soldiering by international lawyers and policy makers. In re-imagining child soldiers, he questions the response mechanisms which often assume that the child soldier has psychological problems, leading to measures such as medicalised trauma recovery and psychotherapy. He opines that this is not necessarily true, that some child soldiers actually escape after getting tired of their militarised lives and therefore are likely to be of sound mind. This causes juveniles to be shielded from law's obligations while being conferred the law's protectiveness. Any response mechanism, according to him, ought to promote reintegration, rehabilitation, restoration and reparation.²⁴ Wessells seems to agree with the argument that there has been a lot of focus on the mental wellbeing of former child soldiers. He says that that sensationalised images of teenage killers and portraying former child soldiers as irreparably traumatised can hamper their reintegration efforts.²⁵

I guess this is the same line of argument proffered by Lee ²⁶ and Hanson ²⁷ on the disadvantages of having inflexible minimum age limits.

8.4 THE APPLICATION OF THE BEST INTERESTS OF THE CHILD DURING ARMED CONFLICT

The best interests principle has been applied and analysed largely with reference to child custody adjudications. Indeed, most of the alternatives suggested²⁸ have

²⁴ Drumbl *Reimagining Child Soldiers in International Law and Policy* 24.

²⁵ Wessells "How we can prevent child soldiering" 2000 *Peace Review* 414.

²⁶ Lee "Understanding and addressing the phenomenon of "Child Soldiers": The gap between the global humanitarian discourse and the local understandings and experiences of young people's military recruitment" Working Paper Series No. 52, Refugee Studies Centre Oxford, Department of International Development, January 2009 www.rsc.ox.ac.uk (Date of use: 14 September 2014).

²⁷ Hanson "International children's rights and armed conflict" 2011 *Hum. Rts. & Int'l Legal Discourse* 60.

addressed questions of custody and placements in the event of divorce. The principle has also been widely applied when seeking to enforce rights against government social welfare institutions. Despite the inadequacies of this principle as cited by some of its critics, it remains arguably quite applicable to safeguard the interests of children during peace times and would even be better with some modification.²⁹ However, during armed conflict, I opine that the best interests principle becomes suspended for reasons advanced below.

8.4.1 The best interests principle was not contemplated for armed conflict situations

The UNCRC, which in effect has been domesticated by national legislations, defines the application of the best interests principle as follows:³⁰

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

I find this phrase idealistic in that it presupposes that the action regarding children is to be undertaken by a public or private institution, and that these institutions are sensible enough to seek as a priority the best interests of the child. This is enforceable when these institutions are well and functioning, and are under an organised system which can dispense sanctions for non-compliance. Unfortunately, when war sets in, all idealism is lost, and the bitter reality of the devastating impacts of war set in. The institutions that would adjudicate over the interests of children are in all probability destroyed or at best malfunctioning. The pressing issues are not custody or

²⁸ Elster *Solomonic Judgments: Studies in the Limitations of Rationality* 54, Goldstein *et al The Best Interests of the Child – the Least Detrimental Alternative* 153, Scott “Pluralism, parental preference and child custody” 1992 *CLR* 615-72.

²⁹ See ch 5 para 5.7.2.

³⁰ A 3(1).

enforcement of welfare rights, but grave matters of life and death, where lives must be saved amidst a raging conflict. Besides, though the GCIV provides obligations for parties to the conflict and occupying territories, there are no corresponding means of enforcement, and even if they were to be present, they would be impossible in the midst of a raging conflict. Without these enforcement mechanisms, the best interests principle is dead on arrival.

8.4.2 The best interests principle is not applicable in the midst of a raging conflict

The Rwandan *Radio Mille Collines* made the announcement: “Let us exterminate them ... the graves are not yet quite full ...”³¹ and the massacres began in quick succession. Soldiers from the presidential guards executed 19 people at a Jesuit Retreat Centre in Kigali. Sixty Tutsi men and boys were taken from a church compound in Kigali and executed. During a mass at a Catholic church where about 500 terrified people had sought shelter, a killing squad burst in and began slashing everyone; the killing lasted two hours.³² That is just a glimpse of the horror in Rwanda at the height of the 1994 genocide.

In Somalia, where clan fighting has been ravaging the country since 1991, one Somali journalist noted that “[d]eath has become too common place to matter”. Clan militias, in their attempts to control Mogadishu, moved from village to village plundering grain stores, killing livestock, burning villages, raping and murdering.³³ The birth of Al Shabaab brought further misery to the Somalia child following forced recruitment into the militia ranks.³⁴

³¹ Meredith *The Fate of Africa: A History of Fifty years of Independence* 509.

³² Meredith 509.

³³ Meredith 470-471.

³⁴ See ch 2 para 2.2.2.1.

At the height of the Balkan conflict, persecutions, murder, forced displacements, plunder of property and destruction of towns and cities were the order of the day. The killing was systematic and planned to wipe out an entire community, adults and children.³⁵

On 11 June 1993, in the perennial Israeli-Palestinian conflict, Israeli forces carried out five targeted strikes in Gaza city within 48 hours, killing 23 Palestinians. The following day, five rockets were fired at a car in Central Gaza killing seven people, including a toddler and a pregnant mother.³⁶ Even more recently, Israel launched “Operation Protective Edge” against Gaza in response to firing of rockets in Israeli territory by Hamas. Between 8 July and 27 August 2014, 2104 Palestinians, 78 Israelis and 1 Thai national were killed in the offensive, most of them civilians. Among the Palestinians, 1462 were reported to be civilians, with 495 children and 293 women amongst them. Indeed, Israeli has been accused of war crimes for targeting schools that were serving as shelters for civilians and humanitarian workers.³⁷

In Sierra Leone, over a period of eleven years, 50 000 people had been killed, 20 000 mutilated and over three-quarters of the population displaced. The RUF captured civilians to act as mules to carry their diamonds from the mines, often killing any weak ones instantly. Villages were raided and young boys conscripted into the rebel ranks after their parents were mutilated or killed.³⁸

All the above incidents are illustrative of the social climate when war is raging. Of course they are just a drop in the ocean; the conflicts raging in our world today are many. In the helter-skelter of war, it is a case of everyone for himself or herself. It is a lawless scenario, and even though in a perfect world the *jus in bello* should apply, more often than not, in the heat of the moment it is trampled away.

³⁵ Pong *Endgame in the Balkans: Regime Change, European Style* 132.

³⁶ Cordesman *The Israeli-Palestinian war: Escalating to Nowhere* 152.

³⁷ BBC World News <http://www.bbc.com/news/world-middle-east-28439404> (Date of use: 12 September 2014).

³⁸ Meredith 573.

A typical war situation is one where the combatants are out to kill each other, and the civilians are running out of the conflict zone to save their lives. Usually the state machinery will have disintegrated such that there is no public or private institution to consider or enhance the best interests of children, and even if it is there, it will have failed to protect the children. The only person who would be thinking of the child is perhaps the parent, like the Sierra Leonian father who offered the RUF rebels his second hand for amputation rather than see his young son's hand go under the pain of the same blade.³⁹

Scenes typical of non-international armed conflict include ambushes on villages and towns by the armed groups, which may be met with fire by the nation's armed forces. To bring this notion to life, one may picture a situation where the LRA raided a village and caught the villagers unawares. They would concentrate on killing some, kidnapping others, looting and pillaging. Ideally, the response would be a follow-up by the Ugandan Forces who would seek to know the casualties, seek treatment for the injured and leave the villagers to bury their dead as they pursued the attackers. In reality, however, the Ugandan forces have been accused of perpetrating some of the worst forms of torture veiled as a response to the LRA invasions.⁴⁰

The grim reality is that in the heat of the moment, the best interests principle is the last thing on people's, (victims or perpetrators) minds.

8.4.3 Humanitarian responses are either too spontaneous or too biased to ensure compliance with the best interests principle

Humanitarian responses to armed conflict are regulated by many dynamics. Responses to conflict and instability are plagued with emergent political realities, which

³⁹ Meredith 574.

⁴⁰ Dolan *Social Torture: The Case of Northern Uganda 1986-2006* 57.

may be characterised by the breakdown of state structures, disputed legitimacy of the host government, hostility amongst the citizenry, widespread abuse of human rights and the possibility that the aid may be manipulated by warring factions to obtain an edge over each other.⁴¹

In such circumstances, the best interests principle may be too remote a consideration in view of all the factors at play. Despite the existence of a large body of laws dealing with civilian protection during armed conflict, the fact is that many civilians die in wars, many humanitarian workers are killed and combatants deny access of humanitarian help to many civilians caught in the midst of war.⁴²

I contend that the best interests principle is not applicable even during humanitarian responses to armed conflict for the following reasons:

8.4.3.1 *Delay in intervention*

While the best interests principle would ideally dictate that once a conflict breaks out, response mechanisms are put in place immediately to alleviate suffering for children, the reality is different. The 1992-1994 intervention in Somalia had dire consequences for the US military after the loss of its soldiers, which forced them to withdraw. It led to a US policy of intervention to the effect that the US military was not to be engaged in places where they did not have strategic interests.⁴³ This reluctance by the international community to intervene proved fatal for Rwanda. The world just watched as a section of the population in Rwanda was decimated in three short months in 1994. The imagery

⁴¹ Roberts “Humanitarian issues and agencies as triggers for international military action” www.icrc.org/eng/resources/documents/misc/57jqqa.htm (Date of use: 28 October 2013).

⁴² Roberts www.icrc.org/eng/resources/documents/misc/57jqqa.htm (Date of use: 28 October 2013).

⁴³ Overseas Development Institute “The state of the international humanitarian system” 1998 Briefing Paper www.odi.org.uk (Date of use: 28 October 2013).

of a mother, being forced to bury her child alive by the Hutu militias while the child is crying to the mother not to bury him is heart-breaking, to say the least. To rub salt into the wound, the men were killed first, put in a mass grave, then the children were thrown in alive and their mothers forced to bury them.⁴⁴ To these mothers and their children, the best interests principle did not exist. The subsequent intervention was too little too late. Even then, the response was not properly coordinated, and some authors opine that more lives could have been saved had humanitarian agencies acted with better coordination and professionalism.⁴⁵

8.4.3.2 *Response mechanisms have been put into question*

When war subsides, humanitarian workers usually rush in to frantically save any civilians still alive. Naturally, hasty decisions may have to be made in an emergency situation, which may not necessarily be in the best interests of the children but which have the least detrimental effect at that particular time. These include evacuation of all civilians from the war theatre to safer ground. Yet during such emergencies, resources are scarce and operational conditions dangerous, and thus the priority is on saving lives and on the provision of basic necessities.⁴⁶ At such a point, the focus is not specifically on children but on all civilians, therefore it is not about the best interests of children but about removal of everybody, including the aid workers and even those who are *hors de combat* from harm's way. It is utilitarianism at its best.

Part of the response to war involves the evacuation of those not actively taking part in the hostilities to safer ground. At this time, the aid workers encounter unaccompanied children, either because they have been separated from their parents during the take-to-

⁴⁴ Holzgrefe "Humanitarian intervention debate" in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* 16.

⁴⁵ Hilhorst "Being good at doing good: Quality and accountability of humanitarian NGOs" 2002 *Disasters* 194.

⁴⁶ Boyden "Children's experience of conflict-related emergencies: Some implications for relief policy and practice" 1994 *Disasters* 258.

the-heel moments of the conflict, or because their parents have been killed. There may be no time to focus on who the parents of the children are; the immediate aim being to save the children. Therefore, even if their parents are traceable within the displaced population, there may be no time to trace them. While it is in the best interests of the children that they be reunited with their parents and that families stay together, the circumstances of the conflict are such that the humanitarian workers have to do, not what is in the best interests of these children but rather what would cause them the least detriment.

Indeed, some of the intervention measures have arguably led to more detriment than benefit. There are many instances when evacuation of children from conflict zones and resettlement has gone wrong and resulted in children being permanently removed or lost from their families of origin.⁴⁷ Some children have been evacuated to distant countries, causing an indeterminate separation from their parents. Studies have concluded that such evacuation, which in effect uproots the child from his or her familiar culture and associates and takes him or her to an unfamiliar place, has long-term consequences on the child. In one such study it was concluded that children who were evacuated while below 10 years old and who received poor foster care were at a greater risk of depression and clinical anxiety, with high levels of self-criticisms as adults.⁴⁸ Another study showed that 20% of those who were evacuated as children and placed in foster care unaccompanied by either parent reported severe depressive symptoms at the average age of 60 years. Evacuations that lasted more than three years had the largest effect and were associated with over 33% severe depressive symptoms.⁴⁹

Some evacuations result in separation of children from the rest of their family members, which is not in the best interests of the child but which may be the alternative fraught

⁴⁷ Kuper "Children in armed conflicts: The law and its uses" 2000 *Development* 38.

⁴⁸ Rusby & Tasker "Long-term effects of the British evacuation of children during World War 2 on their adult mental health" 2009 *Aging and Mental Health* 392.

⁴⁹ Personen *et al* "Depressive symptoms in adults separated from their Parents as children: A natural experiment during World War II" 2007 *Am. J. Epi.* 1131.

with the least danger in the circumstances. For instance, mistakes were made in Cambodia and Vietnam when children were placed in alien cultures which they found hard to adjust to, while in fact they had living relatives with whom they could have been placed.⁵⁰ However, I believe that the persons who did the placements had good intentions, and chose the alternative that they thought was the least detrimental at that particular time. Looking for close relatives during the raging conflict may have been impossible then.

Boyden⁵¹ argues that placing people in refugee camps leads to isolation, lack of freedom, crowding and loss of dignity that arises when persons who were formerly economically independent have to rely on handouts. The camps are artificial environments that interrupt normal patterns of learning and socialisation. Long stays in camps result in loss of important life skills such as herding and cultivation, which would ordinarily be passed down from generation to generation.

Indeed, humanitarian agencies have been accused of complicity in what Dolan calls social torture.⁵² Dolan opines that in the case of Northern Uganda, putting civilians in protection camps caused violation, debilitation, humiliation, dependency, dread and disorientation. The lack of basic necessities caused debilitation, removing control caused disorientation and living in a state of fear and anxiety caused dread. In the end, the effect was devaluation and dehumanisation.

Yet, in the conflict ecology, the camps may be the alternative that causes the least harm to the civilians, including the children. It may boil down to basic necessities, for instance resources may be so scarce that the only available option is to reduce the provision of shelter so as to afford food. The best interests of the child would require that both food and shelter be provided, but what has to be considered in this scenario is that one

⁵⁰ Personen *et al* 2007 *Am. J. Epi.* 1134.

⁵¹ Boyden 1994 *Disasters* 261.

⁵² Dolan *Social Torture: The Case of Northern Uganda 1986-2006* 57.

would prefer a child living in a crowded shelter to one who dies of starvation. It is the least detrimental of both alternatives. In post-war scenarios the resources may be limited, so that the focus is generally on the civilian population as a whole. Most governments carrying out after-war reconstruction give priority to infrastructure as opposed to the physical and psychological well being of the war victims.⁵³

8.4.3.3 *Hostility towards refugees*

A refugee population invariably brings a socio-economic burden on the host country. In some situations, the refugees are not assimilated in the host community due to different cultures. With time, some host communities become hostile towards the refugees because of the strain they cause on resources, and also because the refugees are viewed as a favoured lot due to the services they receive from aid agencies.⁵⁴ In Kenya for instance, the refugees in the Dadaab complex are a detested lot amongst the locals because not only are they viewed with envy, they are also accused of breeding insecurity by harbouring Al Shabaab terrorists. Indeed, the public opinion in Kenya is for the closure of the refugee camps especially due to the periodic terrorist attacks in the country.⁵⁵

Closure of borders to deny refugees access into host countries is not uncommon and more countries are expelling refugees in disregard of the principle of voluntary repatriation. In addition, host countries are increasingly feeling that the international community has left the burden of refugees to them without offering the requisite support.⁵⁶ In 1996, 1.2 million Rwandan refugees were repatriated from the then Zaire

⁵³ Boyden "Children's experience of conflict related emergencies: Some implications for relief policy and practice" 1994 *Disasters* 258.

⁵⁴ Bradley *Refugee Repatriation: Justice, Responsibility and Redress* 16.

⁵⁵ BBC World News "Westgate attack: MPs call for Dadaab refugee camps to close" www.bbc.co.uk/news/world-africa-24339508 (Date of use: 28 October 2013).

⁵⁶ Bradley 12.

and Tanzania because of hostilities arising out of claims that Rwanda was aiding rebels opposed to President Laurent Kabila.⁵⁷

With such practices, refugees may be forced to stay within their home territories, even when conflict is raging. Again, I contend that if the best interests principle was put into consideration, refugee populations would get better consideration especially because most of them are usually women and children.

8.4.3.4 *Politics of donor aid*

Humanitarian agencies operate on voluntary contributions by donors and grants by various countries.⁵⁸ Needless to say, they must raise funds for their operations and survival. In their response, most organisations seek to take advantage of the crisis created by armed conflict to raise funds, thus they rely on the media to report on the humanitarian crisis. Big crises are likely to attract donor sympathy and funds. However, some low-level humanitarian crises are ignored in this economic race even when they have been ranging for a long period. Jefferys says that it is the eye-catching and sudden disaster that makes headlines and thus gets more aid, while the less dramatic, yet equally severe catastrophes languish unnoticed and underfunded.⁵⁹ Indeed, in response to the Kosovo humanitarian crisis, the first governor of Kosovo commented that where there were no cameras, there was no humanitarian intervention.⁶⁰ In addition, when governments fund relief agencies, they also tend to use aid as a tool for strategic political goals. Indeed, sometimes aid is dictated more by

⁵⁷ Overseas Development Institute “The state of the international humanitarian system” 1998 Briefing Paper www.odi.org.uk (Date of use: 28 October 2013).

⁵⁸ Frangonikolopoulos “Non-governmental organisations and humanitarian action: The need for a viable change of praxis and ethos” 2005 *Global Society* 51.

⁵⁹ Jefferys, “Giving voice to the silent emergencies” www.odihpn.org (Date of use: 28 October 2013).

⁶⁰ Cate “CNN effect is not clear-cut” 2002 *Humanitarian Affairs Review* www.globalpolicy.org/ngos/role/index2.html (Date of use: 28 October 2013).

geo-political interests of the donor country that the existence of the crisis.⁶¹ Therefore, as much as the humanitarian agencies may genuinely seek to save lives, their efforts may be influenced by other external players.

8.4.3.5 *Failure to observe local customs*

Many programmes ran by the international humanitarian agencies are formulated away from the war theatre. This is more so for conflicts in the developing nations which receive aid from the developed nations and are influenced by values in these nations, which may differ considerably with those in the conflict zone. Hilhorst opines that in formulation of the programmes, local realities are ignored. Many times humanitarian aid impacts on the victims without taking into account their situations values and norms, especially for children who are not considered able to partake in decisions involving their families.⁶² This is practically seen in some of the relief measures initiated by the agencies, such as relocation of child victims to alien cultures. In this case, the best interests of the child would have been better addressed if the local customs and culture were taken into consideration.

8.4.3.6 *Humanitarian workers are not spared either*

Humanitarian workers have been the objects of violence in many war zones. The Aid Worker Security Database (hereinafter “the AWSDB”) indicate that in 2011 alone, at least 3 aid workers lost their lives or were kidnapped in conflict zones every week.⁶³ If the aid

⁶¹ Frangonikolopoulos 2005 *Global Society* 54.

⁶² Hilhorst 2002 *Disasters* 200.

⁶³ Wille & Fast “Operating in insecurity: Shifting patterns of violence against humanitarian aid providers and their staff (1996-2010)”
http://www.insecurityinsight.org/files/Report_13_1_Operating_in_Insecurity.pdf (Date of use: 28 October 2013).

workers are on the run for their lives, they may not give priority to the needs of civilians generally and children in particular.

8.4.3.7 *Illegal wars*

Some wars are not legal in terms of international norms of war. The entry of the USA into Iraq in 2003 was faced with opposition because it was not authorised by any UN Security Council resolution. The UN Security Council Resolution 1441 of 2002 adopted unanimously by 15 of the Security Council members demanded an immediate and unrestricted access of UN weapons inspectors in Iraq. It did not give the US authority to go into Iraq. The claim by the US that it was acting in self-defence could also not hold water because article 51b of the UN Charter is clear that an appeal to self-defence is to be made only if an armed attack occurs.⁶⁴

This meant that this occupation was going to have blow-back effects because of the resistance it faced. The US military also sought to take control of the humanitarian aid and this meant that humanitarian agencies would inevitably bind themselves to the military. Besides, Iraq became such a dangerous place for humanitarian workers that the marriage between the military and humanitarian agencies was inevitable.⁶⁵ Yet, for humanitarian groups, such liaison would be interpreted to mean tacit complicity in a war that they had vigorously opposed. Helton commented as follows in regards to this forced relationship:⁶⁶

“The relationship can be tense. Different perspectives and functions guarantee some measure of disharmony. The military is task driven, and NGOs are

⁶⁴ “Humanitarian Responses to War in Iraq” www3.carleton.ca/csds/docs/occasional_papers/npsia-36.pdf (Date of use: 28 October 2013).

⁶⁵ Helton & Loescher “After the Iraq war: Planning the humanitarian response” www.opendemocracy.com (Date of use: 28 October 2013).

⁶⁶ Helton & Loescher www.opendemocracy.com (Date of use: 28 October 2013).

concerned that if they are perceived as implementing US-led assistance and thereby becoming 'sub-contractors' of the US military, they compromise their neutrality and independence.”

In addition, the military is not primarily concerned with humanitarian issues and it is not an independent institution; it is subject to political control. It may not manage to uphold humanitarian principles while at the same time fighting a war, thus the need for other bodies whose mandate is purely humanitarian.⁶⁷

Boyden⁶⁸ opines that for the armed forces and political authorities alike, children are of no strategic importance in war and child welfare is of low priority. I could not agree with him more, especially for young children who cannot be recruited into the fighting forces.

8.4.3.8 *The war on terror*⁶⁹

The war on terror has brought in new dynamics in the conflict arena. It has led to indiscriminate bombarding of villages in places like Somalia and Pakistan. Amnesty International carried out a study in the tribal areas of Pakistan where drone attacks have been persistent and found out the untold story of civilians caught in the cross fire.⁷⁰ In this situation, it is obvious that the best interests of children are not a consideration as the US military plan and execute their attacks, most likely citing military necessity.

⁶⁷ Frangonikolopoulos 2005 *Global Society* 51.

⁶⁸ Boyden 1994 *Disasters* 268.

⁶⁹ See ch 6 para 6.5.

⁷⁰ Amnesty International “USA must be held to account for drone killings in Pakistan” www.amnesty.org/en/news/usa-must-be-held-account-drone-killings-pakistan-2013-10-22 (Date of use: 28 October 2013).

8.5 IT IS NOT YET OVER

The report of the UN Secretary-General⁷¹ presented to the General Assembly and Security Council on 15 May 2013 still paints a grim picture of the situation of children in the current global conflict theatres. The evolving nature of armed conflict poses new threats to children.

In Afghanistan, the Secretary-General report indicated that in 2012 alone, 47 boys were recruited by the Taliban, Jamat Sunat Al-Dawa and Latif Mansur Network. Most were used to assemble, plant and transport improvised explosive devices, and at least 10 were set aside to carry out suicide bombing attacks. A 16-year-old boy carried out a suicide attack at the International Security Assistance Force (ISAF) headquarters in September 2012, where seven children were killed. The Afghan National Police were also reported to recruit children.⁷² In its counter-terrorism efforts, the United States Government has been reported to arrest and detain children suspected to be terrorists without charging them in court. The UN Secretary-General report indicated one such incident in Afghanistan where a 14-year-old boy was detained without charges.⁷³

In the DRC, 578 children were recruited into armed groups, especially the “Mai Mai” group, in 2012 alone.⁷⁴ In Iraq, children continued to suffer the effects of the sectarian war by being killed in the many suicide attacks in major cities. In Mali, Libya, Lebanon, the Central African Republic, Myanmar, Somalia, Syria and many other world conflict theatres, the script was the same – heavy casualties suffered by children.⁷⁵

⁷¹ www.childrenandarmedconflict.un.org (Date of use: 28 October 2013).

⁷² Report of the UN Secretary-General to the 67th Session of the General Assembly 7 www.childrenandarmedconflict.un.org (Date of use: 28 October 2013).

⁷³ Report of the UN Secretary-General to the 67th Session of the General Assembly 8 www.childrenandarmedconflict.un.org (Date of use: 28 October 2013).

⁷⁴ Report of the UN Secretary-General to the 67th Session of the General Assembly 14 www.childrenandarmedconflict.un.org (Date of use: 28 October 2013).

⁷⁵ www.childrenandarmedconflict.un.org (Date of use: 28 October 2013).

War increases economic and social responsibilities of children especially if the parents have been killed, or the children have been separated with their parents. Children are forced to prematurely assume adult roles and perform casual opportunistic work. This predisposes them to further violence.⁷⁶

8.5.1 The curse of internal armed conflicts

Without delving into an international relations discourse on internal armed conflicts, it is noteworthy that the majority of the current conflicts are non-international in character and that they have contributed so immensely to the suffering of children today that they cannot be ignored.

Prior to the Geneva Conventions, situations of conflict that were not international were not regulated by international law. This was changed by common article 3 to the Geneva Conventions which embodied a set of humane standards for the treatment of all victims of all conflicts. Article 3 is vague as to the definition of “not of an international character”. API I internationalised wars against colonial domination, alien occupation and racist regimes,⁷⁷ thus taking them outside the ambit of internal conflicts. APII limited application of international humanitarian law to situations of internal armed conflict where “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations ...”⁷⁸ It also isolated situations of internal disturbances and tensions such as riots, isolated and sporadic violence as not being the subject of regulation by international humanitarian law.

⁷⁶ Punamaki “Childhood in the shadow of war a psychological study on attitudes and emotional life of Israeli and Palestinian children” 1982 *CRPV* 31.

⁷⁷ A 4 of Additional Protocol I.

⁷⁸ A 1(1) & (2) Additional Protocol II.

However, the *Tadic* case⁷⁹ extended the realm of internal armed conflicts to protracted armed conflict between organised armed groups and government authorities or between such groups. This position was adopted by the Rome Statute establishing the ICC.⁸⁰

The increasing importance of armed groups in international politics is central to understanding regional and global politics.⁸¹ Most of these groups are considered illegitimate actors and states will normally not grant them any recognition, primarily because many are rebelling against an established state.⁸² Perhaps because of this lack of recognition, these rebel groups do not feel the need to observe humanitarian law.

Besides, these groups do not have much motivation to observe international law. Most are regarded as criminal groups, especially by the states against which they are fighting. They receive no benefits from observance of international or domestic law, and indeed, in some instances, they may feel that this observance stands in the way of the achievement of their objectives. For instance, the recruitment of child soldiers by these rebel groups may be one of the ways of beefing up their rank and file. It may also be culturally acceptable in their context to recruit at a tender age.⁸³

In many African countries, initiation into adulthood occurred at adolescence, when it was believed that the girls and boys had matured enough, at least biologically, to be in a position to perpetuate the race. They may not have had the concept of years as we know it today, but they had seasons upon which they based age groups and age sets.

⁷⁹ *Prosecutor v. Dusko Tadic* No. IT-94-i-AR72, para. 70 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) www.un.org/icty (Date of use: 10 October 2013).

⁸⁰ A 8(2)(f).

⁸¹ Vinci "Anarchy, failed states, and armed groups: Reconsidering conventional analysis" 2008 *ISQ* 296.

⁸² Rosen "Who is a child? The legal conundrum of child soldiers" 2009-2010 *Conn JIL* 86.

⁸³ Rosen 2009-2010 *Conn JIL* 88.

In Sierra Leone, for instance, there were all male and all female secret groups (such as the all-male “poro” group and the all-female “bundu” or “sande” group) where the boys and girls would be taken into seclusion and taught the secrets of the community and how to safeguard them. The initiation would include elaborate ceremonial rituals after which they would be regarded as adults. These “adults” were however below 18 years.⁸⁴ The Civil Defence group involved in the 1990s Sierra Leone conflict drew its membership largely from an age-set system called the “kamajor”; although it had children below 18 years as part of its soldiers, it was considered by the Mende people of Sierra Leone as a legitimate community protection group.⁸⁵

A large part of international law has been generated by treaties and other international agreements between states. For instance, the Optional Protocol to the UNCRC 2000 specifically requires non-state armed groups to refrain from recruiting children below 18 years.⁸⁶ Non-state actors may not feel bound to observe laws that they did not make, and which they may believe were made to oppress them. Besides, it may be in their thinking that breach of international law and the domestic law of the state to which they are opposed is the only way to attract audience and get to influence policies. Terrorist groups are particularly notorious for carrying out attacks to influence an audience.⁸⁷

It is now a well established fact that a lot of recruitment and use of child soldiers is done by non-state actors. Given that these actors may not feel obliged to observe international law, Security Council Resolution 1612 comes in handy to engage them and bring them to a negotiating table. The non-adversarial corroborative nature provided for by the resolution may achieve more results than coercive measures which sometimes generate more resistance than compliance. This resolution works very well especially when there are other threats hanging over the non-state actors, such as sanctions or

⁸⁴ Rosen 2009-2010 *Conn JIL* 89.

⁸⁵ Rosen 2009-2010 *Conn JIL* 89. See also para 8.4.2.

⁸⁶ A 4(1).

⁸⁷ Cullen 2005 *Mil. L. Rev.* 79.

having to face the jurisdiction of the International Criminal Court, in a fusion that Happold aptly describes as “stick and carrot” approach.⁸⁸

The United Nations representatives have attempted to negotiate with these non-state actors, with varied failures and successes. The attempted negotiation with LRA leader Joseph Kony ended abruptly when Kony made fresh demands of a change of the scene of negotiations from South Sudan, whom he believed were collaborators of the Ugandan government, to a neutral place such as Kenya. Kony went further into hiding, and his suspicions over these negotiations may have led to his killing his deputy Vincent Oti.⁸⁹

Terrorist groups such as Al Shabaab have shunned any form of engagement with international organisations who they consider “kafirs” (non-believers). They believe that such organisations are out to annihilate them, and are controlled by their western enemies, particularly the United States of America and Britain among others. For them, any attempt to negotiate with them would be to enter into a death trap. Their fears are further confounded by the many times that the meetings of their leaders have been targeted in drone attacks.⁹⁰

In recognition of the fact that non-state actors are not party to the making of international treaties and yet are expected to submit to them, some other international actors have explored alternatives aimed at having the armed non-state actors (hereinafter “the ANSAs”) respect international norms. Geneva Call, a non-governmental organisation, has sought to engage the ANSAs by having them sign a

⁸⁸ Happold “Protecting children in armed conflict: Harnessing the Security Council's “soft power” 2010 *Isr. L. Rev.* 379.

⁸⁹ BBC News “Uganda negotiators leave venue”
www.news.bbc.co.uk/2/hi/Africa/7342123.com (Date of use: 11 October 2013).

⁹⁰ BBC News – “Somali militants in key port ‘attacked by US drones’”
www.bbc.co.uk/news/world-Africa-15052484 (Date of use: 11 October 2013).

“deed of commitment” where they subscribe to the observance of certain norms.⁹¹ In 2000, they engaged the ANSAs to sign the “Deed of Commitment for Adherence to a Total Ban on Anti-personnel Mines and for Cooperation in Mine Action”. This proved to be effective and by 2010 41 ANSAs had unilaterally signed the deed.⁹² This encouraged UNICEF to approach Geneva Call and try the same mechanism for children in armed conflict. The dynamics were, however, different. The international rules governing children in armed conflict are complex and are found in many instruments. Besides, there were other existing UN mechanisms such as the MRMs in place.⁹³

In 2009, during a meeting bringing together the signatories of the deed on landmines, the idea of a similar deed dealing with the effect of armed conflict on children was raised and was well received. An advisory group of international legal and policy experts on children, armed conflict and ANSAs was convened the same year and they drafted the Deed of Commitment on Children and Armed Conflict.⁹⁴

This alternative is not without its shortcomings. The proponents have been accused of recognising belligerents as international players. The implementation of the deed of commitment on children and armed conflict has also been met with accusations of double standards, especially because of the straight-18 rule. The ANSAs know that some states allow for the recruitment of children below the age of 18 years, and as such insistence on them to stick to 18 and above is not well received.⁹⁵

International intervention in an internal conflict is beset with the hurdles of state sovereignty; it is only in a situation where a domestic government has been unable to

⁹¹ Geneva Call Humanitarian engagement of armed non-state actors www.genevacall.org (Date of use: 29 October 2013).

⁹² Somer “Engaging armed non-state actors to protect children from the effects of armed conflict: When the stick doesn’t cut the mustard” 2012 *JHRP* 108.

⁹³ www.childrenandarmedconflict.un.org (Date of use: 28 October 2013).

⁹⁴ Somer 2012 *JHRP* 113.

⁹⁵ Somer 2012 *JHRP* 115.

deal with its rebels that such intervention may be welcomed by the government. Governments do not want to seek international intervention lest they be viewed as weak and unable to contain dissent in their own countries. It takes courage flanked by loss of lives and property for governments such as that of the DRC to invite international actors like the ICC to help.⁹⁶

The LRA conflict had been raging for about seven years by the time international media focused on it, following the unfortunate incident of the “Aboke girls” in 1996⁹⁷. Even then, Kony’s atrocities continued for several years before the 1998 Rome Statute of the ICC came into force in 2002 and indictments issued in 2005.⁹⁸

Yet, the few instances in which governments have invoked the help of international actors have successfully shown that it is possible to bring impunity amongst non-state actors to an end. The arrest warrants issued against Kony and his fellow leaders of the LRA have kept them on the run, such that the people of Northern Uganda can now rest easy. The successful prosecution of Thomas Lubanga⁹⁹ must have sent shock waves amongst other rebel leaders, who know that their days are counted. Though they may increase their atrocities in self-protection, they will live in fear and this may even force them to the negotiating table. The prosecution of a former head of state, Charles Taylor,¹⁰⁰ for crimes committed in a neighbouring country, Sierra Leone, has shown that criminal liability can be trans-nationally incurred.

Cullen argues that an examination of some of the major internal conflicts of the 19th and 20th centuries shows that where belligerents were given some level of recognition, they

⁹⁶ International Criminal Court “Prosecutor receives referral of the situation in the Democratic Republic of Congo” www.icc.org (Date of use: 9 October 2013).

⁹⁷ See para 6.3.3.2.1 above.

⁹⁸ Dolan *Social Torture: The Case of Northern Uganda, 1986-2006* 46.

⁹⁹ *Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06 www.icc-cpi.int (Date of use: 9 October 2013).

¹⁰⁰ *Prosecutor v Charles Ghankay Taylor* SCSL-03-01-T www.sc-sl.org (Date of use: 9 October 2013).

tended to obey humanitarian rules as opposed to situations where they were not recognised.¹⁰¹

Breach of the *jus in bello* is largely not because of lack of legal provisions, but because of lacunae in enforcement. That said, the children's rights jurisprudence has shown that in order to draw attention to a breach of rights against children, there is a need to address the children specifically other than lumping them together with other civilians. Perhaps the international community needs to pronounce a criterion for intervention in any armed conflict, if there is even the slightest evidence of the six grave violations.¹⁰² Indeed, if the international community had intervened, the LRA conflict might perhaps have ended a long time ago. Situations of proxy wars where states support rebel groups of their "enemy-states", such as the situation where the government of Sudan supported the LRA because of the Government of Uganda's real or perceived support of the Sudan People's Liberation Movement ("SPLA") should never be tolerated by the community of nations.

It is important to recognise that armed groups are a reality, sometimes brought about by the world's macro and micro-economics. Even if one does not agree with their objectives, some of which may be legitimate, they cannot be wished away. Of great concern is their role in robbing children of their childhood and innocence.

Finally, but of most importance, in recognition of past and ongoing atrocities against children, the world should unite and accept one criterion of childhood – that a child is anyone below 18 years and therefore advance the straight-18 movement.¹⁰³ There is no justification for the double standards that are currently applied; children are denied the right to vote because of their age-related incapacity, yet they are used in military

¹⁰¹ Cullen 2005 *Mil. L. Rev.* 75.

¹⁰² See ch 7 para 7.3.2.

¹⁰³ A movement lobbying for adoption of 18 years as the universal age for enlistment to the armed forces www.childsoldiersinternational.org (Date of use: 11 October 2013).

engagements. Armed groups are prohibited to enlist children below 18 years into their ranks, yet states are given a leeway dubbed voluntary enlistment of those between 15 and 18 years.

8.6 CONCLUSION: THE LEAST DETRIMENTAL ALTERNATIVE

Goldstein, Freud and Solnit suggested this alternative standard to the best interests principle in acknowledgment of the fact that by the time a dispute revolves around a child, he or she is already a victim of his environmental circumstances, is greatly at risk and urgent action is needed to remove the child from the situation of harm and avoid further damage to his or her physical and psychological development.¹⁰⁴ While they advanced this principle for placements in family-law proceedings, I think it applies perfectly for children in armed conflict situations.

From the outset, war is not simply a contest of two opposing sides; it involves many other parties caught in between. It involves the combatants, civilians, humanitarian agencies and third parties who may seek to intervene for their own purposes. Since the combatants are often obsessed with annihilating the enemy, the welfare of civilians generally and children in particular is usually left to humanitarian agencies and third party interventionists. While the intentions of the humanitarian agencies may be noble in aiming to alleviate suffering, the limitations within which they operate in terms of resources only ensures that they have to balance between the most and least harm, thus opting for the least detrimental alternative.

As discussed earlier,¹⁰⁵ the impacts of war imply a detriment on the civilians affected by it. Death, injury, displacement and separation from parents are just some of the

¹⁰⁴ Goldstein *et al* *The Best Interests of the Child – The Least Detrimental Alternative* 21.

¹⁰⁵ See ch 2 para 2.3.

immediate effects of war. They are followed almost always by hunger and starvation and resettlement in unfamiliar and usually unfriendly environment.

If application of the best interests principle is difficult in peace times, it is impractical during armed conflict. Goldstein *et al* rightly state as follows:¹⁰⁶

“No one ... can forecast just what experiences, what events, what changes a child ... will encounter. Nor can anyone predict in detail how the unfolding development of a child and his family will be reflected in the long run in the child’s personality and character formation.”

The above quote is even more relevant in a war situation. When a war starts, it is hard to predict how long it will take and what the likely casualties will be. It is a classic case of Elster’s explanation of the indeterminacy of the best interests principle when the options may be known but the possible outcome of each option, the probability of each outcome occurring and the value attached to each outcome are largely unknown.¹⁰⁷

In proposing the least detrimental alternative, Goldstein *et al* observed that their alternative was the most preferable for two reasons; it indicated to the decision maker that the child was already a victim, and secondly, it brought out the fact that decisions purported to be made in the best interests of the child were balanced against other competing interests, and sometimes the best interests were made subordinate to those other competing interests.¹⁰⁸ The least detrimental alternative meant that decision-makers would change their focus from the unattainable best interests to salvaging what

¹⁰⁶ Goldstein *et al* *Beyond the Best Interests of the Child* 51-52.

¹⁰⁷ See ch 5 para 5.4 above.

¹⁰⁸ Goldstein *The Best Interests of the Child – The Least Detrimental* 54.

they could from an unsatisfactory situation.¹⁰⁹ The least detrimental alternative would dictate a quick and unconditional action in emergency situations.

The best interests principle was contemplated for peace times when failure to observe it would attract sanctions from an enforcing authority. This authority has with time been assumed by judicial arms of governments. In a war situation, the decision on what to do with the children and other civilians caught in the midst is left with humanitarian agencies working to save the non-combatants. Sometimes the action taken is impulsive.

Given that most of the humanitarian workers that respond to conflicts are influenced by the western notion of the innocent child, they undertake measures that believe would serve the best interests of the child. Yet this is not always the case.

Rankin¹¹⁰ argues that when the “best interests” principle is not obtainable, the “least detrimental available alternative” or the “least restrictive and most empowering” is to be used. In the case of armed conflict, the “best interests” principle is unobtainable.

¹⁰⁹ Goldstein *The Best Interests of the Child – The Least Detrimental* 63.

¹¹⁰ Rankin “Protecting the best Interests of the child: Some issues and solutions” 2001-2002 *IUC Journal of Social Work* 4.1.

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