

**INTERNATIONAL LAWS OF WAR
AND THE AFRICAN CHILD:
NORMS, COMPLIANCE, AND
SOVEREIGNTY**

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International Laws of War and the African Child: Norms, Compliance, and Sovereignty

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The Convention on the Rights of the Child of 1989 is one of the most prominent international humanitarian treaty in world history. It entered into force quicker than any other treaty and currently only two countries (the United States and Somalia) have not ratified it.¹ Carol Bellamy, Executive Director of UNICEF, says that the Convention has become “the centerpiece of a global movement, a movement that reflects a growing awareness of the importance of safeguarding human rights—and child rights in particular.”² Similarly, Lisbet Palme claimed, after travelling to some of the worst conflict zones in Africa, that, “For many of the children I have met and talked with, the Convention takes on a very meaningful reality.”³ Yet, during the 1990’s, more children in Africa became victims of, and combatants in, war than at any time in history. Partially as a result, a bitter Human Rights Watch Report assessing the state of children’s rights ten years after the Convention on the Rights of Children came into force was entitled Promises Broken.⁴ Indeed, to enhance further international humanitarian law protecting children during war, governments agreed in January 2000, after six years of negotiations, to an Optional Protocol to the Convention on the Rights of the Child that raises the minimum age of combatants to eighteen.

This paper analyzes the politics of international humanitarian law that attempts to protect children in Africa during war. Examining how the international

¹ Geraldine van Bueren, The International Law on the Rights of the Child (Dordrecht: Martinus Nijhoff, 1995), p. 15.

² Carol Bellamy, “10th Anniversary of the Adoption of the Convention on the Rights of the Child,” found at: www.unicef.org/exspeeches/99esp51.html.

³ Lisbet Palme, “Introduction: Personal Reflections on the New Rights for Children in War,” in Cole P. Dodge and Magne Raundalen (eds.), Reaching Children in War: Sudan, Uganda and Mozambique (Uppsala: Scandinavian Institute of African Studies, 1991), p. 1.

community attempts to protect the least powerful when normal political institutions have broken down and the rule of the gun prevails is the ultimate test for international humanitarian law. Indeed, the dichotomy between the law of war and the nature of war has been called, “probably the most acute point of tension between law and life.”⁵ Children have often been a central focus of international humanitarian law: the first global charter protecting a particular sector of society was the 1924 Geneva Declaration on the Rights of the Child that was prompted by concerns over young people affected by conflict in the Balkans.⁶ There has since been a succession of international instruments seeking to protect children, including the Convention on the Rights of the Child which now occupies an extremely important position in international humanitarian law.

Despite the widespread enthusiasm for protection of children via international law and the seemingly palpable failure to affect behavior that hurts youngsters, there has been almost no critical review of the large compliance gap between norms and practices in this area. Most of the discussion of these new international humanitarian instruments has been by what Finnemore and Sikkink call “norm entrepreneurs”⁷ who are deeply vested in the promulgation of ever more elaborate international legal instruments. Yet, as Finnemore and Sikkink note, understanding how norms become law and the patterns of compliance with

⁴ Human Rights Watch, Promises Broken: An Assessment of Children’s Rights on the 10th Anniversary of the Convention on the Rights of the Child, December 1999. Found at: www.hrw.org/campaigns/crp/promises.htm.

⁵ Heather A. Wilson, International Law and the Use of Force by National Liberation Movements (Oxford: Clarendon Press, 1988), p. 35. She is quoting G.I.A.D. Draper.

⁶ Geraldine van Bueren, “The Historical Framework of the International Documents on Children,” in Geraldine van Bueren (ed.), International Documents on Children (Dordrecht: Martinus Nijhoff, 1993), p. xv.

those laws are critical topics at the nexus of international relations and law.⁸ In particular, the law of domestic armed conflict

stretches the idea of law to its very limits. . . In guerrilla wars and in occupied territories the restraints imposed by the law of war appear to be particularly fragile. The parts of the law of war which have been most effective are often difficult to apply in guerrilla wars. Guerillas depend on mobility; they often do not control a secure territory suitable for detention of prisoners; and they usually lack the administrative and judicial infrastructure which eases the law's application."⁹

As the toughest case for international humanitarian law, the new rules protecting children will have obvious enforcement problems. However, their lofty ambitions can help tell us if the international community should continue to set law which, while noble, has little chance of enforcement in the near future because of implementation problems or if setting the goals high is an important effort in and of itself by helping chart the course the international society should eventually travel.

Africa is a particularly appropriate region to examine the evolution of international humanitarian law. In addition to rapidly adopting the Convention on the Rights of the Child, African states were the first to have their own regional instrument focussing on the rights of the child: The African Charter on the Rights and Welfare of the Child that was agreed to in 1990. At the same time, Africa is

⁷ Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52 (Autumn 1998), p. 895.

⁸ *Ibid.*, p. 916.

⁹ Wilson, p. 184.

home to a very large proportion of the conflicts that most endanger children: civil wars where the battlefield is dynamic and largely undefined, guerilla groups are often inchoate bands whose primary goals sometimes appears to be pillage, and civilians take up arms to protect themselves or to form new factions. Two million of the estimated three million civilian casualties in the 1980's were in Africa, a change from previous decades when most civilian war deaths were in Asia.¹⁰ When the tallies for the 1990's are finished, the wars in Angola, Liberia, Mozambique, Rwanda, Sierra Leone, Somalia, Sudan, Uganda, Zaire/Democratic Republic of the Congo and elsewhere will assure that Africa was again the most dangerous continent for civilians, especially children.

Finally, examining how international humanitarian law can affect children is especially informative in understanding how sovereignty may evolve. Laws of war, especially laws that hope to regulate the prosecution of domestic conflicts, are an inherent challenge to sovereignty. As Chadwick notes, "When autonomous state competence to interpret authoritatively the nature of organized domestic violence is in question, the legal expression of the continuing fact of sovereignty is placed in doubt."¹¹ In fact, some of the new provisions affecting children are being promoted precisely by networks of non-governmental organizations that want to challenge an international system that privileges state actions. As an influential book on human rights activists claimed, "All of our networks challenge traditional notions of sovereignty. . . Much international

¹⁰ UNICEF, Children and Development in the 1990's: A UNICEF Sourcebook (NY: UNICEF, 1990), p. 194.

¹¹ Elizabeth Chadwick, Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict (The Hague: Martinus Nijhoff, 1996), p. 134.

network activity presumes . . . [that] it is both legitimate and necessary for states or nonstate actors to be concerned about the treatment of the inhabitants of another state.”¹² Yet, to add to the complexity of the political processes, the new international humanitarian law that non-governmental organizations want is developed by conferences of sovereign states. That activists celebrate new international law as diminishing sovereignty after the provisions have been adopted by conferences consisting of recognized states only exemplifies the confused nature of sovereignty in the twenty-first century.

Again, Africa is the best region to understand how the continuing development of international norms concerning human rights affects sovereignty. As the weakest group of countries in the world, African states are, by necessity, vitally concerned about their sovereign status. In particular, laws of war that affect children are explicitly aimed at altering the behavior of rebels. African states obviously want as much assistance as possible in regulating the behavior of rebels. However, they want to avoid, at almost any cost, having any type of international recognition, especially in the form of a legal personality, bestowed on groups viewed by the state as criminals and thugs rather than as participants in a belligerency as classically understood in international law. Nat Colletta, the head of the World Bank’s post-conflict unit, and Taies Nezam seem to affirm the fears of African states when they argue that, “‘international norms and values’

¹² Margaret E. Keck and Kathryn Sikkink, Activists beyond Borders: Advocacy Networks in International Politics (Ithaca: Cornell University Press, 1998), pp. 35-6.

(human rights) further inadvertently supplant the state, reducing the capacity of the state to impose its will.”¹³

Regulating rebel entities without recognizing them is an extraordinary conundrum. Yet for international humanitarian law, developed primarily to regulate war between states, to be relevant in the twenty-first century, it must come to grips with the fact that almost all warfare in the world is domestic. The challenge to sovereignty is likely to only increase in the future as people across Africa become frustrated with the slow progress of conflict resolution. A recent conference in West Africa focussing on the rights of children during conflict concluded that, “The flexible interpretation of the principle of ‘non-interference’ in the internal affairs of member States—which has enabled OUA to undertake creative initiatives in peace-building and resolution—should be strengthened to reflect the dynamism of African common bonds and traditional norms of shared responsibility for the welfare of every member of the community, be it intra- or across borders.”¹⁴

The international effort to use humanitarian law to protect African children during times of war is therefore at the center of a number of theoretical and policy concerns: What is the role of international norms in affecting state action? Can these norms get so ahead of state behavior that they only produce cynicism or does the international community do best by setting the bar high and then pressuring states and other parties to conflicts to follow even if, in the near term,

¹³ Nat J. Colletta and Taies Nezam, “From Reconstruction to Reconciliation,” Development Outreach 1 (1999), p. 8.

¹⁴ Third Regional Consultation on the Impact of Armed Conflict on Children in West and Central Africa,” Statement, Abidjan, November 1995, A/51/306/Add. 1, p. 25.

complete compliance is lacking? Finally, how do states and non-governmental actors reconcile claims to sovereignty with the increasing intrusiveness of international humanitarian law? Given that other international efforts to affect domestic behavior in trade, environmental protection, and other aspects of the law of war (e.g., landmines) are also being propounded by activists through international conferences of sovereign states, this paper will explore how a critical aspect of sovereignty is likely to evolve in the twenty-first century.

Wars and Children in Africa

War as a public health threat to African children is a relatively recent phenomenon. The traditional concern for the child south of the Sahara has been material deprivation and disease. For instance, in an account of the International Conference on African Children held in Geneva in 1931, Evelyn Sharp noted, “Children in Africa suffer cruelties, but not because people are cruel to them.”¹⁵ Similarly, UNICEF’s major 1963 study The Needs of Children did not even list armed hostilities as a significant threat to children.¹⁶

However, since the mid-1980’s, two phenomena—the dramatic increase in civil unrest in Africa and the increasing likelihood for most casualties of war to be civilian—have combined to endanger Africa children. As is now widely recognized, the clear trend in combat since World War II has been for civilians to suffer an increasing share of total casualties. The proportion of civilian deaths and casualties has risen from less than ten percent in World War I to over fifty

¹⁵ Evelyn Sharp, The African Child: An Account of the International Conference on African Children, Geneva (Westport (CT): Negro Universities Press, 1970), p. 93.

¹⁶ UNICEF, The Needs of Children: A Survey of the Needs of Children in the Developing Countries (NY: Free Press, 1963).

percent in World War II to more than seventy-five percent in the current period. In the one hundred and twenty-seven armed conflicts between World War II and 1990, twenty-two million people are estimated to have died of whom one and a half million were children. A further four million children have been physically disabled and ten million psychologically traumatized.¹⁷ The nature of civil wars in Africa causes civilians to be especially prone to victimization. Indeed, a review of conflict in West Africa concluded,

‘total war’ is increasingly being waged within national boundaries.

Nothing is spared in the quest for power and control—not crops, not women, children, schools, health-care facilities or places of worship. . .

Children and women constitute the overwhelming majority among the uprooted millions in the [West African] subregion and other trouble spots in Africa. These wars are characterized by the indiscriminate destruction of lives and property and unprecedented numbers of human rights violations against children and women.¹⁸

The disembowling of pregnant women to kill their fetuses in Rwanda, the use of amputation as a terror tactic in Sierra Leone, cannibalism and desecration of bodies in Liberia, the destruction of whole communities in Sudan, and the forced recruitment of civilians to promote the war aims of rebels in Mozambique and

¹⁷ UNICEF, 1990, pp. 193-4.

¹⁸ Third Regional Consultation on the Impact of Armed Conflict on Children in West and Central Africa,” 1995, p. 23.

Angola are only some of the most glaring examples of how civilians are no longer collateral casualties during war but, rather, the major targets.¹⁹

In particular, the last decade has seen the emergence of the child soldier in Africa as a particularly devastating phenomenon. The advent of advanced technology weapons means that even small boys and girls (although they are overwhelmingly boys) can handle weapons like M16 and AK47 assault rifles.²⁰ These weapons are also now widely available at a low cost: in Uganda an AK47 costs no more than a chicken and in northern Kenya it is the price of a goat.²¹ A rough estimate suggests that there are currently 120,000 children under eighteen in armed conflicts across Africa, some no more than seven or eight years old.²² Children are used because they are obedient, are expendable, and because they often do not even realize that they are killing other people. They can also be brutally exploited because they are so vulnerable. For instance, in Mozambique, a typical RENAMO tactic was to force children to return to their home village and kill someone. They therefore had to fight for RENAMO because they had no home to go back to.²³ Finally, it is estimated that there will

¹⁹ See respectively, Gérard Prunier, The Rwanda Crisis: History of a Genocide (NY: Columbia University Press, 1995), p. 256; Ibrahim Abdullah and Patrick Muana, "The Revolutionary United Front of Sierra Leone," in Christopher Clapham, African Guerrillas (Oxford: James Currey, 1998), p. 190; Stephen Ellis, The Mask of Anarchy: The Destruction of Liberia and the Religious Dimension of an African Civil War (NY: New York University Press, 1999), p. 146; Ann Mosely Lesch, The Sudan: Contested National Identities (Bloomington: Indiana University Press, 1998), p. 162; and William Minter, Apartheid's Contras: An Inquiry into the Roots of War in Angola and Mozambique (Johannesburg: Witswatersrand University Press, 1994), p. 173.

²⁰ Ilene Cohn and Guy S. Goodwin-Gill, Child Soldiers: The Role of Children in Armed Conflict (Oxford: Clarendon Press, 1994), p. 23.

²¹ Graça Machel, Impact of Armed Conflict on Children, 1996, A/51/306, p. 14.

²² Coalition to Stop the Use of Child Soldiers, Executive Summary: The Use of Child Soldiers in Africa: An Overview, August 1999. Found at: http://www.child-soldiers.org/Afr_exesum.htm.

²³ Cohn and Goodwin-Gill, p. 27.

be ten million orphans in Africa due to the AIDS early in the twenty-first century.²⁴ These children will be especially vulnerable to being coerced into fighting.

Children sometime form a significant portion of those at war in Africa. For instance, it is estimated that of the 40,000 to 60,000 fighters in the Liberian civil war (1989-1997), ten percent were under fifteen and another twenty percent were between fifteen and seventeen. In that war, children as young as nine or ten armed with automatic rifles man checkpoints where they terrorize and kill civilians for no obvious reason.²⁵ The Sudanese Peoples Liberation Army is said to have taken 12,500 children who it thought were ready to fight (as indicated by the presence of two molar teeth) across 1,200 miles of desert in the late 1980's and early 1990's.²⁶ Thousands of young child soldiers, known as "kadogo" (the little ones), were used by Laurent Kabila's Alliance of Democratic Forces for the Liberation of the Congo when he was fighting to overthrow Mobutu Sese Seko in 1996 and 1997.²⁷ In the war in Sierra Leone, in just 1998, members of the Armed Forces Revolutionary Council and the Revolutionary United Front abducted thousands of civilians, including a high percentage of children, to use as combatants, forced labor, or sexual slaves.²⁸ In Uganda, the Lords Resistance Army, a rebel group trying to overthrow the government of Yoweri Museveni, has kidnapped several thousand children, some after watching

²⁴ See, AIDS Becoming Africa's top Human Security Issue, UN Warns," United Nations Press Release, 10 January 2000. Found at: <http://www.unaids.org/whatsnew/press/eng/ny10100.html>.

²⁵ Human Rights Watch/Africa, Easy Prey: Child Soldiers in Liberia (NY: Human Rights Watch, 1994), pp. 2-3.

²⁶ Cohn and Goodwill-Gill, p. 28.

²⁷ Human Rights Watch, The Use of Child Soldiers in the Democratic Republic of the Congo, 1999, found at: <http://www.hrw.org/hrw/campaigns/crp/congo.htm>, p. 1.

²⁸ Human Rights Watch, New Regime, but Continued Human Rights Violations, 1999, found at: <http://www.hrw.org/hrw/campaigns/crp/sierra.htm>, p. 1.

their parents killed, to be used in combat, to raid and loot villages, as porters, and as sex slaves for LRA commanders.²⁹

International Law and Rebellion in Africa

Early humanitarian law towards children, including the 1924 Geneva Declaration and the Declaration of the Rights of the Child adopted in 1959, focussed on their material needs.³⁰ The effort to protect children during times of war is therefore fairly recent and has collided with the long and confused effort to humanely regulate how men kill each other. The immediate problem confronting activists and states who sought to provide greater protection to children is that large parts of international humanitarian law that govern the conduct of war, including the Hague Regulations, apply to wars between states. Most of the Geneva Convention only applies to Contracting Parties and therefore to not apply to most situations of domestic conflict.³¹

To rectify this situation meant working through the United Nations system and through conferences of sovereign states. Of course, this is a system biased clearly toward preserving the rights of states since states founded the UN and are the principle actors in conferences designed to write new international law. The United Nations Charter itself indicates how protective the current international system is of what are seen as the prerogatives of states charter (Article 2.7): "Nothing contained in the present Charter shall authorize the United

²⁹ Human Rights Watch, The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda, 1997, found at: <http://www.hrw.org/hrw/reports97/uganda/recommend.htm>, p. 1.

³⁰ van Bueren, "The Historical Framework," 1993, p. xv.

³¹ William Walker, "The International Law Applicable to Guerrilla Movements in Internal Armed Conflicts: A Case Study of Contra Attacks on Nicaraguan Farming Cooperatives," New York University Journal of International Law and Politics 21 (Fall 1988), pp. 149-150.

Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.” The language is actually broader than the League of Nations’ Covenant.³² For instance, in article eight of the League Covenant, the League’s Council was given the responsibility for reducing the arms held by each nation to the absolute minimum possible. As a result of privileging sovereignty, the entire UN system is, “dependent upon consensual reciprocity. Whether international humanitarian law is actively implemented, or merely made applicable as a code of conduct, remains largely a function of state authoritative interpretation.³³

Article 3 of the Geneva Conventions

In 1949, nations did adopt common Article 3 to all four of the Geneva conventions which bound signatories to observe humanitarian principles in “armed conflicts not of an international character.” The article prohibited each party to a conflict from “a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; b) taking hostages; c) outrages upon personal dignity, in particular, humiliating and degrading treatment.”³⁴

However, governments have resisted the application of Article 3 because it limits, perhaps severely, their ability to prosecute a civil war and to use domestic and municipal law to try what they see as criminals and bandits. As a result, “the applicability of the Article has been skirted in even the most massive

³² James E. Bond, The Rules of Riot: Internal Conflict and the Law of War (Princeton: Princeton University Press, 1974), p. 50.

³³ Chadwick, p. 132.

³⁴ Bond, pp. 34-6.

internal conflicts since 1949. Governments. . . have sought to preserve maximum flexibility, in the national interest, in dealing with internal armed conflict by avoiding such formal international legal obligation. . . (as) might . . . attach in favor of a challenging group. . . by virtue of their treatment by the incumbent in any manner as a legal personality.”³⁵

However, even had states chosen to obey Article 3, its protections with regard to children are suspect. Chadwick notes that the article does not define “armed conflict,” making the observance of its minimal provisions “largely discretionary.”³⁶ The protection offered children is strikingly minimal. As Cohn and Goodwin-Gill have observed, “Common Article 3 places no limits on recruitment or participation of children, the breaches of rules are committed by NGE’s [non-governmental entities], the level of strife is debatable, the applicability of human rights provisions is in doubt, and their enforcement, for various reasons, impossible.”³⁷ As a result, “whether or not there is a lacuna in the law and what this consists of, there is certainly a lacuna in practice.”³⁸

The flaws inherent to Article 3 are hardly accidental. Having been forced by the weight of international opinion to accept that Article 3 did apply to a wide range of conflicts, states have done very little to enhance the protection offered so that their sovereignty is not impinged upon. As a result, it was understood by the 1970’s, even before civil wars came to be the predominant type of conflict,

³⁵ Chadwick, p. 82. She is quoting E.D. Fryer, “Applicability of International Law to Armed Conflicts: Old Problems, Current Endeavors,” International Lawyer 11 (1977), pp. 567 and 570.

³⁶ Chadwick, p. 156.

³⁷ Cohn and Goodwin-Gill, p. 66.

³⁸ Carolyn Hamilton and Tabatha Abu El-Haj, “Armed Conflict: The Protection of Children under International Law,” International Journal of Children’s Rights 5 (1997), p. 32.

that Article 3 by itself simply was an inadequate guide to the protection of civilians, including children, during warfare.

The Optional Protocols to the Geneva Convention

It is a telling lesson that the impetus for the Option Protocols to the Geneva Conventions came from Sean MacBride in his role as chair of the International Commission of Jurists. MacBride argued before and during the 1968 United Nations human rights conference in Tehran that there should be much greater international regulation of domestic conflicts. He therefore proposed a sudden and whole scale revision of international doctrine regarding the laws of war. His was a dramatic early example of a non-governmental organization attempting to redraft international humanitarian law through a conference of sovereign states.³⁹

While most of MacBride's ambitions were not realized, in 1977, two optional protocols were added to the Geneva Convention. Protocol I addresses international conflicts. It strengthened the protection of civilian populations, especially by requiring that parties to conflicts at all times distinguish between civilian and military objectives and only attack the latter; by providing protection to cultural objects and houses of worship; by protecting the natural environment and civilian infrastructure; and by making provision for demilitarized zones which all parties must respect. There is also a much greater elaboration of the fundamental rights of each person.⁴⁰ Finally, there are articles (77 and 78)

³⁹ MacBride's effect on international humanitarian law is describe well by, Keith Suter, An International Law of Guerrilla Warfare: The Global Politics of Law-Making (NY: St. Martin's Press, 1984), pp. 24-35.

⁴⁰ See the review in *Ibid.*, pp. 160-161.

designed to give special protection to children. In particular, children under the age of fifteen are not to take part in combat and should not be recruited. For those recruited between the ages of fifteen and eighteen, priority is given to the latter when sending soldiers into combat. Finally, special protection is still to be offered to children under fifteen even if they fight and are captured by the enemy.⁴¹

This new protocol governing international conflict posed an interesting but complex opportunity for African countries that in the 1970's were heavily engaged in supporting the wars against the remaining white minority regimes. The African countries and their sympathizers throughout the third world desperately wanted the laws of international war to extend to national liberation struggles occurring in, among other places, Angola, Guinea-Bissau, Mozambique, Namibia and Rhodesia. However, they did not want the laws of war to apply to all domestic disputes because they understood that they were themselves extremely vulnerable to rebellion, including secessionist threats. In an extraordinary political win, third world countries were able to get Protocol I to extend the definition of international armed conflict to include conflicts in which "peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."⁴² However, the Protocol does not apply to armed conflicts within a country that was not governed by a colonial regime.

⁴¹ See, van Bueren, International Documents on Children, p. 528.

⁴² Geraldine van Bueren, The International Law on the Rights of the Child (Dordrecht: Martinus Nijhoff, 1995), p. 331.

To ensure that Protocol I could only be used against colonial regimes, regional organizations were appointed the gatekeepers to international recognition. Thus, the Organization of African Unity has to recognize African rebel groups before they can gain an international personality.⁴³ The Arab League had a similar role in certifying the Palestinian Liberation Organization. This filter was a further reification of sovereignty because the OAU and other regional organizations are composed of sovereign states. Indeed, the *raison d'être* of the OAU has been, despite its name, to preserve the sovereign status of African countries.⁴⁴

Protocol II of 1977 to the Geneva Convention does apply to internal conflicts other than national liberation struggles against a colonial power. Many of the same protections are offered to the civilian population, including essentially similar guarantees for children in combat (Article 4).⁴⁵ However, for the protocol to be invoked, a classic belligerency has to be recognized. Under commonly accepted international law, a belligerency is said to occur where 1) there are general hostilities; 2) the rebels act like an army; 3) they have an effective command; 4) they control substantial territory and 5) third states recognize them as belligerents.⁴⁶ Not surprising, states, in general have jealously guarded their prerogative to fight domestic opponents and have refused to recognize that a belligerency is occurring in their country. Cohn and Goodwin-Gill note,

⁴³ Malcolm Shaw, "The International Status of National Liberation Movements," in Frederick E. Snyder and Surakiart Sathiratha (eds.), Third World Attitudes toward International Law (Dordrecht: Martinus Nijhoff, 1987), p. 142.

⁴⁴ See, Jeffrey Herbst, States and Power in Africa: Comparative Lessons in Authority and Control (Princeton: Princeton University Press, forthcoming).

⁴⁵ See, van Bueren, International Documents on Children, 1998, p. 530.

⁴⁶ Bond, pp. 34-6.

“Relatively few states involved in internal hostilities have been willing to abandon their presumptive claim to a free hand in dealing with local threats, so that the applicability of Additional Protocol II is resisted, even where the objective criteria are satisfied. . . The scope for *legal* protection in a non-international armed conflict or violent internal strife situation is thus much less than in a traditional inter-State conflict.”⁴⁷ Schindler concluded that, “In no civil war since 1945 has belligerency been recognized. . . The disappearance of the recognition of belligerency coincides with the decline of neutrality. Most States today, both in international and civil wars, prefer not to be bound by the rules of the law of neutrality.”⁴⁸ Thus, even in El Salvador, where there was a brutal and long-running civil war, the government was unwilling to apply the provisions of Protocol II despite the fact that it had ratified the instrument.⁴⁹

No state would want to recognize a belligerency within its borders. However, Protocol II provided a particularly inappropriate set of incentives to states to treat an insurgency according to the new laws of war because a state could only be worse off if it tried to apply humanitarian provisions. Therefore, once African states had reclassified the conflicts they wanted to receive extra protection as “international,” they were content to see that the effective regulations that might govern internal conflict were as weak as possible. In particular, the possibility of providing a legal personality to rebels other than

⁴⁷ P. 60. Emphasis in the original.

⁴⁸ Dietrich Schindler, “State of War, Belligerency, Armed Conflict,” in Antonio Cassese (ed.), The New Humanitarian Law of Armed Conflict (Naples: Editoriale Scientifica, 1979), pp. 5-6.

⁴⁹ Judith Gail Gardam, Non-Combatant Immunity as a Norm of International Humanitarian Law (Dordrecht: Martinus Nijhoff, 1993), p. 179.

through the improbable route of recognition as a classical belligerency was foreclosed.

The failure to better regulate domestic conflict at a time when guerrilla war was becoming the predominant form of conflict was ultimately a reflection of who made international law. As Suter notes, international humanitarian law was not “effectively extended to cover guerrilla warfare because there was insufficient political commitment by the governments, by the NGOs, by the UN Secretariat or by the ICRC.”⁵⁰ As a result, “when it came to the crunch” states were not willing to create a powerful protocol for the type of war that really mattered.”⁵¹ The conservatism of diplomats, especially in conferences of sovereign states, where maintaining consensus is critical to achieving some kind of final product, made such new thinking impossible. Suter concluded that pressure by NGO’s on conferences of sovereign states is unlikely to succeed because of the interests of the states themselves. Therefore, non-governmental organizations, “must look beyond simply creating the issue and maintaining pressure on governments” but, instead, inject that new thinking themselves in order to change the nature of the debate.⁵²

Convention on the Rights of the Child

The Convention on the Rights of the Child came about because of the agitation of many non-governmental groups and the success of UNICEF, and particularly of its director James Grant, in focussing attention on the plight of children. Western states were the principle drafters of the Convention and only

⁵⁰ Suter, p. 184.

⁵¹ Ibid., p. 177.

three African countries (Algeria, Morocco, Senegal) even attended the working group sessions. The failure of African countries to engage during the long drafting process was probably less lack of interest than a reflection of their limited diplomatic personnel resources compared to the very large delegations western countries maintain in New York and Geneva. However, African states were among the quickest in ratifying the Convention.⁵³ The quick ratification was due to enthusiasm for the Convention and because many African states, always concerned about their international status, view ratifying such international documents as one more re-affirmation of their sovereignty.

The Convention covered a wide range of child rights including naming, rights to speech and assembly, protection from neglect, and to a variety of social services. However, the protections offered to children in armed conflict were not impressive. Article 38 first asked states to apply international humanitarian law, something they were already required to do. Second, the Convention reaffirmed that children under the age of fifteen not take part in hostilities and that there was a presumption against recruiting children between the ages of fifteen and eighteen. Finally, the Convention again asked states to protect children in armed conflict according to their existing international obligations. Article 39 on the responsibilities of states to promote physical and psychological recovery from violence, including armed conflict, did break new ground but these provisions obviously did not affect the actual conduct of hostilities.⁵⁴

⁵² Ibid., p. 184.

⁵³ Lawrence J. LeBlanc, The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights (Lincoln: University of Nebraska, 1995), pp. 33 and 49.

⁵⁴ Van Bueren, International Documents on Children, 1993, p. 19.

The Convention, as with most international law, was clearly a reaffirmation of the sovereignty of African countries. This was hardly a surprise given that the Convention was written by sovereign states but the notion of new rights for children gave further prominence to the false idea that international humanitarian law somehow degrades sovereignty. The Convention made it clear that responsibility for implementing international human rights law lies first and foremost with the state. In the Convention on the Rights of the Child, state parties are charged to undertake to “respect and ensure” the rights in the Convention.⁵⁵

Optional Protocol to the Convention on the Rights of the Child

There was especially great unhappiness that the Convention had not raised the age of recruitment for children in combat. Indeed, African countries were in some ways ahead of the Convention because they had already raised the minimum age to participate in conflict to eighteen. The Charter on the Rights and Welfare of the African Child of 1990 had defined a child as under eighteen years old and states were directed in article 22(2) to, “take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child” and in article 22(3) to protect civilian populations in conflict, especially children. In a further innovation, the African Charter on the Rights and Welfare of the Child extends protection to children not only to international and internal armed conflict but also to “lower levels of

⁵⁵ Bo Viktor Nylund, “International Law and the Child Victim of Armed Conflict—Is the ‘First Call’ for Children?” *International Journal of Children’s Rights* 6 (1998), p. 45.

violence and to ‘tension and strife.’⁵⁶ However, only state parties are recognized as responsible for guaranteeing child rights. There is nothing in the Charter about rebel groups, continuing the African allergy to any recognition of rebels that challenged African states.

Over six years, between 1994 and 2000, there was a tremendous grassroots effort by international non-government organizations to redress what were seen as the flaws in the Convention, especially as they related to protection of children during conflict. The rise of the phenomenon of child soldiers in the 1990’s, especially in the wars in Liberia and Sierra Leone, helped focus international attention on the problem as did an important report by Graça Machel, widow of the former President of Mozambique and now the wife of Nelson Mandela.⁵⁷ In addition, the inclusion of using children under fifteen in combat as a war crime by the newly created International Criminal Court gave further impetus to the effort.⁵⁸

The international Coalition to Stop the Use of Child Soldiers included many of the most prominent non-governmental organizations in the world including the African Coalition to Stop the Use of Child Soldiers, Amnesty International, Defence for Children International, Human Rights Watch, International Federation Terre des Hommes, The International Save the Child Alliance, the Refugee Service, the Latin American Coalition to Stop the Use of

⁵⁶ Reprinted in Maria Rita Saulle and Flaminia Kojanec (eds.), The Rights of the Child: International Instruments (Irvington (NY): Transnational Publishers, 1995), p. 768.

⁵⁷ See, Machel, 1996.

⁵⁸ See, Rome Statute of the International Criminal Court, 1998, Article 8(2)(b)(26) found at: <http://www.un.org/icc>.

Child Soldiers, Quaker UN Office and World Vision International.⁵⁹ These organizations were outraged by the child soldier issue and undoubtedly helped in their campaigning by the opposition of the US government, already the recipient of international opprobrium because of its failure to sign the treaty on landmines, which feared that the voluntary recruitment of seventeen year old could be adversely affected. Finally, these organizations justify their existence, in part, through their work on international humanitarian law so that it was useful for them to keep the pot boiling. The impressive degree of mobilization around the child soldier issue certainly validates Keck and Sikkink's argument that transnational advocacy networks have organized most effectively when the "issues involve bodily harm to vulnerable individuals, especially when there is a short and clear causal chain" or when issues involve legal equal opportunity.⁶⁰

The new Optional Protocol to the Convention on the Rights of the Child was agreed to in January 2000. It raises minimum the minimum age for participation in hostilities from 15 to 18 but allows recruiting of 17 year olds as long as "all feasible measures" are taken to keep them out of conflict. However, the Protocol continues the practice of international humanitarian law respecting, to an extraordinary degree, the rights of sovereign states. The Optional Protocol (Article 4(1)) prohibits armed groups opposing government from even recruiting children under eighteen, a stronger provisions than is applied to states. In addition, the Optional Protocol (Article 4(3)) notes that if armed rebel groups accept this higher standard of action, "The application of the present article under

⁵⁹ See the Coalition's web site at: www.child-soldiers.org.

⁶⁰ Keck and Sikkink, p. 27.

this Protocol shall not affect the legal status of any party to an armed conflict.”⁶¹

Thus, third world countries managed to have it both ways: they seemingly made it more difficult for rebels to fight than for governments and they explicitly declared that even if the rebels do follow international law they would not have a legal personality. It was another win for sovereignty.

States, International Law, and African Children

One of the clearest claims regarding the mobilization around human rights at the international level is the diminishment of sovereignty. For instance. Keck and Sikkink “We do find. . . that enough evidence of change in the relationships among actors, institutions, norms, and ideas exists to make the world political system rather than international society of states the appropriate level of analysis”⁶² However, in the case of regulating states’ ability to combat rebels while trying to protect children, perhaps the paradigmatic expression of sovereignty, there has been no obvious diminishment of sovereignty. Fundamentally, states are allowed to determine whether the conflicts within their own borders justify international attention (as is the case with both Article 3 and Protocol II). The failure to address the issue of who determines the nature of a conflict—perhaps the most important issue in governing the international regulation of a domestic conflict--starkly suggests that at every turn sovereignty has been respected, preserved, and, in fact, enhanced.

Undoubtedly part of the reason that sovereignty has not been a palpable victim of the campaigns to enhance international humanitarian law is that the

⁶¹ The Optional Protocol can be found at: www.child-soldiers.org.

⁶² Keck and Sikkink, p. 212.

forums in which the law is produced are composed of states. States might be more vulnerable to international pressure on an individual basis when campaigns can focus on their behavior and other states may be too embarrassed to come to their aid. However, international conferences of states provide strength in numbers.

In addition, it is also important to note that the countries that are potentially affected by the international protection of children are among the poorest in the world with profoundly disrupted local civil societies. Networks of domestic and international NGO's might be most powerful in countries which are stable and which seek further integration into global society. For instance, Keck and Sikkink note that human rights activists were most successful in Mexico between 1988 and 1994, when many domestic NGO groups were being formed⁶³ and when the Mexican government was keen to gain approval of NAFTA. In contrast, African states and others that are potentially threatened by international humanitarian law have relatively few domestic NGO's. In addition, the likely benefits of further international integration for many of these failing states is probably not high but they may calculate that they face the real possibility of domestic armed rebellion. As a result, they are much more likely to guard their sovereignty and much less likely to be susceptible to pressures from non-governmental organizations, despite the fact that they are quite weak by global standards. Indeed, it is their very weakness that makes them less vulnerable to the type of pressure that can be brought about by international human rights networks.

⁶³ Ibid., p. 116.

Compliance

Given that international humanitarian law has not effectively challenged sovereignty, compliance with the new international norms has been problematic. What then is the value of all of the promulgations that international society has made about the rights of the child during war? Further, why did non-governmental organizations and sympathetic governments continue to pressure for the Optional Protocol when it was obvious that the other international instruments protecting children were not being followed? A study for UNICEF argues that the value of the successive documents lies in the realm of moral suasion: "It is worth re-emphasizing that the power of humanitarian law does not lie only in the fact that its principles are in the form of legal instruments. This only adds additional weight. The power of humanitarian principles arises from the fact that they form a moral code rooted in a concept of the common good in the public conscience of men, women and children around the world and that those who violate them do so at the expense of their own legitimacy in the minds of humankind."⁶⁴ Thus, the argument for raising the age of combatants to eighteen in the Optional Protocol was that it would send a strong signal that the international community always found it unacceptable for children to be in armies, much less in combat.

Of particular interest is that NGO's and sympathetic governments believe that they can influence the actions of rebel groups—the same ones that the international codes have gone to some length to not recognize and to

⁶⁴ Everett M. Ressler, Joanne Marie Tortorici and Alex Marcelino, Children in War: A Guide to Provisional Services (NY: UNICEF, 1993), p. 54.

disadvantage—to behave better. The Machel report argued that, “Many non-state entities aspire to form governments and to invoke an existing Government’s lack of respect for human rights as a justification for their opposition. In order to establish their commitment to the protection of children, non-state entities should be urged to make a formal statement accepting and agreeing to implement the standards contained in the Convention on the Rights of the Child.”⁶⁵ The groups promoting the Optional Protocol to the Convention on the Rights of the Child—which treats rebel groups particularly poorly—also argued that, “the desire for international recognition by some of those groups would curb the most extreme cases of putting children into combat.”⁶⁶

The moral suasion argument is potentially useful because it gets around the sovereignty issue by justifying setting high humanitarian norms that might not actually be implemented in the near future but which could serve as an eventual goal. However, what is continually striking about the pronouncements of NGO’s, international organizations, and foreign governments is that they do not seem prepared to actually use moral suasion as a carrot. In the various human rights campaigns in favor of children, there has not been any pressure on governments to declare that their internal conflicts justify international regulation. Human rights groups often proclaim that chapter three of the Geneva Convention applies to a particular situation but there is usually no discussion of how the international community will reward countries for recognizing the application of international humanitarian law or will be delegitimated if they do not.

⁶⁵ Machel, p. 65.

The same tactical problem applies to rebels. The explicit bargain proposed is that if rebel groups obey international norms, they will get some kind of recognition from the international community. Yet, the actual rhetoric directed at rebel groups by non-governmental organizations and foreign states does not provide any such incentive. For instance, Human Rights Watch's recommendations to the Lord's Resistance Army was, in its totality, to: "immediately stop abducting children; immediately stop killing children; immediately stop torturing children; immediately stop sexually abusing children; immediately release all children remaining in captivity; ensure that Lord's Resistance Army combatants respect the human rights of civilians in areas of conflict." Human Rights Watch does not suggest what type of international recognition the LRA would get if it were to take these actions. Nor in its recommendations to the Ugandan government or the international community does Human Rights Watch suggest what type of recognition should be given to the LRA if the rebels were to carry out these reforms.⁶⁷ It can, of course, be argued that these norms should be respected no matter what the international community does but the justification for setting relatively high international norms was that moral suasion could then be used to accelerate compliance.

Human Rights Watch might find the Lord's Resistance Army so repulsive that even if the rebels agreed to respect the international humanitarian norms with regard to children, they should still not receive any international recognition. However, the advice to the Ugandan government is still perplexing because

⁶⁶ Steven Lee Myers, "After US Reversal, Deal is Struck to Bar Using Child Soldiers," New York Times, 22 January 2000, p. 8.

Human Rights Watch does not urge the Ugandan government to do the one thing that would appear logical if the LRA is, in fact, an inherently evil entity: win an outright military victory. Instead, Human Rights Watch urges the Ugandan government to be careful while fighting but it does not urge that the LRA be defeated. Human rights groups seem to be profoundly conflicted: they are willing to provide advice on how combat should proceed but they shy away from any conclusion about how combat should end even when, as is the case of the LRA, they have clearly implied that the atrocities committed against children and other civilians are absolutely unacceptable.

Other campaigns directed at rebel groups and governments demonstrate a similarly perplexing use of the moral suasion argument. For instance, Human Rights Watch urged all warring factions in Liberia to “disarm and demobilize immediately all fighters under the age of eighteen , and to refrain permanently from enlisting children under eighteen in the conflict.”⁶⁸ However, it does not indicate if the warring parties would receive some sort of recognition for these highly desirable reforms.

Similarly, UNITA, the rebel group in Angola, has pledged in its interim constitution that it will not recruit children under eighteen.⁶⁹ This pledge has largely been honored in the breach. However, it is profoundly unlikely that even if UNITA were to implement its constitutional provision, that it would receive any sort of recognition or goodwill from the international community because

⁶⁷ Human Rights Watch, *The Scars of Death*, p. 5.

⁶⁸ Human Rights Watch, *Easy Prey*, p. 55.

⁶⁹ See the Coalition to Stop the Use of Child Soldiers’ Angola case study at: <http://www.child-soldiers.org/angola.htm>.

countries are skeptical of UNITA's overall goals and the international community has now clearly indicated that it wants the Angolan government to win the war. Therefore, international sanctions have been imposed on UNITA although few foreigners actually pledge outright support for a military victory by the government.

Other NGO's have the same problem. For instance, World Vision's position paper on children in armed conflict states that "ensuring respect for and compliance with international standards both by state and non-state actors must be a priority" and it goes on to express enthusiasm for the Optional Protocol to the Convention on the Rights of the Child. However, World Vision does not actually say how states or rebel movements are to be enticed to comply with international standards, especially what they will get if they comply.⁷⁰ The Coalition to Stop the Use of Child Soldiers condemns numerous rebel groups (including UNITA and FLEC in Angola, Hutu opposition groups in Burundi, the LRA in Uganda, and the Sudan People's Liberation Army in Sudan) but also does not say what international recognition these rebel groups will receive if they comply with international law.⁷¹

Similarly, governments and international organizations have not gone beyond simply stating that moral suasion is useful. The Machel report does not contain any recommendations on how to relate to rebel organizations that actually comply with international norms. Nor did any nation in the long 1998

⁷⁰ World Vision, Position Paper—Children in Armed Conflict, June 1999, found at: <http://www.crin.org>.

United Nations debate on children in armed conflict suggest a way of relating to rebel groups might respect international norms. Yet, at the same time, there were no calls for governments to be encouraged to win outright military victories against rebels who did not respect international norms.⁷²

New Ideas for International Humanitarian Law

It seems that there is an unbreachable gap between norms and compliance when international humanitarian law is applied to children in armed conflict. The problem is not that the norms have necessarily been set too high. It does seem reasonable that children under eighteen in almost all circumstances should not be involved in hostilities. Nor is the problem a norm “overload:” international attention to the issues of children in conflict seems justified by the enormity of the human rights abuses. The heart of the problem is that the international community has no way of getting around sovereignty.

Yet, NGO's and governments continue to do what they know how to do and have been doing for years: writing more international law which basically reiterates already accepted practices or changes norms around the edges. These new humanitarian laws are written with the knowledge that they will not be enforced but no new thinking is given to how international practices (in particular how to relate to states in conflict and rebels) might be changed to gain compliance. Ironically, NGO's, which often promote themselves as the primary

⁷¹ See, Coalition to Stop the Use of Child Soldiers, Executive Summary: The Use of Child Soldiers in Africa: An Overview, August 1999, found at: <http://www.child-soldiers.org/Africa%20report.htm>.

⁷² See, UN Security Council, Security Council Considers Involvement of Children in Armed Conflict, 29 June 1998, Press Release SC/6536.

challengers of state sovereignty, have been timid about challenging sovereignty when it comes to the protection of children.

What is clearly needed, as Suter recognized when the Optional Protocols to the Geneva Convention were adopted, is new international approaches to domestic armed conflict. Such new international practices would allow the international community to determine what sort of international regulation should apply to domestic conflict, including if some form of recognition to rebels if it wanted to reward them for complying with international norms. If the international community actually wants to remain neutral during a civil war, as is implied by the failure of many NGO's and foreign governments to support outright military victories by African governments, then new practices should be developed which would allow for neutrality. For the norms to be effective, new methods to promote compliance will have to be developed.

There had, in fact, in the 1960's and early 1970's, been a sophisticated intellectual effort made to try to distinguish between different types of civil conflict so that a more fine-grained version of international humanitarian law could be applied.⁷³ This effort was no doubt propelled by the wars in Southeast Asia where scholars were often in favor of international recognition of domestic combatants and by concerns of others that national liberation movements be recognized. That effort ended in part because the Optional Protocols to the

⁷³ The most important work was Richard Falk, "Toward a New International Law for Civil War," in Richard Falk (ed.), The International Law of Civil War (Baltimore: The Johns Hopkins University Press, 1971). See also, Rosalyn Higgins, "International Law and Civil Conflict," in Evan Luard (ed.), The International Regulation of Civil Wars (London: Thames and Hudson, 1972).

Geneva Convention were adopted and, in part, because the wars in Southeast Asia subsided.

However, there clearly needs to be a new effort to differentiate among conflicts so that the international community can apply the now comprehensive set of international laws relating to conflict and begin to relate to rebels. This effort might center around reviving classical understandings of international recognition of a belligerency so that outside parties could help determine the nature of the conflict and possibly develop some relationship to rebels or remain neutral in domestic conflicts. The African Charter on the Rights and Welfare of the Child is a slight indication that the time for such an approach has come in Africa given that sovereignty in parts of the country is collapsing. The role of the OAU as a gatekeeper to the international recognition of domestic parties during armed conflict provides the ideal avenue for Africans to begin to think about new approaches to relating to parties during domestic armed conflict.

Part of the new thinking about sovereignty will have to include new approaches to developing international norms and practices. Having all the states of the world come together to adopt international humanitarian law towards domestic conflict is like recruiting criminals to write gun control laws. New ways of developing international practice will have to be found if there is to be more innovative practices that might ensure compliance. At the very least, these new international efforts should include investigating the possibility of involving groups outside the state, including rebels, in adopting new practices.

Of course, such an approach might be the first step in rebels actually complying with international norms.

Conclusion

There is nothing inevitable about the current state of the laws of war. Despite current rhetoric how human rights law challenges sovereignty, it is important to recognize that the law of war were actually more effective in the past. For instance, Quincy Wright found that international law with regard to the “status of rebels, the conduct of hostilities, and the rights and duties of neutrals” was continually referenced by both the protagonists and neutral governments during the American civil war.⁷⁴ It has been the international law of domestic conflict in the twentieth century that has privileged states. In the current legal context, the effort to protect African children during times of conflict is a noble one but it threatens to exhaust itself by simply trying to propound ever more ambitious norms. Much more attention will have to be given to compliance, including the difficult questions of who determines the nature of an armed conflict and how to relate to rebel groups during conflict. The international community—including governments, international organizations, and NGO’s—has now proclaimed for a decade how committed they are to African children. It is time to simply stipulate that the commitment exists and begin the difficult job of investigating how to enforce the norms. The ultimate test of seriousness will be if the international community no longer always values state sovereignty above the welfare of African children.

⁷⁴ Quincy Wright, “The American Civil War, 1861-1965,” in Richard Falk (ed.), The International Law of Civil War (Baltimore: Johns Hopkins University Press, 1971), p. 103