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Situating the Debate

I. A BRIEF CHRONOLOGY OF THE PREVENTION OF CHILD SOLDIERING

FOR MOST OF human history, children's participation in armed conflict was not a matter of concern. Indeed, there are many accounts in history, theology and mythology of children's heroism in battle, notably the boy David defeating Goliath, the giant Philistine warrior. The origin of the word 'infantry' is said to be derived from the Latin word *infans*, meaning 'a very young child or baby'.[1] The infantry were those soldiers in the Roman legions who were too young, or of too low rank, to form part of the cavalry.[2] Many small towns in the United States have monuments and statues in honour of children who fought in the American Civil War: for example, the grave of Avery Brown is a landmark in Elkhard, Indiana.[3] Brown enlisted in Abraham Lincoln's Union Army during the Civil War, aged 8 years, 11 months and 13 days.[4] More recently, significant numbers of children participated in hostilities during the Second World War; yet the Geneva Conventions of 1949 did not prohibit the recruitment and participation of children in armed conflict.[5]

By 1977, a shift in the mores of the international community had occurred and the first instruments directly prohibiting child soldiering had been adopted in the form of the Two Additional Protocols to the Geneva Conventions.[6] For more than a decade after the adoption of

[1] C Soanes and A Stevenson (eds), *Concise Oxford English Dictionary*, 11th edn (Oxford, Oxford University Press, 2006).

[2] Ibid. The origin of the word 'infantry' is attributed to *infanterie* in French, and *infanteria* in Italian. The root of both these words is attributable to the Latin word *infant*, which means 'a very young child or baby'.

[3] MD Banks, 'Avery Brown (1852–1904), Musician: America's Youngest Civil War Soldier', *America's Shrine to Music Newsletter*, February 2001; also cited in DM Rosen, *Armies of the Young: Child Soldiers in War and Terrorism* (New Brunswick, NJ, Rutgers University Press, 2005) 5, note 12.

[4] Ibid.

[5] See generally Chapter 3.I below.

[6] Art 77(2) of Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977 (entered into force 7 December 1978) 1125 UNTS 17512; and Art 4(3)(c) of Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection

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the Additional Protocols there were no further developments. During 1989, the UN Convention on the Rights of the Child (CRC) was adopted which (inter alia) prohibited child soldiering and mandated the creation of the Committee on the Rights of the Child (CRC Committee).[7] Two vital decisions were taken at the Committee's third session, during 1993. It was decided to submit a request to the Secretary-General of the UN to appoint an expert to launch an in-depth investigation into the protection of children during armed conflict.[8] It was also decided to entrust a member of the Committee with drafting a first preliminary text of a Protocol to the CRC on the involvement of children in armed conflict (CIAC Protocol).[9]

Graça Machel was duly appointed in terms of a General Assembly resolution to investigate and report on the situation of children during armed conflict.[10] Although her mandate included the plight of all children during armed conflict, it was her ground-breaking report, released during 1996, that drew the international community's attention to the problem of child soldiering.[11] In her report, Machel states:

> The flagrant abuse and exploitation of children during armed conflict can and must be eliminated. For too long, we have given ground to spurious claims that the involvement of children in armed conflict is regrettable but inevitable. It is not. Children are regularly caught up in warfare as a result of conscious and deliberate decisions made by adults. We must challenge each of these decisions and we must refute the flawed political and military reasoning, the protests of impotence, and the cynical attempts to disguise child soldiers as merely the youngest 'volunteers'.[12]

This sentiment resonated across the divide between civil society and state actors. If ever the participation of children in armed conflict was wholly accepted, the turning point had been reached by the time this study was released. This is evident today in that not a single state, not even those most responsible for the use and recruitment of child soldiers, argues that such use or recruitment is lawful.

As recommended in the Machel report, the Office of the Special Representative to the Secretary-General on Children and Armed Conflict (SRSG) was created during 1998, and Olara Otunnu was appointed

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of Victims of Non-International Armed Conflicts, adopted 8 June 1977 (entered into force 7 December 1978) 1125 UNTS 609.

[7] Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3 (CRC).

[8] Committee on the Rights of the Child, 'Report on the Third Session', CRC/C/16 (5 March 1993), para 176 and Annex VI.

[9] Ibid, para 176 and Annex VII.

[10] General Assembly Resolution 48/157 (20 December 1993).

[11] G Machel, 'Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children', UN Doc A/51/306 (26 August 1996) (Machel Report).

[12] Ibid, para 316.

as the first SRSG.[13] The SRSG has a multifaceted mandate that, in relation to children in armed conflict, includes: tracking progress, raising awareness, promoting information gathering, working closely with other role players, fostering international cooperation to ensure respect for children's rights and finally contributing to the coordination of efforts by governments and relevant UN bodies.[14]

Child Soldiers International is a non-government organisation (NGO) that was originally founded as The Coalition to Stop the Use of Child Soldiers (CSUCS), collaboratively formed by Amnesty International, Human Rights Watch, the International Save the Children Alliance, the Jesuit Refugee Service, the Quaker United Nations Office, and Terre des Hommes International Federation during 1998 as an NGO coalition. By this time, Rädda Barnen (Save the Children Sweden), Quaker United Nations Office, the International Committee of the Red Cross and others had already made significant contributions to the prohibition of child soldiering on both an advocacy and a research basis. Behind the driving force of the CSUCS, civil society spearheaded the campaign for the drafting and adoption of a protocol to the CRC on the involvement of children in armed conflict, originally the brainchild of the CRC Committee. The campaign called for a protocol that would lift the minimum use and recruitment age to a so-called 'straight-eighteen' threshold. Accordingly, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CIAC Protocol) was adopted during 2000.[15] However, in my view, the final product is very disappointing. The adopted text presents a compromise on the straight-eighteen threshold that allows states parties to the CIAC Protocol to voluntarily recruit children between sixteen and eighteen, but not allowing them to use children younger than eighteen in direct participation in hostilities.

In another important development in 2000, the Security Council of the United Nations acknowledged that child soldiering 'may constitute a threat to international peace and security'.[16] It thus took a mere four years from when child soldiering was placed firmly on the agenda of the international community by the Machel report, for the organ of the UN with principal responsibility for the maintenance of international peace and security to recognise child soldiering as a problem potentially affecting such peace and security.

By 16 January 2002, the date upon which the Special Court for Sierra Leone was established, there had never been a prosecution for the use

[13] Ibid, paras 266–69.

[14] General Assembly Resolution 57/77 (12 December 1996).

[15] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (entered into force 12 February 2002) 2173 UNTS 222.

[16] Security Council Resolution 1314 (11 August 2000), operative para 9.

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and recruitment of child soldiers. To date, that Court has delivered four Trial Chamber judgments on the subject,[17] as well as appeal judgments in each of those cases.[18] All of these cases relate to the war crime of child soldier enlistment, conscription or use. Furthermore, in the International Criminal Court's (ICC) first conviction, the *Lubanga* case (appeal pending), the defendant was charged with the sole war crime of enlisting, conscripting or using children for active participation in hostilities.[19] In the Democratic Republic of the Congo (DRC), numerous prosecutions, in national courts have been finalised.[20] The first was during 2008.

During 2005, a comprehensive Monitoring and Reporting Mechanism (MRM) on child soldiering was established in terms of a Security Council resolution.[21] Otunnu, in his capacity as SRSG, first proposed the creation of such a mechanism to the General Assembly during his 2003 annual report.[22] The MRM serves to 'collect and provide timely, objective, accurate and reliable information' on those situations affecting children that have been identified by the SRSG as most urgently deserving attention,[23] which includes 'recruiting or using child soldiers'.[24]

The exact level of effectiveness of these measures is relatively unclear. What is clear, however, is that the recruitment and use of child soldiers internationally persists and no clearly visible inroads have been made as yet. This is not to say that current measures are wholly ineffective, but, as Drumbl suggests, 'although international interventions have helped reduce specific incidents, the practice of child soldiering still persists. It may shift locally, but it endures globally.'[25] Having said this, it is certainly also true that there are far fewer child soldiers today than during

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[17] *Prosecutor v Sesay, Kallon and Gbao*, Trial Chamber I, SCSL-04-15-T (2 March 2009) (*RUF* case); *Prosecutor v Fofana and Kondewa*, Trial Chamber I, SCSL-04-14-T (2 August 2007) (*CDF* case); *Prosecutor v Brima, Kamara and Kanu*, Trial Chamber II, SCSL-04-16-T (20 June 2007) (*AFRC* case); *Prosecutor v Charles Taylor*, Trial Chamber II, SCSL-03-01-T (26 April 2012) (*Taylor* case).

[18] *Prosecutor v Fofana and Kondewa*, Appeals Chamber, SCSL-04-14-A (28 May 2008) (*CDF appeals* case); *Prosecutor v Brima, Kamara and Kanu*, Appeals Chamber, SCSL-04-16-A (22 February 2008) (*AFRC appeals* case); *Prosecutor v Sesay, Kallon and Gbao*, Appeals Chamber, SCSL-04-15-A (26 October 2009) (*RUF appeals* case); *Prosecutor v Charles Taylor*, Appeals Chamber, SCSL-03-01-A (26 September 2013) (*Taylor appeals* case).

[19] *Prosecutor v Thomas Lubanga Dyilo*, Trial Chamber I, ICC-01/04-01/06 (14 March 2012) (*Lubanga* case).

[20] See generally Chapter 7.B below.

[21] Security Council Resolution 1612 (26 July 2005).

[22] OA Otunnu, 'Protection of Children Affected by Armed Conflict', Report of the Special Representative of the Secretary-General for Children and Armed Conflict, A/58/328 (29 August 2003), paras 73–78.

[23] Security Council Resolution 1612, n 21 above, operative para 5(c).

[24] 'Report of the Secretary-General on Children in Armed Conflict', A/59/695, S/2005/72 (9 February 2005), para 68.

[25] MA Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford, Oxford University Press, 2012) 1.

the 1990s. What is less clear is whether this reduction has much to owe to the interventions of international law.

At the time of writing there are indeed a number of situations internationally where child soldiering is a real and a large-scale problem. The armed conflicts in Syria and the Central African Republic are key areas of concern, and reports that the Nigerian terrorist group Boko Haram are using child soldiers is equally worrisome. As such, the need for a strong international law response remains as acute as ever.

II. CONCEPTUALISING AN 'ERA OF APPLICATION'

During 1999, the SRSG at that time, Olara Otunnu, reported to the General Assembly that:

> The Special Representative believes that the time has come for the international community to redirect its attention and energies from the juridical task of the development of norms to the political project of ensuring their application and respect on the ground. An 'era of application' must be launched. Words on paper cannot save children and women in peril. Such a project can be accomplished if the international community is prepared to employ its considerable collective influence to that end.[26]

The year prior to recommending this refocus of attention towards an 'era of application', Otunnu had already reported that 'the Special Representative believes that the most important and pressing challenge today is how to translate existing standards and commitments into action that can make a tangible difference to the fate of children exposed to danger on the ground'.[27] With reference to the establishment of the child soldier monitoring and reporting mechanism,[28] SRSG Otunnu contended that this mechanism 'marks a turning point in our collective campaign for the "era of application"—for transforming protective standards into compliance, and condemnation into accountability'.[29] Almost ten years after first introducing the era of application, on the occasion when Otunnu received the Harvard Law School Association Award and when he was no longer the SRSG on Children in Armed Conflict, he elaborated further on what an era of application entails.[30] On this occasion, he placed specific emphasis on the need that an era of application be 'embedded

[26] 'Promotion and Protection of the Rights of Children: Protection of Children Affected by Armed Conflict Note by the Secretary-General', A/54/430 (1 October 1999), para 165.

[27] 'Promotion and Protection of the Rights of Children: Protection of Children Affected by Armed Conflict Note by the Secretary-General', A/53/482 (12 October 1998), para 140.

[28] See generally Chapter 6.II.C.i below.

[29] OA Otunnu, '"Era of Application": Instituting a Compliance and Enforcement Regime for CAAC', statement before the Security Council, 23 February 2005.

[30] OA Otunnu, 'Era of Application', remarks on the occasion of receiving the Harvard Law School Association Award, 15 June 2007.

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within formal, structured and binding compliance mechanisms'. This, however, has to be interpreted together with his earlier statement, quoted above, that a shift has to occur from norm creation to 'the political project of ensuring their [norms] application and respect on the ground'. As such, an era of application is dependent on a broad range of mechanisms that has the potential to contribute to child soldier prevention.

My conception of an era of application overlaps very much with that of Otunnu. In his work, Cassel speaks of 'rights protection',[31] whereas Dror, for example, focuses on 'social change'.[32] Rights protection is a narrower concept than social change in that the former occurs on individual bases, without necessarily affecting deeper systemic problems that account for the occurrence of the social problem in question. In this study, emphasis is placed on many mechanisms aimed at rights protection. This is done based on the argument that extensive rights protection is one of the primary components of broader social change. Such rights protection is central to an era of application. The notion that focus should shift to enforcement and compliance in human rights more broadly is not novel. It is, however, important to recognise that this shift of focus necessitates a move away from a preoccupation with doctrine, and an embracing of international institutional law. In 1950, Hersch Lauterpacht commented that

> no legal order, international or other, is true to its essential function if it fails to protect effectively the ultimate unit of all law—the individual human being. The two decades that followed the First World War lent weight, with ominous emphasis, to these now self-evident propositions. They resulted, in the Second World War, in the widespread conviction that the effective international protection of fundamental human rights, including some form of International Bill of Rights of Man, was a major purpose of the war inasmuch as it is an essential condition of international peace and progress.[33]

At present, there are in existence at least eight binding international instruments directly prohibiting the use and recruitment of child soldiers. Moreover, every state in the world bar Somalia has ratified at least one of these instruments.[34] In other words, regardless of the fact that the prohibition of the use and recruitment of child soldiers is undoubtedly a norm of customary international law,[35] all states except Somalia are also under a treaty obligation to refrain from such conduct. Few substantive norms of international law can make this claim. Lauterpacht would

[31] D Cassel, 'Does International Human Rights Law Make a Difference?' (2001) 2 *Chicago Journal of International Law* 121, 126–34.

[32] Y Dror, 'Law and Social Change' (1958–59) 33 *Tulane Law Review* 787, see generally.

[33] E Lauterpacht, *International Law and Human Rights* (London, Stevens & Sons, 1950) 79.

[34] Art 38 of the CRC prohibits the use and recruitment of child soldiers. All states except Somalia and the US have ratified this instrument. The US has, however, ratified the OPCRC, which also prohibits the use and recruitment of child soldiers.

[35] See generally Chapter 4.III below.

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argue that this is pre-World War Two thinking. As discussed above, these treaty standards are by no means perfect. Nevertheless, the international community has been unable to ensure compliance or enforcement with even the weakest of these standards by some of its members.

I argue that international law has a role to play in the effective prevention of the use and recruitment of child soldiers.[36] Examples are discussed later in the book where the mobilisation of international law directly resulted in not only the demobilisation of active child soldiers, but also the cessation of their use and recruitment, even while hostilities were ongoing.[37] In order for international law to be an agent through which an era of application can be entered in the context of child soldier prevention, the focus must now be shifted from norm creation to norm enforcement. As President Kennedy said regarding law reform in the context of civil rights in the US, 'law alone cannot make men see right'.[38]

Buergenthal, in commenting on the 'evolving international human rights system', has divided this system into four sequential stages: 'the normative foundation'; 'institution building'; 'implementation in the post cold war era'; and 'individual criminal responsibility, minority rights and collective humanitarian intervention'.[39] In line with Otunnu's statement, this study is aimed at imagining an era of application, which would correspond with stages three and four of Buergenthal's evolution. It is important to note that, although it may be significant, the capacity and resources that the international community will expend on child soldier prevention is finite.[40] A rigid divide between these stages is unrealistic, as there will always be further development within each of these stages and a significant degree of overlap. What is more, this debate about evolution within international human rights law (IHRL) is framed within the context of the Human Rights Movement broadly. This is well evidenced from Buergenthal's stages, as the fourth stage includes 'minority

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[36] International law is a broad concept; in this context, it means all the rules that emanate from the accepted sources of international law, including soft law that is relevant to the prevention of the use and recruitment of child soldiers. Of particular relevance in this regard are rules belonging to international humanitarian law, international human rights law and international criminal law.

[37] See, eg Chapter 7.B below.

[38] JF Kennedy, 'Civil Rights: Address to Nation' (11 June 1963), published in TJ McInnerny and FL Israel (eds), *Presidential Documents: Works that Shaped a Nation from Washington to Obama* (New York, Routledge, 2013) 271–74.

[39] T Buergenthal, 'The Normative and Institutional Evolution of International Human Rights' (1997) 19 *Human Rights Quarterly* 703, see generally. See also P Nikken, *La Proteccion Internacional de los Derechos Humanos: Su Desarrollo Progresivo* (Madrid, Institudo Interamericano de derechos humanos, 1987).

[40] The amount of resources and capacity that are allocated to preventing the use and recruitment of child soldiers is proportional to the level of commitment of states to combat this problem. Nevertheless, it will never be infinite. As such, any departure from a norm creation paradigm to a norm enforcement paradigm requires the reallocation of resources and capacity away from the former to the latter.

rights' and, as such, the developmental course of these rights lags behind most of the corpus of IHRL. For present purposes, this begs the question where child rights more broadly, and child soldier prohibitive rules in particular, factor in on this evolution of IHRL.

The CRC, which directly prohibits the use and recruitment of child soldiers, is the most rapidly and widely ratified human rights treaty.[41] Additionally, as previously stated, there are no less than eight binding international instruments prohibiting the use and recruitment of child soldiers, from within four regimes of international law (international humanitarian law (IHL), IHRL, international criminal law (ICL) and international labour law). Finally, such use and recruitment is a violation of customary international law.[42] Cumulatively, these factors strongly indicate that the time is ripe to progress from an era of standard setting to an era of application, or from Buergenthal's first two stages to his last two stages.

There is a very big gap between the existence of normative standards and the strength of these normative standards. The relative weakness of normative standards can for practical purposes be divided into two categories: first, those standards that are weak because the content of the norm fails to provide extensive protection, for example, instruments that prohibit the use and recruitment of children younger than fifteen, instead of eighteen; and secondly, those standards that are weak because of bad drafting, or the use of language that is imprecise and hard to apply to a concrete situation, for example, those standards that state that 'all feasible measures' must be employed to ensure that a child does not take a direct part in hostilities. As these examples indicate, instruments prohibiting child soldiering suffer from both these forms of relative weakness.

The first mentioned category poses less of a problem, as it does not directly affect the ability to enforce the norm. On the contrary, as the norm provides a lesser standard of protection than many would desire, it should be applicable to fewer situations, and only in those situations where there is very broad agreement that the conduct in question should be prohibited; as such, the enforcement of such norms should be easier. The argument can therefore be made that the international community should refrain from further norm creation until such time as the current norms enjoy a significant measure of enforcement. However, the second category directly impacts on the enforceability of the norms. If the norm itself inherently inhibits its own enforceability, the argument that emphasis should shift from norm creation to norm enforcement is likely to fail. However, there has never been an instance where the use of a child soldiers in hostilities was justified on the basis that 'all

[41] Art 38 of the CRC, n 7 above.
[42] See generally Chapter 4.III below.

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feasible measures' were taken to ensure that the child would not be used in hostilities.

This may cast doubt on whether, in the context of child soldier prevention, the evolution of IHRL has really entered Buergenthal's third stage. Because of the nature of the law-making process on the international level, there is always compromise in agreeing to treaty norms. As such, no norms are perfect and there is a significant degree of overlap between the different stages.

There are numerous weaknesses in those instruments that prohibit the use and recruitment of child soldiers, and they are discussed in detail in Chapters 3 and 4. Some of these weaknesses may well impact on the level of enforceability of these norms. Accordingly, this issue forms one of the central research questions in determining whether it is feasible, and indeed possible, to progress to an era of application.

I am not arguing that all capacity and resources should be reallocated to enforcement instead of norm creation, just as all capacity and resources are not currently allocated to norm creation. Rather, a critical mass of these resources and capacity should be so reallocated. We should not simply accept the weaknesses of the positive law. Instead, we should now put greater emphasis on enforcing these imperfect, but necessary, standards.

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III. 'THE POLITICS OF AGE'[43]

As mentioned, the participation of children in armed conflict has been accepted throughout most of human history. Quénivet explains this, in part, on the basis that the concept of childhood did not exist during the Middle Ages.[44] That children under a predetermined age threshold should not be used or recruited as soldiers remains an assertion less obvious than most would imagine. The politics of age, as it manifests in the child soldier discourse, revolves around two central themes: the increased recognition of agency among children in the liberal rights discourse and cultural relativism.

Concrete age barriers are often challenged as young people develop at different rates, so that a particular eighteen-year-old may be less independent and less capable of making informed decisions than a particular sixteen-year-old. This argument has been further advanced on the basis that children have a greater capacity for making important decisions,

[43] This title is quoted from Rosen, n 3 above, 132–58.

[44] N Quénivet, 'The Liberal Discourse and the "New Wars" of/on Children' (2012–13) 38 *Brooklyn Journal of International Law* 1053, 1058, where Quénivet cites A James and AL James, 'Childhood: Toward a Theory of Continuity and Change' (2001) 575 *Annals of the American Academy of Political and Social Science* 25, 26.

such as enlisting in an armed force or group, than they are given credit for, although this in itself is not an argument against the creation of age barriers.

It is ironic that both the plight of child soldiers and the progression from viewing children as passive subjects to cogent agents were matters taken up at the same time, and largely among the same advocates. Van Bueren has argued that there is a tension between the protection of children and the participatory rights of children.[45] Similarly, in an interview I conducted with Jean Zermatten, Chairperson of the UN Committee on the Rights of the Child, Zermatten expressed the view that there is an ongoing paradigm shift from child protection to child rights.[46] However, Van Bueren has correctly warned: 'to regard the issue as only that of protection versus participation is too simplistic as some children will not survive unless taken into the armed forces'.[47]

The increased recognition of the agency of children notwithstanding, virtually all commentators assume the virtue in trying to prevent the use and recruitment of child soldiers. Rosen, however, takes a different approach. He challenges the assumptions that 'modern warfare is especially aberrant and cruel; that the world-wide glut of light-weight weapons makes it easier than in the past for children to bear arms; and that vulnerable children become soldiers because they are manipulated by unscrupulous adults'.[48] In this regard, he challenges a number of notions upon which the differentiation between age groups for protective purposes is based, arguing that the development of a child cannot be predicted in clear terms;[49] that 'the politics of age' is debated within a cultural and political context;[50] and that children have a far greater agency than they are given credit for by both those driving international law and civil society in general.[51] Rosen does not argue that the contemporary use of children in armed conflict is acceptable in all circumstances. However, where such use is unacceptable in his view, it is not inherently due to the fact that the child is a soldier, but rather due to the specific circumstances—for example, forced conscription.

There is much truth to Rosen's critiques. For example, Pinker has argued convincingly that 'we are living in the most peaceable era of our existence as a species'.[52] Thus Pinker, like Rosen, challenges the

[45] G Van Bueren, *The International Law on the Rights of the Child* (Amsterdam, Kluwer 1998), 335.

[46] Interview conducted with Mr Zermatten on 2 February 2011, Geneva, Switzerland.

[47] Van Bueren, n 45 above.

[48] Rosen, n 3 above, 1.

[49] Ibid, 1–4.

[50] Ibid, 4.

[51] Ibid, 131–38.

[52] S Pinker, *The Better Angels of Our Nature: Why Violence has Declined* (New York, Penguin, 2011) 1.

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dominant humanitarian narrative, often fuelled by civil society, that 'modern warfare is especially abhorrent and cruel'. Nevertheless, there is a breakdown in reasoning in arguing that, because many of the premises upon which the abhorrent nature of child soldier use and recruitment is based are false, it is any less abhorrent, or, by extension, that children are any less deserving of protection. In this era of individual rights, sight is often lost of group dynamics. The fact that a given child develops at a different pace than his or her peers does not change the fact that juveniles, as a group, are less able to make life-changing decisions than adults.

Moreover, perspectives such as Rosen's gives scant attention to the fact that today the theory of cognitive ability (which associates age with cognitive ability), or some variations thereof, has become deeply entrenched in not only all municipal legal systems, but also international law in general.[53] It is inescapable that, although arguably at different ages, all children will, up to a certain phase in her/his development, not be in a position to make an informed decision as to whether or not to join an armed force or group, while many are subject to forced recruitment and adult manipulation. International law cannot be based on a system whereby the unique developmental characteristics of each young person are considered to inform a determination as to whether or not the specific child can make an informed decision whether or not to enlist. This argument is certainly not new: it is endorsed in every municipal criminal justice system, where differentiation based on age is used across the board for purposes of determining criminal capacity, sentencing and appropriate detention facilities.

In assessing municipal legal systems, Lowe argues that a state's freedom to create its own unique laws and legal systems plays a major role in creating a separate and unique identity and character for the relevant state.[54] The pursuits of international law, he argues, are quite the opposite.[55] International law exists to create a minimum threshold of norms to which all states are bound, and in so doing creates a degree of uniformity among states.[56] Thus, international law is, by definition, universalist. It goes without saying that a degree of dissent generally exists from a minority of states, or even a majority of weaker states, regarding a specific rule.[57] This dissent has often manifested itself in

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[53] See generally Chapter 2.III.A.iii below.
[54] AV Lowe, *International Law* (Oxford, Oxford University Press, 2007) 7.
[55] Ibid.
[56] Ibid.
[57] In its most extreme form, this results in persistent objectors to the formation of customary international law. In general persistent objectors are not bound by the relevant rule. See, eg *Anglo-Norwegian Fisheries,* ICJ Reports 1951, 115, 131; *Asylum,* ICJ Reports 1950, 277; *Nicaragua,* ICJ Reports 1986, 107. Against: Judge Tanaka, Dissenting Opinion, *South West Africa Cases, Second Phase*, ICJ Reports 1966, 6, 291.

a divide, or at least in a perceived divide, between western and non-western states and ideas.[58]

Within the human rights paradigm, this has led to tension between a universalist approach to human rights and a culturally relative approach, and the cultural relativity of age goes to the heart of this debate. Sen speaks of 'world justice and the rule of law'.[59] Some argue that the notion of child soldiering and the international attention it has garnered of late is an example of western conceptions of childhood and ideals of child protection being forced upon non-western states.[60] In this regard, it is again useful to refer to Sen:

> I have also argued against considering the question of impartiality in the fragmented terms that apply only within nation states—never stepping beyond the borders. This is important not only for being as inclusive in our thinking about justice in the world as possible, but also to avoid the dangers of local parochialism against which Adam Smith warned nearly two and a half centuries ago. Indeed, the contemporary world offers much greater opportunity of learning from each other, and it seems a pity to try to confine the theorization of justice to the artificially imposed limits of nation states. This is not only because . . . 'injustice anywhere is a threat to justice everywhere' (though that is hugely important as well). But in addition we have to be aware how our interest in other people across the world has been growing, along with our growing contacts and increasing communication.[61]

Furthermore, in many instances non-western states have subscribed to legal provisions regarding the prohibition of the use and recruitment of child soldiers at a faster rate than western states.[62] Additionally, there are no persistent objectors to the customary international rule prohibiting the use and recruitment of child soldiers. The African Charter on the Rights and Welfare of the Child (the African Children's Charter) provides an apt example of the global response to child soldiering not only being accepted among some of the most traditional and culturally sensitive societies in the world, but even further developing such prohibitive norms.[63] This charter was the first convention to elevate the age threshold for the prohibition of the military use and recruitment of children to eighteen, as opposed to fifteen.[64] Furthermore, this convention provides:

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[58] See, eg JJ Heckman, RL Nelson and L Cabatingan (eds), *Global Perspectives on the Rule of Law* (New York, Routledge, 2010).

[59] A Sen, 'Global Justice' in Heckman et al, ibid, 69.

[60] Rosen, n 3 above, 4.

[61] Sen, n 59 above, 69–70.

[62] See generally Chapter 4.III.A below.

[63] The African Charter on the Rights and Welfare of the Child (1990), OAU Doc CAB/LEG/24.9/49 (entered into force 29 November 1999).

[64] Ibid, Art 22.

> States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
> (a) those customs and practices prejudicial to the health or life of the child; and
> (b) those customs and practices discriminatory to the child on the grounds of sex or other status.[65]

It might seem contradictory to seek to enforce a global standard in a culturally sensitive way. However, I argue that this approach is justified, as today there is no dissent from the basic premise of the global standard—that young children should not be soldiers.

IV. CONCEPTUALISING THE 'CHILD SOLDIER'

There are soft law instruments providing overarching definitions of child soldiering; for example, the Paris Principles provide that 'a child associated with an armed force or armed group' refers:

> to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.[66]

However, it is clear that the customary norm that has crystallised prohibiting the use and recruitment of child soldiers has much less proscriptive content.[67] Furthermore, in order to assess the legal obligations incumbent upon a specific state, one has to have regard to the treaty norms the state has made itself subject to by acceding to or ratifying relevant treaties. At present, there are at least eight international treaties prohibiting the use and recruitment of child soldiers, as opposed to regional treaties.[68] The obligations created by each of these treaties are different from one another, some only slightly and others more materially. What is more, different states have ratified different combinations of

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[65] Ibid, Art 21(1).

[66] Art 2(1) of the Paris Commitments and the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (2007). See also the Cape Town Principles on Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilisation and Social Reintegration of Child Soldiers in Africa (1997).

[67] See generally Chapter 4.III below.

[68] See generally Chapters 3 and 4 below for an analysis of such legal obligations. Additional Protocol I and Additional Protocol II, n 6 above; CRC, n 7 above; CIAC Protocol, n 15 above; the Rome Statute of the International Criminal Court (Rome Statute) (entered into force 1 July 2002) 2187 UNTS 90; ILO Forced Labour Convention No 29 (entered into force 1 May 1932) 39 UNTS 55; ILO Minimum Age Convention No 138 (entered into force 19 June 1976) 1015 UNTS 297; ILO Worst Forms of Child Labour Convention No 182 (entered into force 19 November 2000) 2133 UNTS 161.

these treaties, further complicating the assessment of the exact nature of the legal obligations to which a specific state may be subject vis-à-vis a specific child in a concrete case.

There are two ways in which to address this phenomenon. First, one can argue that if the law does not prohibit the enlistment of a child (a person younger than eighteen) into the military, that child will not be deemed a child soldier. Alternatively, one can argue that the child remains a child soldier, but that no legal norms were violated in recruiting or even using that child in military operations, where the relevant state has not subscribed to a legal obligation to the contrary. IHRL provides that 'a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'.[69] The United Kingdom, for example, has not subscribed to any legal norm that bars it from recruiting persons of sixteen years of age or older into its armed forces, and indeed, the UK does recruit such persons. In contrast, a number of states, such as Norway, have subscribed to such international norms. If one were to favour an interpretation in terms of which concept of the child soldier is the one which inherently denotes the unlawfulness of the child's enlistment, conscription or use, it would mean that a sixteen-year-old child would be deemed to be a child soldier if she/he were in the Norwegian Armed Forces but would not be deemed a child soldier if she/he were in the British Armed Forces. This results in a situation in which one would have to examine the treaty obligations to which a particular state has subscribed in every instance in which one wished to use the term 'child soldier'. Such a state of affairs will further be detrimental to the movement to progressively provide for more stringent prohibitive rules—such as achieving the straight-eighteen age barrier; which will also, over time, affect the content of customary international law.

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The term 'child soldier' is thus broad and legally imprecise, but its use seems to me to be unavoidable. All instruments that predate the Rome Statute use the terms 'use' and 'recruit' in defining the proscribed conduct. The Rome Statute and those instruments that were drafted after the Rome Statute use the terms 'enlist', 'conscript' and 'use', which are broader than 'recruit'. This distinction is immaterial for the purposes of the present chapter, as well as Chapter 2. These chapters deal with child soldiering as a social phenomenon, which the international community wishes to regulate. The parameters of this regulation only become relevant in Chapter 3. The term 'child soldier' is therefore employed extensively in the first two chapters, whereas in the later chapters more precise and legally relevant terminology is employed, which is specific to the relevant legal norm under discussion in the given instance.

[69] Art 1 of the CRC, n 7 above.

The NGO community generally prefers concepts such as 'a child associated with an armed force or armed group' over that of a 'child soldier'.[70] In order to be a soldier, one has to engage or potentially engage in armed conflict,[71] whereas the NGO community and soft law instruments advocate for the non-use and recruitment of children in a broader context than direct military engagement only. However, the concept 'child soldier' can reasonably be interpreted as being broader than any of the relevant treaty norms or customary rules in existence. When considering international law, there is little use in employing concepts such as 'a child associated with an armed force or armed group' unless one wishes to advocate for the adoption of broader or higher legal standards, which I do not wish to do. I will therefore use the term 'child soldier' instead of broader concepts such as those discussed.

Like virtually any problem that is difficult to contain and address, child soldiering is multifaceted. Today it is clear that children participate, on a significant scale, in gang activity, whether it is on the streets of Los Angeles or in the context of narco-gangs in Mexico and other parts of Latin America.[72] Children are also extensively used in terrorist activities.[73] Nevertheless, for present purposes, child soldiering will for the most part be discussed in the context of military recruitment and participation in armed conflict. The response to child soldiering in armed conflict is very different to that of child gang and terrorist participation. Not only is the application of IHL limited to armed conflict, but the application of IHRL is different during armed conflict, in light of the fact that IHL is often the *lex specialis*.[74] The prevention of the use of children in gang and terrorist activity is much more reliant on municipal policing and law enforcement. International law does not create obligations for entities such as gangs and groups utilising terror tactics (outside of the context of armed conflict), whereas IHL does so in relation to state

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[70] This phraseology is also used in the Paris Principles, n 66 above.

[71] See generally Chapter 3.II below.

[72] Edgar Jimenez Lugo, who is known as 'El Ponchis', is currently standing trial in Mexico for the murder, torture and decapitation of four people. His alleged crimes were all committed when he was fourteen years of age, and within the context of narco-gang warfare. Children participate in such gang activity on a significant scale. I Grillo, 'In Teenage Killers, Mexico Confronts a Bloody Future', *Time*, 8 December 2010.

[73] Terrorist activities in this context refers to the nature of the tactics used, eg bombings of civilian markets with the intention to inspire fear in the minds of a civilian population. The term is not used to connote a political determination regarding the nature of a specific group.

[74] There is some disagreement as to whether IHL is always the *lex specialis* and IHRL the *lex generalis*, or whether one has to consider the case at hand before determining which regime's norm is the *lex specialis*. Moreover, increasing commentators are considering other possibilities than the *lex specialis/lex generalis* construct to assess the relationship between IHL and IHRL. See generally Chapter 4.I below.

and non-state armed groups during armed conflict.[75] Outside the context of armed conflict, the international law duties to which states are subject in suppressing crime related to gangs and terror groups emanate from IHRL, not IHL. Therefore, although there is a margin of overlap, suppressing the use of children by gangs and terrorist entities requires a unique response.

The phenomenon of girl soldiers has rightly received increased attention from within the child soldier discourse. The use of girl soldiers adds several unique dimensions to the problem: most significantly, sexual exploitation.[76] Girl soldiers can broadly be divided into two categories: first, girls who are recruited to contribute to the war effort, in the same way as boys are recruited and used; and secondly, girls who are specifically recruited for the purpose of sexual exploitation, often called 'bush wives' in the African context.[77] Both groups are equally susceptible to sexual abuse by fellow soldiers, and especially commanders. Male child soldiers also sexually abuse young girls.[78] In many respects during the prevention of the use and recruitment of child soldiers the needs of girls require specific attention. This is particularly important during disarmament, demobilisation and reintegration processes. In this study, the particular experiences and needs of girls are acknowledged and addressed whenever this is relevant to the prevention of the military use and recruitment of children. However, this study has at its heart the concept 'child', not boy or girl. I therefore make no gender distinctions with regard to the reasons why children should not be used and recruited as soldiers.[79]

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[75] See generally Chapter 3.II below. In the age of the war on terror, the concept of terrorism has become less precise. News media and the US administration routinely refer to belligerents in the ongoing conflicts in Iraq and Afghanistan as terrorists. These conflicts are conflicts properly falling within the IHL paradigm. As such, children who are used and recruited into structures engaged in these conflicts form part of the subject matter of this study.

[76] R Brett, 'Girl Soldiers Denial of Rights and Responsibilities' (2004) 23(2) *Refugee Survey Quarterly* 32, see generally.

[77] See, eg *AFRC appeals* case, n 18 above, 186.

[78] A Honwana, *Child Soldiers in Africa* (Philadelphia, PA, University of Pennsylvania Press, 2007) 91–92.

[79] I am of the view that the law cannot create a distinction based on sex for the purpose of prohibiting the enlistment, conscription or use of children. It is highly unlikely that such a differentiation will result in any greater enforcement. On the contrary, it is likely that such a differentiation will add a layer of complexity behind which armed groups can hide their use of boy soldiers. Furthermore, it was a hard fought battle in many states to gain the right for women to join the armed forces and positively contribute to the security and citizenship of their states. As it will be a step backwards to deny women the right to join the armed forces, it will equally be a retrogressive step to prohibit the enlistment, conscription or use of girl soldiers differently or for different reasons than boy soldiers.

V. THE POTENTIAL ROLE OF INTERNATIONAL LAW IN PREVENTING CHILD SOLDIERING

In order to achieve social change with regard to a phenomenon as widespread and complex as the military use and recruitment of children, one has to recognise that there are many relevant disciplines and that any single contribution to the greater body of knowledge must identify the parameters and limitations not only of the relevant contribution, but also of the discipline from within which the contribution emanates. In this regard, Dror has stated:

> One of the more important devices used to initiate and control directed social change is law, a device the use of which is prima facie (and, in most cases, perhaps mistakenly) believed to be cheaper and quicker than education, economic development and other instruments and ways of directed social change.[80]

According to Tamanaha, the instrumentalist view of law 'is the notion that law is an instrument to achieve ends. At the systemic level, it has often been said that law is an instrument to serve the public good, or an instrument to direct social change.'[81] He further acknowledges that the instrumentalist view of law has led some to argue that the 'law is an instrument of domination by one group over another within society . . . that lawyers instrumentally manipulate or utilise legal rules and processes to achieve the ends of their clients'.[82] His critique of an instrumentalist approach to law is premised on the importance of balancing interests among parties. If a lawyer manipulates the law to further the interest of her/his client, then the legitimacy of law, it may be argued, is at stake, as the legitimate interests of the opposing party to the dispute will not be safeguarded. However, when the law is used instrumentally to achieve social change by preventing the use and recruitment of child soldiers, there is no tension between such social change and the legitimate interests of the offending party. Both Dror and Tamanaha's approaches are outcomes based. As such, neither of these approaches will be of much value should law not be able to direct social change significantly. International law's ability to do so has, for the most part, been presumed by international lawyers,[83] whereas international relations scholars have been far more sceptical.[84]

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[80] Dror, n 32 above, see generally.

[81] BZ Tamanaha, 'The Tension between Legal Instrumentalism and the Rule of Law' (2005–06) 33 *Syracuse Journal of International Law and Commerce* 131, 231.

[82] Ibid.

[83] B Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1998) 19 *Michigan Journal of International Law* 345, 346. HH Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599, 2599–600.

[84] OA Hathaway, 'Do Human Rights Treaties Make a Difference?' (2001–02) 111 *Yale Law Journal* 1935, 1937–38.

As Schwebel has stated, 'compliance is a problem which lawyers tend to avoid rather than confront'.[85] This is even more apparent in the context of IHRL.[86]

After famously stating that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time', Henkin also stated that 'the forces that induce compliance with other law . . . do not pertain equally to the law of human rights'.[87] Unlike most other fields of international law, IHRL is primarily concerned with the manner in which a state treats people within its borders. The interests of other states are thus not directly at stake, as would be the case in the law of international finance, for example. Henkin thus argues that, without opposing state interest, the incentive to comply with rules of international law falls away to some extent. Yet the extraordinary amount of pressure that was placed on South Africa to abandon its policy of apartheid, an internal policy, serves as an example that compliance is not wholly dependent on opposing direct state interest.

Sceptics of IHRL and IHL are quick to cite the massive failures of these regimes, such as the 1994 Rwandan genocide, the Bosnian genocide that followed soon thereafter and more recently the killing of tens of thousands of civilians during the closing phases of the civil war in Sri Lanka.[88] The visibility of these failures is matched by the invisibility of the potential successes of these regimes. What these sceptics fail to appreciate is that efforts directed at the protection of human rights and those in armed conflict do not take much, if anything, away from any other field or discipline. While IHRL and IHL are less effective than one would hope, their pursuits are worthy and they do not have direct negative consequences.[89] Kuper has stated that 'it is arguable that the relevant law serves its purpose if it enables even one child to escape death or injury in armed conflict situations, and clearly it has succeeded in that respect'.[90] She has, however, also questioned 'why, with so much law, it

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[85] SM Schwebel, 'Commentary' in MK Bulterman and M Kuijer (eds), *Compliance with Judgments of International Courts* (Leiden, Martinus Nijhoff, 1996) 39.

[86] Hathaway, n 84 above, 1937–38.

[87] L Henkin, *How Nations Behave* (New York City, Columbia University Press, 1979) 47 and 235.

[88] The mass atrocities committed in Rwanda and Bosnia during 1994 and 1995, respectively, are well documented and often referenced. However, the atrocities committed in Sri Lanka during 2009 are only just beginning to be brought to light. See especially the 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011).

[89] Against: D Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101, see generally; D Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, NJ, Princeton University Press, 2004) 3; WH Simon, 'Solving Problems vs Claiming Rights: The Pragmatist Challenge to Legal Liberalism' (200405) 46 *William and Mary Law Review* 127, see generally.

[90] J Kuper, 'Children and Armed Conflict: Some Issues of Law and Policy' in D Fottrell,

seems generally so ineffective'.[91] Indeed, this study is aimed at achieving an era of application by materialising the relevant law.

Hathaway and others have attempted to gauge compliance with human rights norms quantitatively.[92] In her extensive study, Hathaway relied 'on a database encompassing the experiences of 166 nations over a nearly forty-year period in five areas of human rights law: genocide, torture, fair and public trials, civil liberties, and political representation of women'.[93] The aims of this study were to:

> examine two separate but intimately related questions. First, do countries comply with or adhere to the requirements of the human rights treaties they have joined? Second, do these human rights treaties appear to be effective in improving countries' human rights practices—that is, are countries more likely to comply with a treaty's requirements if they have joined the treaty than would otherwise be expected?[94]

The conclusions reached in this empirical study suggests that countries do not adhere to their IHRL treaty obligations on a significant scale and states are also not significantly more likely to comply with treaty requirements incumbent upon them as a result of the ratification of an IHRL treaty.[95] Nevertheless, on a qualitative level, Hathaway concludes:

> we must not jump to conclusions about the worth of human rights treaties based solely on the quantitative analysis above. Even if accurate, the results do not preclude the possibility that human rights treaties have a favourable impact on human rights.[96]

These findings are valuable and play an important role in the ongoing debate as to the efficacy of IHRL treaties. However, such a broad-based empirical study also has severe shortcomings, which may prove fatal to the veracity of the results.[97] The five treaty norms incorporated in the study all form part, in some way, of customary international law.[98] As such, the states that are not party to the relevant treaties have

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Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child (Leiden, Brill, 2000).

[91] J Kuper, *International Law Concerning Child Civilians in Armed Conflict* (Oxford, Oxford University Press, 1997) 216; J Kuper, 'International Law Concerning Child Civilians in Armed Conflict', PhD Thesis (University of Oxford, 1996) 308.

[92] Hathaway, n 84 above, generally. See also E. Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?' (December 2005) 49(6) *The Journal of Conflict Resolution* 925, see generally.

[93] Hathaway, n 84 above, 1936.

[94] Ibid, 1939.

[95] Ibid, 2002–20.

[96] Ibid, 2020.

[97] The first shortcoming of such a quantitative study, as Hathaway admits, is flaws in the data relied upon. Ibid, 1967.

[98] The prohibitions against genocide and torture are not only norms of customary international law; there is general consensus that these norms have attained the status of *jus cogens*. In the case of genocide, see especially *Prosecutor v Zoran Kupreškić et al*, Trial

comparable obligations incumbent upon them by virtue of customary international law. The most extreme example among the norms used in the study is genocide. No state would dare argue that they are not under an international law obligation not to commit genocide, regardless of whether that state has ratified any treaty prohibiting such conduct and regardless of the fact that the relevant state engages in the commission of genocide. Therefore, if states do not adhere more to their treaty obligations than they do to their customary international law obligations, the nominal variance between treaty norm observance by states who are subject to the relevant treaty norm vis-à-vis those who are not may be explained.

This study also largely fails to take account of the individual circumstances of the relevant state. For example, the US is not a state party to the CRC, whereas the DRC is.[99] However, the level of compliance by the US to the CRC is significantly higher than that of the DRC. Nevertheless, the CRC may have already had an impact on the rights of children in the DRC, whereas this is not, of course, the case with the US.

Quantitative studies, by definition, are limited to treaty norms. In analysing the weaknesses of Hathaway's study I am not attempting to argue that such statistical analysis is irrelevant, but that such findings are not conclusive. The point of convergence between quantitative and

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Chamber II, ICTY-IT-95-16 (14 January 2000), para 520; J Wouters and S Verhoeven, 'The Prohibition of Genocide as a Norm of *Ius Cogens* and its Implications for the Enforcement of the Law of Genocide' (2005) 5 *International Criminal Law Review* 401, see generally. In the case of torture see especially *Prosecutor v Anto Furundžija*, Trial Chamber II, ICTY-IT-95-17/1-T10 (10 December 1998), paras 155–57; E De Wet, 'The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law' (2004) 15 *European Journal of International Law* 97, see generally. Fair and public trial is a broad concept including various individual rights from a human rights perspective. Some of the most fundamental of these rights have been identified as having crystallised into rules of customary international law. CJF Doebbler, and MP Scharf, 'Will Saddam Hussein Get a Fair Trial' (2005-2006) 37 *Case Western Reserve Journal of International Law* 21, see generally; CJF Doebbler, *Introduction to International Human Rights Law* (CD Publishing, 2007) 108. In her study Hathaway defined civil liberties as 'freedom of expression and belief, association and organisational rights, rule of law and human rights, and personal autonomy and economic rights' (Hathaway, n 84 above, 1975). This definition is also very broad, incorporating various rights, most of which undoubtedly form part of customary international law. Political representation of women was measured 'using the percentage of men in each country's legislature' (ibid). There is wide support for the principle of non-discrimination being a *jus cogens* norm; some argue that the *jus cogens* dimensions are limited to racial discrimination: J Dugard, *International Law: a South African Perspective* (Cape Town, Juta, 2011) 39; while others argue that it is broader and includes discrimination based on sex: T Makkonen (revised and updated by J Kortteinen) ,'The Principle of Non-Discrimination in International Human Rights Law and EU Law' (Erik Castrén Institute, University of Helsinki, August 2005) 3. Nevertheless, non-discrimination based on sex undoubtedly forms part of customary international law.

[99] Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3.

qualitative data presents a good starting point from which to assess the ability of IHRL and IHL to achieve social change.

The results of Neumayer's quantitative study on whether the ratification of international human rights treaties increases respect for human rights indicate that, in general, for human rights treaty ratification to result in compliance, 'there must be conditions for domestic groups, parties, and individuals and for civil society to persuade, convince, and perhaps pressure governments into translating the formal promise of better human rights protection into actual reality'.[100] This finding is consistent with Cassel's hypothesis of IHRL, which includes IHL in his use of the term,[101] as a rope:

> Where rights have been strengthened the cause is usually not so much individual factors acting independently—whether in law, politics, technology, economics, or consciousness—but a complex interweaving of mutually reinforcing processes. What pulls human rights forward is not a series of separate, parallel cords, but a 'rope' of multiple, interwoven strands. Remove one strand, and the entire rope is weakened. International human rights law is a strand woven throughout the length of the rope. Its main value is not in how much rights protection it can pull as a single strand, but in how it strengthens the entire rope.[102]

Law, politics, technology, economics and consciousness are referenced. They, among innumerable others, also form strands in this rope. In adhering to an instrumentalist view of law, my approach to child soldier prevention in this study accords with Cassel's metaphor of human rights as a rope. Indeed, the norms and enforcement mechanisms of IHL and ICL also form strands in this rope. In order to achieve an era of application in the battle against the use and recruitment of child soldiers, it is necessary to continuously strengthen and refine each of the myriad of mechanisms that have a contribution to make in putting the law into action.

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VI. SUMMARY

Even if one is committed to the prevention of the use and recruitment of child soldiers, it remains important to understand that the issue is a complex one, and that there is no agreement on exactly what the parameters of such prohibition should be—or, indeed, on whether there should be so much focus on child soldier prevention. This chapter has introduced concepts and arguments surrounding the what, why and

[100] Neumayer, n 92 above, 952.
[101] Cassel, n 31 above, 126.
[102] Ibid, 123. See also J Tacsan, 'The Effectiveness of International Law: An Alternative Approach' (1996) 2(1) *International Legal Theory* 3, see generally.

how of child soldier prevention. For the most part, the remainder of this work will expand on these concepts.

The distribution, use and causes of child soldiering in contemporary armed conflict are discussed in Chapter 2—informing the reader of child soldiering as a social reality. The distribution of child soldiers is relevant to the prevention of child soldiering in that reliance is placed in this regard on international machinery on a geospecific basis. The capacity in which child soldiers are used in armed conflict is similarly relevant to child soldier prevention, as different legal instruments prohibit only specific degrees of participation in armed conflict by children. Finally, understanding the causes of child soldiering potentially allows for the identification of strategies aimed at child soldier prevention addressing the root causes of the problem, not only its symptoms.

Chapters 3 and 4 addresses child soldiering from the vantage point of IHL and IHRL, respectively. Chapter 4 commences with an analysis of the relationship between IHL and IHRL. This relationship is particularly important in the context of child soldier prevention, as there is probably a larger degree of overlap between the IHL and IHRL prohibitive norms in this regard than any other proscribed conduct. The prohibition of the use and recruitment of child soldiers in terms of legal instruments forming part of IHL and IHRL is then discussed. Lastly, the customary law nature of the prohibition of child soldiering is also discussed.

Chapter 5 is aimed at the war crime of the use and recruitment of child soldiers. The primary contributions of this chapter are, first, an analysis of this war crime as formulated under the Rome Statute, and the scope for prosecution by the ICC; and secondly, the role the ICC can potentially play to prevent the use and recruitment of child soldiers.

The contribution of mechanisms forming part of the UN and the African Union (AU) to the prevention of child soldiering is analysed in Chapter 6. These UN mechanisms represent the core of the international communities' response to child soldiering. Therefore, this chapter presents a critical analysis of those UN mechanism best suited to the prevention of child soldiering, with particular attention being paid to areas of potential improvement to the effectiveness of these mechanisms. Conversely, a descriptive account of mechanisms forming part of the AU is also presented, as these mechanisms have never before been used in response to child soldiering, but have the potential to contribute to the prevention of the use and recruitment of child soldiers.

Chapter 7 is a case study on the prevention of child soldiering in the DRC, one of the countries in which children have been greatly affected by this issue for several decades. The conclusions reached in previous chapters are compared to the practical situation in the DRC in order

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to establish the accuracy of these conclusions in relation to a concrete situation.

The central thesis of the study is that, in order to enter an era of application in preventing child soldiering, focus must be shifted from norm creation to norm enforcement. In conclusion, Chapter 8 takes stock of key findings regarding international law's contribution to the fight against child soldiering.

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