

The protection and participation rights of the child soldier: An African and global perspective

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1 Introduction

In retrospect it may be regarded as somewhat ominous that the Geneva Declaration of the Rights of the Child¹ was inspired by, and remained closely allied to, our encountering of war.² The pendulum of our conception of the involvement of children in war has since swung from that of the exclusive categorisation of the child as the 'civilian' victim deserving of the ideal of 'peace and universal brotherhood'³ and worthy of special protection in that context,⁴ to the special protection afforded to children as combatants. This happened in both the Additional Protocols

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1 Records of the Fifth Assembly Supplement (1924) 23 *League of Nations Official Journal* (adopted in September 1924). It marked the evolution of child 'welfare' from a focus on social work to 'an official object of international relations' (D Marshall 'The construction of children as an object of international relations: The Declaration of Children's Rights and the Child Welfare Committee of the League of Nations, 1900–1924' (1999) 7 *International Journal of Children's Rights* 103).

2 Marshall (n 1 above) 133.

3 Principle 10 Declaration of the Rights of the Child, General Assembly (GA) Res 1386 XIV (adopted on 20 November 1959). See arts 14, 17, 23, 24, 38, 50, 51, and 68 of the Convention Relative to the Protection of Civilian Persons in Time of War 12 August 1949 (Geneva Convention No IV) 75 *United Nations Treaty Series* 287.

4 Art 25(2) of the Universal Declaration of Human Rights GA Res 217A(III) (adopted on 10 December 1948).

to the Geneva Conventions of 1949,⁵ the Convention on the Rights of the Child (CRC)⁶ and the African Charter on the Rights and Welfare of the Child (African Children's Charter).⁷ Indeed, the 1995 Statement on the First Regional Consultation on the Impact of Armed Conflict on Children in the Horn, Eastern, Central and Southern Africa realised the truth of the ominous inception of children's rights, opening with the phrase: 'A threat haunts Africa . . .'.⁸

The question of the nature of the special protection afforded to children in armed conflict has been described as the most controversial issue debated during the course of the CRC negotiations.⁹ The outcome of this debate was dissatisfactory and revealed a 'general lack of innovation'.¹⁰ Furthermore, the higher standard of protection subsequently granted by the African Children's Charter¹¹ was seen as being of little practical use. This was due to its inability to gain sufficient support to enter into force,¹² until recently.¹³ The African Children's Charter inevitably presents the same obstacles encountered in the enforcement of the provisions of the CRC.

However, the CRC recognises the child as the bearer of rights entrenched in a binding international instrument, comprising various categories of rights including protection and participation rights.¹⁴ So does the African Children's Charter. The struggle between these competing rights is epitomised in the case of child soldiers who are at the same time entitled

5 See art 77(2)–(5) of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (Geneva Protocol I) (1977) 16 *International Legal Materials* 1391. See also art 4(3)(c) of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 (Geneva Protocol II) (1977) 16 *International Legal Materials* 1442.

6 Art 38(2)–(3) GA Res 44/25 (1989) 28 *International Legal Materials* 1448 (adopted on 20 November 1989 and entered into force on 2 September 1990). See also the Preamble to the Declaration on the Protection of Women and Children in Emergency and Armed Conflict GA Resolution 3318(XXIX) of 14 December 1974 for the specific reference to 'women and children belonging to the civilian population'.

7 OAU Doc CAB/LEG/153/Rev 2 (1990), which entered into force on 29 November 1999.

8 Report of the Secretary General on the impact of armed conflict on children: UN Doc E/CN.4/1996/110/Add.1 of 11 March 1996, Annex 1.

9 LJ LeBlanc *The Convention on the Rights of the Child: United Nations lawmaking on human rights* (1995) 148.

10 LeBlanc (n 9 above) 280.

11 Art 22(2), read with art 2 CRC.

12 G Van Bueren *The International law on the rights of the child* (1995) 332. See also B Thompson 'Africa's Charter on Children's Rights: A normative break with cultural traditionalism' (1992) 41 *International and Comparative Law Quarterly* 432.

13 The African Children's Charter entered into force on 29 November 1999. By the end of September 2000, it had been ratified by 21 states (OAU DOC/OS(XXVIII)INF.25).

14 Van Bueren (n 12 above) 15.

to the special protection accorded to children in situations of armed conflict and to exercise their participation rights. As Graça Machel, the previous United Nations (UN) expert on children in armed conflict, stated:¹⁵

[I]t is important to note that children may also identify with and fight for social causes, religious expression, self-determination and national liberation. As happened in South Africa or in the occupied territories, they may join the struggle in pursuit of political freedom.

It is this conflict between protection and participation rights, the role of prevention and provision rights¹⁶ and the 'suspect classification'¹⁷ of age, that this article seeks to explore. Viewing the issue as being merely one of protection as opposed to participation 'is too simplistic'.¹⁸ This article hopes to meet the challenge posed by the realisation that for some children participation is their only means of survival¹⁹ — a consequence of socio-economic and political circumstance. It is necessary to throw off the shackles of 'symbolic politics'²⁰ in order to return to the empowerment of children. We need to consider them not only within the constraints and challenges of their present situation, but also as 'a privileged way to speak about the future'.²¹

2 Placing the debate in an African context

Although the African Children's Charter came into force only recently, the question of the impact on, and involvement of children in armed conflict has long since lingered on African agendas.²² In July 1996 the Organisation of African Unity (OAU) adopted a resolution on the plight of African children in situations of armed conflict.²³ This conviction was reiterated in its decision of July 1999.²⁴

15 G Machel Impact of armed conflict on children: Report of the expert of the Secretary General, Ms Graça Machel (Machel Report), submitted pursuant to GA Res 48/157: UN Doc A/51/306 and Addendum 1 of 26 August 1996, para 43.

16 Van Bueren (n 12 above) 15.

17 M Freeman 'Taking children's rights more seriously' (1992) 6 *International Journal of Law and the Family* 52 66.

18 G Van Bueren 'The international legal protection of children in armed conflicts' (1994) 43 *International and Comparative Law Quarterly* 809 816.

19 As above.

20 n 17 above 61.

21 Marshall (n 1 above) 143.

22 n 9 above.

23 Res 1659 (LXIV) adopted in Yaoundé, Cameroon. See also report of an international workshop 'Armed conflict and minority and indigenous children in the Horn and Great Lakes regions of Africa' 23–24 April 1998, Kampala, Uganda <<http://www2.essex.ac.uk/c&acu/international/comment/Text/paper005.htm>> (accessed 8 February 2001).

24 Decision of the African Conference on the Use of Children as Soldiers CM/Dec.482 (LXX) <<http://www.child-soldiers.org>> (accessed 8 February 2001).

Most significantly, the concern felt for this threat to African children culminated in the African Conference on the Use of Children as Soldiers in April 1999, and the adoption at this conference of the Maputo Declaration on the Use of Children as Soldiers.²⁵ The extent of the participation of children in armed conflicts in Africa was captured in the *Africa Report* that was released at this conference: At the time more than 120 000 children under eighteen years were participating in armed conflicts across Africa. The countries most affected by this problem were Algeria, Angola, Burundi, Congo-Brazzaville, the Democratic Republic of Congo, Liberia, Rwanda, Sierra-Leone, Sudan, Uganda, and to a lesser extent Ethiopia and Eritrea.²⁶

Recently, Graça Machel concluded that despite humanitarian efforts and the intervention of governments, 'our promises to children throughout the world remain unfulfilled. This review is a second call to action.'²⁷

However, this is not only an African problem. African states are also not only subject to regional treaties, but also to obligations under UN treaties. It is in this context that the CRC, the African Children's Charter and the Optional Protocol to the Children's Convention on the Involvement of Children in Armed Conflicts (Optional Protocol) are considered. The Machel Report encouraged this co-operation 'within the framework of the Convention on the Rights of the Child and other relevant international and regional treaties, declarations and guidelines that emphasise children's rights'.²⁸ This approach is adopted here.

3 International law and the human rights of the child soldier

3.1 An overview of humanitarian protection

The provisions and underlying perceptions of international humanitarian law are relevant not only in a global, but also in a regional context. The African Children's Charter specifically requires that states respect the 'rules of international humanitarian law applicable in armed conflicts

25 Maputo Declaration on the Use of Children as Soldiers, Maputo, Mozambique 22 April 1999 <<http://www.hrw.org/campaigns/crp/maputo-declaration.htm>> (accessed 8 February 2001).

26 The coalition to stop the use of child soldiers *Africa Report* March 1999 <http://www.child-soldiers.org/reports_africa/report_cover.html> (accessed 8 February 2001).

27 G Machel 'The impact of armed conflict on children: A critical review of progress made and obstacles encountered in increasing protection for war-affected children' <<http://www.war-affected-children.org/machel-e.asp>> (accessed 8 February 2001), paper delivered at the International Conference on war-affected children held in Winnipeg, Canada in September 2000.

28 n 15 above para 279.

which affect the child'.²⁹ This overview begins with the Geneva Declaration of the Rights of the Child that was, admittedly, based on a 'certain conception of childhood'.³⁰ Its only reference to children affected by armed conflict was that they were to 'be the first to receive relief in times of distress'.³¹ The 1959 Declaration of the Rights of the Child represents considerable progress.³² However, this non-binding instrument omits specific reference to the plight of children affected by armed conflict, and contains no definition of childhood. Similarly, the definition of childhood in contemporary international law is imprecise.³³

By 1960 the assumption that children were affected by war only in their capacity as civilians could no longer be sustained owing to the use of child soldiers in various wars of national liberation and self-determination.³⁴ The question of child soldiers was therefore addressed for the first time in both Geneva Protocol I and II, which set fifteen as the minimum age for the recruitment of child soldiers with regard to international and non-international armed conflicts.³⁵ However, the position in Geneva Protocol II with regard to non-international armed conflicts is more stringent.³⁶ It does not limit participation restrictions to that of the 'direct' participation of children in hostilities,³⁷ and it clearly applies to both 'recruitment' and voluntary enlistment.³⁸ Protocol II also omits the limitation of states' obligations to the taking of all 'feasible measures' alone.³⁹ All these restrictions on states' obligations are included in Geneva Protocol I.

Commentators have noted that the prohibition of recruitment and the restriction on participation of children under the age of fifteen⁴⁰ were manifestations of the perception that children who reached that age

29 Art 22(1).

30 Marshall (n 1 above) 143.

31 Principle III. See also P Veerman *The rights of the child and the changing image of childhood* (1992) 168–180.

32 Van Bueren (n 12 above) 12.

33 Van Bueren (n 12 above) 333.

34 H Mann 'International law and the child soldier' (1987) 36 *International and Comparative Law Quarterly* 32 35–6.

35 Art 4(3)(c) Geneva Protocol II. Art 77(2) Geneva Protocol I.

36 Mann (n 34 above) 50, as to the motivation of states for reducing the perceived military advantage of dissident groups.

37 Mann (n 34 above) 46 for the debate between states over this provision. See also art 4(3)(c) of the Geneva Protocol II and art 77(2) of the Geneva Protocol I.

38 Van Bueren (n 12 above) 813–15. See also art 4(3)(c) of the Geneva Protocol II and art 77(2) of the Geneva Protocol I.

39 Art 4(3)(c) of the Geneva Protocol II and art 77(2) of the Geneva Protocol I. See also Mann (n 34 above) 44 for the drafting procedure substituting the word 'feasible' for that of 'necessary'.

40 See also the provision in art 77(2) of the Geneva Protocol I which provides a measure of protection to children between the ages of 15 and 18 by requiring states to 'endeavour to give priority to those who are oldest'.

were at that stage of development which did not require the same special or systemic protection.⁴¹ However, international humanitarian law is inconsistent in this regard, placing a prohibition on the execution of the death penalty on children under eighteen,⁴² owing to their lack of judgment and recognition of the consequence of their actions. This is an inconsistency which one commentator attributes to the 'differentiation between the physical and developmental needs catered to under the concept of special protection'.⁴³

State parties to these international humanitarian instruments did not consider the participation rights of children. One exception is the failed attempt of Vietnam to have a provision included in article 77(1) of Geneva Protocol I concerning the early release of child prisoners of war arrested because of their 'political non-submission' or patriotism.⁴⁴

Having compromised with regard to the protection of children affected by armed conflict, having disregarded the socio-economic and political root causes of such participation as well as children's rights (whether participatory or protectionist), the criticism that 'humanitarian law represents a compromise between humanitarian considerations and military necessity'⁴⁵ rings ominously true.

3.2 The 'contribution' of the CRC

The CRC entrenched children's rights in a binding document. It is the entrenchment of children's participation rights that is most significant in the context of the further evolution of children's rights. Children's participation rights are also the most controversial category of rights to be recognised.⁴⁶ Although the CRC protects child soldiers and establishes a minimum age for recruitment and participation in hostilities, the framing of these provisions was not concerned with an examination of the developmental needs or abilities of children with regard to either protection or participation rights.⁴⁷

41 Van Bueren (n 12 above) 333. See also Mann (n 34 above) 39–40.

42 Art 68(4) Geneva Convention IV, art 77(5) Geneva Protocol I and art 6(4) Geneva Protocol II.

43 n 34 above 40. See also C Reis 'Trying the future, avenging the past: The implications of prosecuting children for participation in internal armed conflict' (1997) 28 *Columbia Human Rights Law Review* 629.

44 Van Bueren (n 12 above) 44.

45 n 15 above para 218.

46 Van Bueren (n 12 above) 15.

47 Van Bueren (n 18 above) 814 for the dismissal of Algeria's proposal concerning voluntary enlistment of children over 15 in wars of national liberation.

Instead, article 38⁴⁸ is an 'approximation'⁴⁹ of article 77(2) of the Geneva Protocol I and in fact is inferior to the protection afforded by the Geneva Protocol II. Article 38 of the CRC therefore undermines existing humanitarian standards.⁵⁰ This regression is evidenced by the restriction on the prohibition of participation in hostilities to that of 'direct' participation.⁵¹ This limitation is also contained in the African Children's Charter.⁵² The answer to Colombia's question as to why the Working Group was prepared to recognise the rights of children generally up to the age of eighteen, but was only prepared to protect child soldiers up to the age of fifteen,⁵³ is that states were concerned primarily with making the provisions compatible with their domestic legislation.⁵⁴ The contention was that the Working Group was not the correct forum for, nor empowered to amend existing international humanitarian law standards.⁵⁵ General dissatisfaction with the resulting protection led several states to attach declarations to their ratifications, stating their adherence to a higher standard of protection.⁵⁶

Sadly, it is evident from the observations of the UN Committee on the Rights of the Child (UN Children's Committee) that even these low standards with regard to the protection of child soldiers are not being enforced. Examples are the UN Children's Committee's reports on Uganda and Sierra Leone.⁵⁷ This reveals little prospect for compliance with the higher standard embodied in the African Children's Charter, which requires that 'no child', being a person under the age of eighteen,⁵⁸ takes a direct part in hostilities or be recruited.⁵⁹

An innovative feature of the CRC is its provisions with regard to states' obligations concerning the psychological recovery and social reintegration of children affected by armed conflict.⁶⁰ Unfortunately this

48 Art 38(2) setting the minimum age for 'direct' participation of children in hostilities at 15 and requiring states to merely take all 'feasible measures' to enforce this. Art 38(3) requires states to refrain from 'recruiting' children under the age of 15 and to give preference to the older of those children between 15 and 18 years.

49 Mann (n 34 above) 56.

50 S Detrick and others (eds) *The United Nations Convention on the Rights of the Child: A guide to the 'travaux préparatoires'* (1992) 515.

51 Art 38(2) CRC.

52 Art 22(2) African Children's Charter.

53 n 50 above 514.

54 n 9 above 281.

55 n 50 above 514.

56 n 9 above 153-4.

57 Committee on the Rights of the Child Concluding observations of the Committee on the Rights of the Child: Uganda (21/10/97) UN Doc CRC/C/15/Add.80 para 19. See Committee on the Rights of the Child Concluding observations of the Committee on the Rights of the Child: Sierra Leone (28/01/2000) UN Doc CRC/C/15/Add.116 para 70.

58 Art 2.

59 Art 22(2).

60 Art 39. See also arts 37 and 40.

innovation is not mirrored in the African Children's Charter. Furthermore, the greatest contribution of the UN Children's Committee is undoubtedly its recognition that poverty and armed conflict are difficulties affecting the implementation of children's rights generally.⁶¹ The UN Children's Committee has therefore already begun to place children's rights in a country and environment specific context with regard to enforcement, which may assist in combating the 'unique factors' which determine the critical situation of many African children as recognised in the Preamble of the African Children's Charter.⁶² The next step is to consider the definition and to weigh up such rights in this light.

3.3 The impact of the Optional Protocol to the CRC

The dissatisfaction with the final provisions of the CRC concerning armed conflict resulted in the UN Economic and Social Council (ECOSOC) establishing an open-ended Working Group. Its purpose was to draft an Optional Protocol to the CRC dealing with this issue.⁶³

It was agreed that various areas required the raising of standards,⁶⁴ but commentators noted that the Optional Protocol would 'represent a squandered opportunity if its sole purpose is the raising of minimum ages'.⁶⁵ However, this remained the focus of the Working Group, which at first failed to reach consensus on the minimum age of recruitment.⁶⁶ Later the Working Group adopted a Draft Optional Protocol.⁶⁷

61 Uganda (n 57 above) para 6. See also Sierra Leone (n 57 above) para 5. See also Committee on the Rights of the Child Concluding observations of the Committee on the Rights of the Child: Sri Lanka (21/06/95) UN Doc CRC/C/15/Add.40 para 6.

62 The Preamble refers to African children's unique 'socio-economic, cultural, traditional and developmental circumstances', exacerbated by 'natural disasters, armed conflicts, exploitation and hunger'.

63 Adopted and opened for signature, ratification and accession by GA resolution UN Doc A/RES/54/263 of 25 May 2000 (Optional Protocol) UN Doc ECOSOC Resolution 1994/10. See also Commission on Human Rights Inter-sessional working group on the Draft Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts Fifth Session Geneva 11 January 1999, UN Doc E/CN.4/1999/WG.13/3, paras 7–18, for the background and scope of the issue (Chairman's Report); see <<http://www.unhcr.ch/html/menu3/b/treaty17.asp.htm>> (accessed 8 February 2001) for the signatories and ratifications of the Optional Protocol. As at 4 January 2001, no African state had ratified the Optional Protocol.

64 Van Bueren (n 18 above) 825–6. See Chairman's Report (n 63 above) para 15.

65 Van Bueren (n 18 above) 825–6.

66 See Commission on Human Rights Inter-sessional working group on the Draft Optional Protocol to the Convention on Rights of the Child on the involvement of child soldiers in armed conflicts, Sixth Session, Geneva, 10–21 January 2000, UN Doc E/CN.4/2000/WG.13/3, para 8 for alternative proposals.

67 Adopted on 21 January 2000.

In its Preamble the Optional Protocol states that the raising of the age of possible recruitment and participation of children would, in itself, somehow 'contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children'.⁶⁸ This fails to consider the root causes of child recruitment and participation, and the fact that existing standards are not being implemented.

Instead it perpetuates the attempt of the CRC and the African Children's Charter⁶⁹ to implement obligations by means of the state reporting system. The UN Children's Committee has already shown that a reporting obligation is not a guarantee of the implementation of children's rights.⁷⁰ In mitigation, it should be stated that the Preamble recognises the political, economic and social root causes of children's involvement in armed conflict.⁷¹ However, it contains no substantive provisions in this regard. This recognition is absent from both the CRC and the African Children's Charter. Furthermore, the only reference in the Optional Protocol to the developmental difference between children of the age of eighteen as opposed to the existing standard of fifteen was made by the Quakers, who merely stated that it should be debated no further than to say that it heralded the essential distinction between adults and children.⁷²

The ultimate failure of the Optional Protocol is that despite its emphasis on the importance of raising the minimum age of recruitment and participation from its present level of fifteen years, it in fact fails to do so. The result is that those states that decide to ratify it undertake to raise this minimum age to at least that of sixteen.⁷³

68 Para 8 of the Preamble to the Optional Protocol <<http://www.unhchr.ch>> (accessed 8 February 2001).

69 Art 43 African Children's Charter; art 44 CRC.

70 Art 8 Optional Protocol. See also R Harvey 'Recruitment and deployment of child soldiers — The beginning of the end?' <<http://www2.essex.ac.uk/c%26acu/News%20Folder/Future/2000News/Comments/DraftOPCS.htm>> (accessed 8 February 2000).

71 Para 15 and 16 of the Preamble Optional Protocol.

72 Commission on Human Rights Inter-sessional working group on the Draft Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, Sixth Session, Geneva, 10–21 January 2000, UN Doc E/CN.4/2000/WG.13/2 <<http://www.unhchr.ch>> (accessed 8 February 2001).

73 Arts 2, 3 and 4 of the Optional Protocol; Special representative for children and armed conflict welcomes agreement on minimum age for participation in conflict, 26 January 2000 press release HR/4455, <<http://www.un.org/News/Press/docs/2000/20000126.hr4455.doc.html>> (accessed 24 April 2000); Human Rights Watch International community welcomes the agreement to raise the minimum age for participation in conflict to 18 years 22 January 2000 <<http://www.essex.ac.uk/c%26acu/News%20Folder/Future/2000News/Breaking/breaking.htm>> (accessed 24 April 2000).

3.4 United Nations and regional initiatives outside the CRC structure

The UN emphasised, unfortunately outside the structure of the CRC, the importance for the prevention of participation of children in armed conflicts, of providing children with alternatives to such involvement.⁷⁴ These have also been recognised at a regional level in various declarations concerning child soldiers in Latin America,⁷⁵ Europe⁷⁶ and Africa.⁷⁷ Furthermore, the Machel Report reiterated that one of the 'most basic reasons that children join armed forces is economic'.⁷⁸ Combined, these approaches are very useful. We must both realise the root causes of the involvement of children in armed conflict, as well as respect their participation rights by providing alternative methods by which they can contribute to their social, cultural or political convictions.

The ultimate realisation is that the law itself cannot be relied upon as the only safeguard.⁷⁹

4 The role of autonomy and participation rights

4.1 Considering the children's rights perspective as opposed to 'our view' of children

Considering children as 'autonomous beings' is widely contested,⁸⁰ and the adult-centred perspective of many researchers often focuses on attitudes 'towards and of children'.⁸¹ It is within this context that fundamental problems arise for those who advocate greater participation rights for children concerning decisions affecting their lives, as their attitudes 'towards' children intervene with regard to the question of the participation of children in armed conflicts.⁸²

Critics of the realisation of the child as an autonomous bearer of rights see this autonomy as an 'isolated benefit' justified by rights rhetoric.⁸³ However, this view employs the same tools as the proponents of child

74 Res of the Security Council, 25 August 1999, S/RES/1261 (1999) para 13.

75 Para 8 (a) of Montevideo Declaration on the Use of Children as Soldiers 8 July 1999 <http://www.hrw.org/campaigns/crp/monte_dec.htm> (accessed 8 February 2001).

76 Para 7(iv) of Berlin Declaration on the Use of Children as Soldiers, 20 October 1999 <<http://www.hrw.org/campaigns/crp/berlin.htm>> (accessed 8 February 2001).

77 n 25 above para 8.

78 n 15 above para 39.

79 n 15 above para 36.

80 C Lowy 'Autonomy and the appropriate projects of children: A comment on Freeman' (1992) 6 *International Journal of Law and the Family* 72.

81 Veerman (n 31 above) 10.

82 Van Bueren (n 12 above) 335.

83 A Morita Beyond the myth of children's rights <http://www.worldcongress.org/gen99_speakers/gen99_morita.htm> (accessed 8 February 2001).

autonomy who resort to welfarism and the 'best interests' principle in restricting the very autonomy they wish to confer.⁸⁴ Eekelaar describes 'welfarism' as being those actions which hold the promotion of the welfare of another as their sole motivation,⁸⁵ and poses the question as to whether any meaningful rights are possessed by the child if another has the right to determine that child's welfare.⁸⁶

It should be borne in mind throughout that childhood is a social construction and a relative concept defined by those in authority. It is also dependent upon cultural, social, environmental and political variants.⁸⁷ Seen against this background, the use of age as a means of classification of status or capacity becomes 'suspect'.⁸⁸ With regard to the restriction of children's participation rights, the use of a specific age as a means of rights limitation (or protection) ignores the consequent varying rate of the moral and cognitive development of children.⁸⁹ The exercise of autonomy cannot necessarily be dependant upon the achievement of a specific age.⁹⁰

Others argue that children's autonomy should be respected only with regard to 'appropriate projects'.⁹¹ But this argument may in fact not involve the exercise of autonomy as the child is not the person to determine these 'appropriate projects'. A possible compromise involves the reconciliation of actions taken with the objective of furthering a child's best interests and the view of the child as a bearer of rights.⁹² This compromise allows children to contribute in determining what their interests are.⁹³ Further clarity can be obtained by giving a child's basic interests a pre-eminent status, whereas the child's developmental and autonomy interests can reasonably be compromised.⁹⁴

4.2 Assessing specific participation rights

Not all rights entrenched in the CRC are protective in nature, as some relate to children being heard in matters that affect their lives and empower them to act.⁹⁵ These empowerment or participation rights

84 Van Bueren (n 18 above) 816.

85 J Eekelaar 'The importance of thinking that children have rights' (1992) 6 *International Journal of Law and the Family* 231 228.

86 n 85 above 223.

87 Freeman (n 17 above) 56; Veerman (n 31 above) 10; Van Bueren (n 12 above) 6.

88 Freeman (n 17 above) 66.

89 Freeman (n 17 above) 58-9.

90 Freeman (n 17 above) 64.

91 Lowy (n 80 above) 74.

92 J Eekelaar 'The interests of the child and the child's wishes: The role of the dynamic self-determinism' (1994) 8 *International Journal of the Law and the Family* 42.

93 Eekelaar (n 92 above) 43.

94 Eekelaar (n 85 above) 231.

95 n 9 above 157.

include the right to freedom of expression,⁹⁶ the right to have his or her views heard⁹⁷ and freedom of association.⁹⁸ The 'evolving capacities of the child'⁹⁹ is the guiding principle in respect of these rights.¹⁰⁰ It is the conflict between this category of rights, dealt with more insubstantially than other categories of rights in the CRC,¹⁰¹ and protection rights, more specifically the safeguards provided by article 38 of the CRC and article 22 of the African Children's Charter concerning the voluntary participation of children in armed conflict, which deserves examination.

One argument favours the view that the safeguards in article 38(2) and (3) of the CRC, and by comparative analysis article 22(2) of the African Children's Charter, restrict the manifestation of a child's right to freedom of expression and freedom of association.¹⁰² During the drafting of the CRC the United States maintained that the importance of the right to freedom of association lay in the fact that adolescents have often acquired 'the skills necessary to participate fully and effectively in society'.¹⁰³ Despite the reservations attached to this provision,¹⁰⁴ it may be maintained that the importance of this right for children lies in increasing the power of individuals by 'conferring on them the right to participate in group activity'.¹⁰⁵ This right is an important right, especially for older children.¹⁰⁶ Van Bueren argues that the safeguards concerning voluntary participation in armed conflict limit the right to freedom of association more persuasively than the argument relating to the right to freedom of expression.¹⁰⁷ The argument concerning the limitation of freedom of expression reiterates that the protective provisions in article 38 are an 'appropriate humanitarian gesture', but that its underlying philosophy may conflict with that of article 13, especially with regard to the expression of political views.¹⁰⁸ This would be of specific relevance to wars of national liberation.

96 Arts 13 and 14 CRC. See also arts 7 and 9 African Children's Charter.

97 Art 12 CRC; art 4(2) African Children's Charter.

98 Art 15 CRC; art 8 African Children's Charter.

99 Art 12(1) CRC; art 4(1) African Children's Charter.

100 n 9 above 157.

101 As above.

102 Van Bueren (n 18 above) 816.

103 n 9 above 173.

104 n 9 above 174-5.

105 Van Bueren (n 12 above) 144.

106 Lowy (n 80 above) 74.

107 Van Bueren (n 18 above) 816.

108 F Olsen 'Children's rights: Some feminist approaches to the United Nations Convention on the Rights of the Child' (1992) 6 *International Journal of Law and the Family* 192 214.

It is important to note that children are not always forcibly recruited into the armed forces. Only voluntary enlistment is focused upon here.¹⁰⁹ As was the case in Ethiopia, Eritrea and South Africa, an appeal was made to children's sense of patriotism in their fight for self-determination and national liberation.¹¹⁰ The debate is therefore complicated by some children's belief that fighting in wars of national liberation is the only means for them to contribute to a political or social cause, as was sometimes the case in Uganda.¹¹¹ In this regard it is important to note the responsibilities placed upon the child in the African Children's Charter, which include the duty to 'serve his national community by placing his physical and intellectual abilities at its service',¹¹² 'to preserve and strengthen social and national solidarity'¹¹³ and 'to preserve and strengthen the independence and the integrity of his country'¹¹⁴ — more specifically how these duties may be interpreted in the light of the wars of liberation and in the context of other remnants of colonisation.

An argument used in justifying the limitation on the voluntary enlisting of children is that of equating it with 'participation in specific forms of exploitation'.¹¹⁵ This comparison may have philosophical limitations.¹¹⁶ Also, the European Commission on Human Rights held that the voluntary enlistment of children under the age of eighteen did not amount to 'forced or compulsory labour'. Noting that in the particular instance parental consent had been given, it added that the young age at which the applicants had entered into the armed service could not 'in itself attribute the character of "servitude" ' to such service.¹¹⁷

Both sides of the protection versus participation debate, however credible either may be considered, depart from the premise that there is either an autonomy right to be exercised or that protection must be conferred. Neither departs from the premise that there is often no autonomy right being exercised at all, but merely actions taken to secure basic needs for survival — bearing in mind the primacy of the child's right to survival and development as the point of departure,¹¹⁸ however we may wish to package it.

109 Goodwin-Gill and Cohn *Child soldiers* (1994) 24–34 who cite, *inter alia*, past reported examples of coercive recruitment by Uganda's National Resistance Army, the Sudanese Peoples Liberation Army and RENAMO of Mozambique.

110 TW Bennet 'Using children in armed conflict: A legitimate African tradition?' <<http://www2.essex.ac.uk/c%26acu/issues/Texts/Soldiers002.htm>> (accessed 8 February 2001). See also n 15 above para 43.

111 Van Bueren (n 18 above) 816.

112 Art 31(b).

113 Art 31(c).

114 Art 31(e).

115 Van Bueren (n 18 above) 816–17.

116 As above.

117 European Commission of Human Rights, *W, X, Y and Z v United Kingdom*, 19 July 1968.

118 This right is enshrined in art 5 of the African Children's Charter and art 6 of the CRC.

5 The way for the wars ahead

During the drafting of the CRC the proposal was made, and rejected, that the Working Group should not limit itself to provisions concerning recruitment and recruitment age, as the problem was essentially that of the 'militarization of children' itself.¹¹⁹ Commentators have noted that setting a minimum age for the recruitment or participation of children in armed conflicts,¹²⁰ and the emphasis on treaty amendment are misplaced.¹²¹ These do not address the question of the participation rights of children, the root causes of their participation, or provide sufficient protection. However, this approach has been perpetuated by the Optional Protocol, and excessive optimism would therefore be misplaced. It has been 'weakened by compromise in some of its key provisions'.¹²² It contains a mere reference to the necessity 'to take into *consideration* the economic, social and political root causes of the involvement of children in armed conflicts'.¹²³ Its provisions alone are consequently insufficient to either prevent recruitment or to ensure state parties' compliance.¹²⁴

In order to provide for the exercise of participation rights and effective protection it is essential that alternatives be provided to those children who are induced by circumstances to join armed forces, as is stated in the Maputo Declaration on the Use of Children as Soldiers.¹²⁵ The aim should be to provide children with the opportunity to make a valuable contribution in accordance with their convictions, by other means.¹²⁶ An issue for immediate attention is that of 'decision-making [entailing] that we partake in decisions governing our families, countries and the world in general'.¹²⁷ This remains a desirable ideal, despite the realisation that this ideal is somewhat complex owing to the need to take into account 'the social and cultural context of the country and communities involved',¹²⁸ and more specifically the 'unique factors' alluded to in the African Children's Charter.

119 Detrick (n 50 above) 510.

120 Van Bueren (n 12 above) 334.

121 Van Bueren (n 12 above) 350.

122 Harvey (n 70 above) 4–5.

123 Para 16 of the Preamble to the Optional Protocol (emphasis added).

124 Harvey (n 70 above) 4.

125 n 25 above para 8(a); see also para 8(a) of Montevideo Declaration on the Use of Children as Soldiers (n 75 above) and para 7(iv) of Berlin Declaration on the Use of Children as Soldiers (n 76 above).

126 Van Bueren (n 12 above) 350.

127 Annexes to the Statement of the Third Regional Consultation (n 8 above).

128 Reis (n 43 above) 653.

In order to implement participation alternatives and fulfil children's basic needs, we need to return to the necessity of redressing resource allocation. Without addressing these concerns, 'there is little point [in] creating an improved legal framework or instituting greater participation rights for children'.¹²⁹ This concern is a common thread which runs through the UN Children's Committee's recommendations to states in which large numbers of children are known to participate in armed conflicts.¹³⁰

The case for considering children's views as opposed to 'our' view of children was succinctly stated in the recommendations adopted at the Statement of the Third Regional Consultation on the Impact of Armed Conflict on Children in West and Central Africa:¹³¹

Children have the right to shape their own lives. They have the right to their own beliefs and to express them, and to participate in decisions affecting their lives. Children must be an integral part of the design and implementation of programmes and strategies. . . .

The protection versus participation debate should be reduced to a fundamental realisation in order to achieve the aims of the proponents of both views: The empowerment of children and not mere symbolic politics is what is needed to create a secure and enriching environment for children as autonomous beings.

129 Freeman (n 17 above) 61.

130 Concluding observations of the Committee on the Rights of the Child: Belize (10/05/99) UN Doc CRC/C/15/Add.99 para 12. Concluding observations of the Committee on the Rights of the Child: Iraq (21/10/98) UN Doc CRC/C/15/Add.94 para 13. See also Sierra Leone (n 57 above) para 14.

131 n 8 above Annex III.