

Accountability of States and Non-state Actors under the International Law of Child Soldiering



Candidate number: not known

Lydia Tujuba Atomssa

Supervisor: Nobuo Hayashi

Deadline for submission: september/30/2008

Number of words: 16,354

30.09.2008

UNIVERSITY OF OSLO

Faculty of Law

Content

| | | |
|----------|---|-----------|
| 1 | Introduction..... | 1 |
| 2 | Extent of child soldiering..... | 3 |
| 2.1 | Using children in armed conflicts..... | 4 |
| 2.2 | Involuntary recruitment..... | 5 |
| 2.3 | Voluntary recruitment..... | 6 |
| 3 | Enforcing provisions governing child soldiering under the different treaty laws..... | 8 |
| 3.1 | International Humanitarian Law Treaties..... | 9 |
| 3.1.1 | Art 51 of the GCIV..... | 9 |
| 3.1.2 | Art 77(2) of the API..... | 9 |
| 3.1.3 | Art 4(3) of the APII..... | 12 |
| 3.1.4 | Enforcing the provisions..... | 14 |
| 3.2 | International Human Rights Law Treaties..... | 17 |
| 3.2.1 | Art 38 of the CRC..... | 17 |
| 3.2.2 | CRC Optional Protocol..... | 19 |
| 3.2.3 | ILO Convention no. 182..... | 19 |
| 3.3 | Regional Instruments..... | 20 |
| 3.4 | International Criminal Law..... | 21 |
| 3.4.1 | The DRC situation..... | 24 |
| 4 | Accountability of Natural Persons..... | 26 |
| 4.1 | Crime of child recruitment – The Norman Case..... | 26 |
| 5 | Accountability of States and Non-State Actors..... | 30 |
| 5.1 | Accountability under the Security Council Resolutions..... | 30 |
| 5.1.1 | Application of chapter VII..... | 31 |
| 5.1.2 | Resolution 1261(1999)..... | 31 |
| 5.1.3 | Resolution 1314(2000)..... | 32 |
| 5.1.4 | Resolution 1379(2001)..... | 33 |

| | | |
|----------|--|-----------|
| 5.1.5 | Resolution 1460(2003)..... | 34 |
| 5.1.6 | Resolution 1539(2004)..... | 37 |
| 5.1.7 | Resolution 1612(2005)..... | 38 |
| 5.2 | Accountability under the Draft Articles..... | 40 |
| 5.2.1 | The Notion..... | 40 |
| 5.2.2 | Character of the obligation breached..... | 41 |
| 5.2.3 | The value protected..... | 42 |
| 5.2.4 | Art 53 of the VCLT..... | 43 |
| 5.2.5 | Intensity of the breach..... | 46 |
| 5.2.6 | Consequences of the breach for states..... | 47 |
| 5.2.7 | Consequences of the breach for non-state actors..... | 48 |
| 6 | Conclusion..... | 50 |
| | Bibliography..... | 51 |
| | Literature..... | 51 |
| | Books..... | 51 |
| | Articles..... | 52 |
| | Case Law..... | 54 |
| | UN Documents..... | 54 |
| | Treaties..... | 54 |

1 Introduction

In the contemporary international law, the issue of child soldiering is addressed in three major categories, namely the international humanitarian law, the international human rights law and the international criminal law. Despite the existence of such rules children are being recruited and used by state and non-state actors, chiefly, in on going and recent internal armed conflicts around the globe¹. Moreover, the number of children recruited and used in armed conflicts has increased over the years. Some attribute the increased availability of automatic weapons, M16 or AK-47 easy to disassemble, assault rifle, has made the use of child soldiers more noticeable now.² Poverty, according to some, causes the conflicts and suggests that in the end any change for such children in the developing world depends on poverty reduction and settling conflicts caused by poverty.³

The violation of the international law on child soldiering is one of the challenges that the international community is encountering. It has been suggested that success to end the practice will depend on "...continued monitoring ...an uncompromising commitment by local, national, and international authorities to hold perpetrators accountable"⁴.

The issue of the thesis is what can be done about the violations of the international law of child soldiering by states and non-state actors? In other words the thesis addresses the issue that comes up once the international law on child soldiering is breached. How can those who breached their duty be made accountable for their violation under international law? In answering the question the thesis explores into the Security Council resolutions and the International Law Commission's draft articles on Responsibility of States for Internationally Wrongful Acts (hereinafter the Draft Articles). This issue is addressed

¹. <http://humanrightswatch.org/campaigns/crp/facts.htm> ,outlines 'facts about child soldiers' visited on January 8, 2008

² . Madubuike-Ekwe (2005) p.2

³ . *Ibid*

⁴. Becker (winter 2005) p.18

notwithstanding the effort to end the practice by dealing with the underlying causes. The issue also takes cognizance of the advocacy for the universal application of the 18 years age limit. On the other hand the issue is addressed given the enforcement of individual criminal responsibility under the Special Court for Sierra Leone (hereinafter SCSL) and now the International Criminal Court (hereinafter ICC). In addressing this issue, the thesis intends to forward the focus on enforcement of the rule that now arguably forms part the customary norm. But the thesis discussion of the customary status of the prohibition of the conscripting and enlisting of children below 15 years of age into armed forces and using them to participate actively in hostilities will be limited to the 2004 decision of the SCSL and writings of scholars.

The thesis focuses on the accountability of states and non-state actors that in breach of international law recruit and use children below the age of 15 years. Accordingly, accountability for the purpose of the thesis is either to indicate individual criminal responsibility of natural persons or the responsibility of the state or the non-state actors for breaching the international obligation on child soldiering. In addition, the phrase non-state actor is used to refer to armed groups such as insurgent, paramilitary, rebel, irregular forces, liberation fighters or other armed groups of similar nature. The thesis also uses the word recruitment alternatively and interchangeably with the phrase “conscription or enlistment”. Recruitment is taken as being inclusive of the conscription and enlistment.

The structure of the thesis is five-fold. Firstly, the thesis outlines the extent of the practice of child soldiering in armed conflicts. It gives the picture of how children are used, why recruiters target children and on the other hand why children themselves volunteer. Secondly, the thesis discusses the enforcement mechanisms under the different treaty laws and the specific provisions regulating child soldiering.

Thirdly, the thesis examines the accountability of natural persons by looking into the 2004 preliminary decision of the SCSL on child recruitment, customary nature of the crime, in the light of its contribution to invoke accountability of state and non-state actors as such. Forthly, the thesis argues for and analyzes how states and non-state actors could be held accountable, for breaching the international law of child soldiering, under the Security

Council resolutions and the draft articles. The thesis finally concludes by suggesting for more targeted action by the Security Council and for the application of the draft articles.

2 Extent of child soldiering

Reported by the Human Right Watch, there are 300,000 child soldiers, constituting children under 18 and even as young as 8 years old.⁵ Despite the growing concern and effort, by non-governmental organizations and inter-governmental organizations, to raise the age limit to 18 years and setting legal rules on different treaty bodies children in developing countries are continually being exposed to the modern warfare⁶.

The Convention on the Rights of the Child (hereinafter CRC) under Article 1 defines a child to mean "...every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier." But it is only to those below 15 years that the said convention extends its protection from recruitment and use in armed conflict.⁷ Child soldiering is not new phenomenon to the international community. History shows that the practice dates back to the Middle Ages when children in thousands went off from Europe to martyr themselves in the "Children's Crusade"⁸. Whereas the "Baby Brigade" of the Tamil Tigers forms part of the 1990's child soldiering that the world has experienced.⁹ Yet age limits for recruitment into armed groups, however, varying between the age of 15 and 18, is put in place by international instruments.

Children below the age of 15 years old are recruited in armed groups and participate in different armed conflicts, often forcibly and armed group commanders in some cases were themselves recruited at a very young age.¹⁰ These children are used for a variety of tasks, once they become part of the armed force.

⁵. *Supra note*, 1

⁶. Geske (2005) p. 123

⁷. CRC, Art 38 , see part 3.2 of the thesis

⁸. Webster (2007), p. 229, see also *supra* note 6, p.112

⁹. Briggs (2005) p. 86

¹⁰. *Ibid*, p. 42 children as young as eight in the guerilla groups in Colombia like the FARC, p.86 children as young as 11 in the Tamil Tigers of Sir Lanka

2.1 Using children in armed conflicts

Children fought in the battles for instance, in Sri Lanka and Northern Uganda. In Sri Lanka “Many Tamil children have been recruited or conscripted into the LTTE (Tamil Tigers) cadres...” and thus drawn into combat where as those Children that Joseph Kony took “...became foot soldiers in his personal insurgency...”¹¹ Children serve as ordinary foot soldiers, sent to front lines or into the mine fields ahead of adult troops.¹² In the Rwanda genocide children participation was planned and it was the case that children below 14 years had participated in some form in the genocide.¹³ Children were used as informants in identifying members of particular targeted groups in the genocide and they have engaged in looting and as servants or guards of the Hutu army.¹⁴

Children are trained for suicide bombing mission. The Tamil Tigers in Sri Lanka is known for using children for suicide bomb mission, particularly girls.¹⁵ In Sri Lanka child soldiers make mines and are made to manufacture bombs.¹⁶ Children used by the guerillas were used to place bombs.¹⁷

The Lord Resistance Army (LRA) in Northern Uganda uses children as shields. In addition Joseph Kony the LRA leader is known for sending children into battle unarmed. These children are made to move towards an objective. Then commanders force them to march in single file and to essentially act as shields. Whereas when they are made to fight they will get killed if they drop their weapons, take cover, or retreat.¹⁸

Girls in armed groups are also subjected to sexual abuse, exploitation and some are used for sexual service as forced ‘wives’.¹⁹ Boys in Afghanistan war “...were thought to have been used as sexual partners by adult commanders”.²⁰

¹¹ . *Supra note* 9, p. 83 ,p.108

¹² . *Supra note* 6, p.111

¹³ . *Supra note* 9, p. 20

¹⁴ . *Ibid* , p.18

¹⁵ . *Supra note* 2, p.3

¹⁶ . *Supra note* 9, p. 89

¹⁷ . *Ibid* , P. 42

¹⁸ . *Ibid* , p.122

¹⁹ . *Supra note* 6, p.111

Children taken by the LRA, "...became porters who carried supplies or farming equipment; they were sold to neighboring Sudan for arms and supplies; or they were murdered as an example ,to toughen up other abductees."²¹ Children used by the FARC in Colombia spy, carry messages and guard kidnapped victims.²²

Children are either forced to join armed groups or it may also be the case that they volunteered to join. The following parts will show the different findings that suggest different reasons as to why children are targeted or why they choose to join armed groups.

2.2 Involuntary recruitment

Involuntary recruitment is used to refer the different ways by which children are forced to join in armed groups. Joseph Kony, since the LRA started to fight in 1986, has abducted up to ten thousand girls and boys from boarding schools, church and isolated farms.²³ It was typical of these abductions that the children's families and neighbors are murdered or the children's themselves were made to do the killings so that they become hardened to violence.²⁴ On the other hand "as the tide of civil war takes over people's lives and homes, young people may be forcibly conscripted and abducted into armed groups."²⁵ Then they become greatly vulnerable for abduction. There are explanations as to why children are being targeted by the armed groups and forced to join.

Some of the explanation given include²⁶ firstly, children are found unaccompanied on the streets driven by poverty and violence. Secondly, children become the next obvious choice when there is shortage of adult soldiers. Thirdly, children's obedience and malleability makes them desirable. On the other hand the lack of documents certifying their age and the

²⁰ . *Supra note 9*, p. 155

²¹ . *Ibid* , p. 108 -109

²² . *Ibid* , p.42

²³ . *Ibid* , p. 108 and p.115

²⁴ . *Supra note 2*, p.2

²⁵ . Berry (2001) p.93

²⁶ . *Supra note 6*, p.113, see also Madubuike-Ekwe (2005), p.2 for more on the second reason

lack of serious legal ramifications which armed groups face facilitated such recruitment in Sierra Leone.²⁷

2.3 Voluntary recruitment

The growing number of non-international armed conflicts, the increase in the easy availability of small arms and the fact that such wars tend to turn the civilian communities into battle grounds all contribute to the reasons why children choose to join armed groups.²⁸ The issue of how voluntary is their choice is debated.

They become soldiers”...in light of the influences and pressures upon them, which they experience as part of their day-to-day environment.”²⁹ Economic hardship, promises of payment and education are the driving force for the children to join.³⁰ Thus decide to join armed groups to run away from the poverty they live in.

Girls in Sri Lanka join armed groups of the Tamil Tigers to protect themselves against rape and sexual assault by government forces.³¹ Children volunteer when they loss what constitutes their security and guarantee for their future, like land or cattle.³² Seeking vengeance for the lost or killed family members or parents, children make the choice to join armed groups.³³ Some children also join simply because they think that fighting is heroic. Some are attracted by the power and status of carrying weapons.³⁴

Lack of schools or the irregularities in schooling, which are most of the time affected by armed conflicts, makes the children to be without any kind of activity that occupies them thus they join armed groups. For instance studies on children in Colombia showed ‘social

²⁷ . *Supra note 2*, p.2

²⁸ . *Supra note 25*, p.93

²⁹ . *Ibid*

³⁰ . *Supra note 6*, p.113

³¹ . *Supra note 9*, p.83 and p. 91

³² . *Supra note 25*, p. 100

³³ . *Supra note 9*, p.57

³⁴ . *Ibid*, p. 157

exclusion, mistreatment, and lack of educational opportunities and jobs in rural and marginal areas...’are the reasons why children join armed groups.³⁵

Thus, one has always to ask if their choice to join is really voluntary. Some studies show that children who made the choice to join armed groups are more likely to return, even if demobilized, if the reason that they choose to join has not changed significantly as compared to children who were abducted and physically forced to join an armed group.³⁶

Except for the few cases where children really join or volunteer for the sole reason to fight with a full understanding about the political and ideological reasons behind the group, it is frequently the case that the distinction between voluntary and forced recruitment is not clear-cut.³⁷

The different reasons behind their volunteering show that they join because of circumstances beyond their control, lack of alternatives or lack of other options or because of misleading information or false promises of pay or education.³⁸ As such, any ‘choice’ these children may have as to whether or not to enlist is illusory.”³⁹

Many argue that in order to end the use of child soldiers in armed conflicts, all these factors must be taken into account and solution must be designed to deal with the root causes. Some studies suggest that children should be provided with education in secured schools, poverty should be eradicated and the issue underlying the conflict should be resolved.⁴⁰

Other studies suggest that global monitoring of arms trade and effective conflict prevention will end the practice of child soldiering.⁴¹ Whereas other studies emphasis much effort should be made to continually demobilize and integrate child soldiers.⁴² Hence, how does the international law regulate child soldiering and makes violators accountable?

³⁵ . *Ibid* , p43

³⁶ . Brett (2004) p.105

³⁷ . *Ibid* , p.112

³⁸ . *Ibid*

³⁹ . *Supra note* 2, p.2

⁴⁰ . *Supra note* 36, p. 3

⁴¹ . *Supra note* 25, p.99

⁴² . *Supra note* 36, p.2

3 Enforcing provisions governing child soldiering under the different treaty Laws

Treaty law binds states that have ratified it whereas customary international law binds all, both state and non-state actors. When it comes to the regulation and enforcement of child soldiering on the one hand it concerns respect to the law of war and on the other hand protection of the rights of children. Especially the prohibition and regulation of those under 15's is much about public order as it is about the protection of children's rights.⁴³ This part will examine the regulation and the enforcement of child soldiering in the international humanitarian law, international human rights law, regional instrument and international criminal law.

3.1 International humanitarian law

Under the four Geneva Conventions there is no specific provision that regulates child soldiering. Thus the Additional Protocols are the first international humanitarian law instruments that explicitly stipulated rules on child soldiers. But Art 51 of the fourth convention can be linked to prohibition of child soldiering.

3.1.1 Art 51 of the GCIV

The 1949 Geneva Convention relative to the protection of civilian persons in time of War (hereinafter GCIV) according to Art 4(1) provides protection for persons who find themselves "...in the hands of a party to the conflict or occupying power of which they are not nationals." The first paragraph of Art 51 of the GCIV stipulates "the occupying power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted." The commentary on Art 51 distinguishes the services that are prohibited from civilian work. Under this

⁴³ . Happold (2000) p.30

paragraph the “occupying power is forbidden to force protected persons to serve in its armed or auxiliary forces”. In addition to the prohibition of enlistment all forms of pressure or propaganda to secure voluntary enlistment is also prohibited. No derogation from such rule is permitted.⁴⁴

This provision does not regulate the situation in which a state forces its own nationals to serve in its armed forces. According to Art 2 of GCIV, the convention does not apply to non-states actors. Second Art 51 does not regulate voluntary enlistment in the absence of pressure or propaganda. It can be said that the article is not stipulated to address child soldiering alone, since the provision refers to protected persons in general. If the child soldiers are not among the protected persons then Art 51 does not apply to them.

3.1.2 Art 77(2) of API

The 1977 protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (hereinafter API), governs situation of civilians in international armed conflicts. According to Art 1(1) and (4) of API the protocol applies to states and to national liberation movements fighting colonial domination and alien occupation and a racist regime in the exercise of the right to self-determination. The particular provision dealing with child soldiering, Art 77 (2) of API, stipulates that

The parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the parties to the conflict shall endeavor to give priority to those who are oldest.

This provision is the first to address explicitly the issue of child soldiering. It is a development to the GCIV and other rules of international law such as the declaration on the rights of the child “which at the time was developing into a convention under UN”⁴⁵. The

⁴⁴ . <http://www.icrc.org/ihl.nsf/WebPrint/380-600058-COM?OpenDocument> (Visited January 29,2008)

⁴⁵ . *Ibid*, parag 3176 & 3177

provision applies to all children who are in the territory of the party states involved in the conflict.

The phrase “...all feasible measures...” which was adopted instead of “all necessary measures” makes the obligation under the former weak.⁴⁶ The fact that the article offers much lower standard will allow a state party considerable freedom to evade the general prohibition.⁴⁷ On the other hand the phrase “...direct part in hostilities...” needs interpretation. What does “direct part in hostilities” mean? The fact that there is no definition of the term under the treaty body of international humanitarian law contributes to the problem of applying Art 77(2). Is it only delivering of violence or fighting that is regarded as direct part in hostilities? If yes, it leads to the argument that activities like gathering and transmission of information is not prohibited under the rule.⁴⁸ Qualifying the nature of participation in this manner fosters ambiguity and invites subjective interpretation by states.”⁴⁹

The phrase “direct participation in hostilities” is used not only under Art 77(2) of the API but also in many other provisions of international humanitarian law. Thus there is direct participation in hostilities by child soldiers and by civilians in general. As to what constitutes direct participation in hostilities is controversial. What is not controversial is that carrying out an attack is a direct participation in hostilities. But whether preparing or returning from an attack is direct participation in hostilities is still controversial.⁵⁰ It is argued that “...the behavior of civilians must constitute a direct and immediate military threat to the adversary” for it to be regarded as a direct participation in hostilities.⁵¹ The critics on such an interpretation enlarge the notion to include “...acts aimed at protecting personnel, infrastructure or material.”⁵² Even much broader interpretation of the term

⁴⁶ . *Supra note 43*, p.35

⁴⁷ . *Supra note 2*, p. 4

⁴⁸ . *Supra note 43*, p.36

⁴⁹ . *Supra note 2*, p.4

⁵⁰ . <http://www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205>

⁵¹ . *Ibid*

⁵² . *Ibid*

suggest that the direct participation in hostilities “rest on appreciation of the value added brought to the war effort by civilian post as compared to a purely military activity.”⁵³ It is also debated if direct part in hostilities includes logistical support activities and intelligence or guarding activities.⁵⁴

International humanitarian law intends to protect civilians as much as possible. Civilian loss their status and the protection afforded to them for the time that they take direct part in hostilities.⁵⁵ That is why direct participation in hostilities by civilians must be interpreted narrow enough to give more protection to civilians. Thus, the narrower the interpretations of the term “direct participation in hostilities” the more protection that civilians will be entitled to. On the other hand taking Art 77(2) the interpretation of the term “direct part” if broad enough might provide greater the protection to children. An interpretation that includes other than engaging in violence, will contribute in order to spare children from armed conflicts and at the same time for the order of warfare. Taking Art 77(2) states have a duty to take all feasible measure to make sure that children below 15 years do not take direct part. If applying narrow interpretation then it may mean what is prohibited is only carrying out attack or fighting. Therefore in order to protect children and to make sure that order of warfare is respected the interpretation of “direct part in hostility” for the purpose of Art 77(2) be enlarged.

3.1.3 Art 4(3) of APII

The 1977 protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (hereinafter APII) regulates the issue of child soldiering in internal armed conflicts. Art 4 of the protocol stipulates the fundamental guarantees that civilians are entitled in internal armed conflict. Sub article 3(c) of the said provision provides that “children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities”. This paragraph “...determines the lower age limit of 15 years for recruitment

⁵³ . *Ibid*

⁵⁴ . *Ibid*

⁵⁵ . Art 51 in general and sub article 3 of the said provision of the API

into armed forces”.⁵⁶ The restriction is broader than that under Art 77(2) API. The obligation under Art 4(3) (c) is absolute in prohibiting that children should not take part at all in hostilities.⁵⁷ Meaning the provision is not limited to direct participation. “The language of the protocol ascribes responsibility to those who allow children to participate rather than to children themselves”.⁵⁸ Thus it is the duty of states and non-state actors to make sure that they do not recruit children below 15 years of age.

The above provisions of the international humanitarian law on child soldiering are now customary international law. This was firmly held by the 2004 SCSL decision on the preliminary motion on recruitment of child soldiers. The court held that prior to 1996 there is a customary international law that prohibited the recruitment of child soldiers below the age of 15 years old. The court considered whether the two elements of customary international law are present to conclude that the rule has crystallized as customary international law. According to the Art 38(1) (b) of the 1945 statute of the international court of justice “custom as evidence of general practice accepted as law” is one of the sources that the SCSL had to look into. The court looked into the state practice and *opinio juris*, the two elements of custom.

The court has demonstrated that state practice is widespread by taking the wide ratification of the treaties. It showed that the GCIV, API and APII are widely ratified treaties. 185 states are parties to the GC prior to 1996 and 133 states have ratified APII before 1995.⁵⁹ The court also looked into the 2004 UNICEF amicus brief which shows the list of states that have legislation indicating the minimum age.⁶⁰ From the brief the SCSL concluded that it shows that states have for a long time prohibited recruitment of below 15 years olds. As for *opinio juris* the court held that the state practice shows *opinio juris*. The state practice is

⁵⁶ . *Supra* note 44, parag 4549

⁵⁷ . *Supra* note 43, p.39

⁵⁸ . *Supra* note 2, p.5

⁵⁹ . *Infra* note 114, paragraph 18, p.13

⁶⁰ . *Ibid* , paragraph 18, p.13

the result of *opinio juris* and the court did not go into detail to show the existence of *opinio juris*.⁶¹

In the contemporary international law the identification of customary international law has become more relaxed. The modern identification of the crystallization of customary law “...relies principally on loosely defined *opinio juris* and/or inference from the widespread ratification of treaties ...” making it more flexible and open to the relatively rapid acceptance of new norms.⁶² This flexible approach is very useful when important values are involved, as it is the case with the prohibition on child soldiering. As for the SCSL the court if it had not used such flexible approach then it would not have been able to exercise its jurisdiction on indictments on child soldiering. The Value that is protected by the prohibition should be given much emphasis than sticking to the traditional form of identification of customary status of a given rule.

3.1.4 Enforcing the provisions

What are the enforcement mechanisms available under the international humanitarian law? Depending on the particular provision at issue, there are different mechanisms to ensure observance of international humanitarian law. Among the mechanisms are reprisal, penal and disciplinary measures, compensation, protecting powers and their substitutes, international fact finding, the International Committee of the Red Cross (hereinafter ICRC) and diplomatic activities.⁶³ From this mechanisms only three of them, ICRC, penal measures and compensation, will be examined to address the enforcement of the provisions on child soldiering. Forestalling breaches and ensuring compliance with the provisions on child soldiering would be the most appropriate way of enforcing the provisions. But, once the rules are breached then the penal enforcement and compensation can be resorted to. The following paragraphs will show the issues underlying enforcement.

⁶¹ . *Ibid* , paragraph 17, p.13

⁶² . Meron (2005) p.1

⁶³ . The handbook of Humanitarian Law in Armed Conflict (1995) p.525

ICRC is an organ that is dedicated to promoting the faithful application of the law of war. It monitors the observance of the Geneva Conventions and the AP's.⁶⁴ ICRC has no express supervisory authority but it monitors observance.⁶⁵ Its "...reports and findings are strictly confidential and are only forwarded to the party concerned" and it is only in some cases that it makes a public statement urging compliance with the rules of the Geneva Convention and the Additional Protocols.⁶⁶ With the level of confidentiality expected of the ICRC, if the state concerned is not complying with the ICRC suggestions there can't be much of enforcement.

Penal repression is the most appropriate and fitting method of ensuring compliance with international treaties.⁶⁷ Similarly provisions on child soldiering may best be enforced through penal repression. Under the treaty body of the international humanitarian law grave breaches call for penal measures. "The consequences of a grave breach are always of a penal nature..." and every state has a duty to investigate and prosecute accused person for committing or ordering in violation of the rules.⁶⁸ Except what is provided under Art 147 of GCIV, violation of Art 77(2) of API and Art 4(3) of APII do not form part of the grave breaches of the international humanitarian law. One of the grave breaches enshrined under Art 147 of GCIV includes "compelling a protected person to serve in the forces of a hostile power". Art 51 may be related to "...the regulation of children's participation in hostilities...however, although the article refers to all protected persons, children included, due to its general nature it cannot be seen as specifically dealing with their protection".⁶⁹ Its application is limited to situation of occupied territory or to the nationals who are in the hands of the adversary. Its enforcement will be restricted to situations where there is power that is enlisting children protected under the said provision.

⁶⁴ . *Ibid* , p.547

⁶⁵ . *Ibid* , p.548

⁶⁶ . Cassese (2005), p.429

⁶⁷ . *Ibid* , p.426

⁶⁸ . *Supra note* 63, p.528

⁶⁹ . *Supra note* 43, p.30

But penal repression is not limited to the grave breaches since under customary international law it is well established that other serious violation of international humanitarian law provisions entail criminal responsibility. Child soldiering provisions considered above do not form part of grave breaches of the international humanitarian law, thus whether the violation of the rules has been criminalized has to be established. The crime of child recruitment was considered as a serious violation of the law of war by the SCSL (discussed in part 4). When the court was determining whether the crime existed it used the test that International Criminal Tribunal for the former Yugoslavia (ICTY) has set in *Prosecutor v. Tadic* case.⁷⁰ As per the test four requirements must be met for a violation of the law of war to entail penal measure. The requirements are⁷¹ international humanitarian law rule must be violated, the rule at issue must be customary in nature, violation must be “serious” (meaning a breach must protect important value and that it involves grave consequence for the victim) and, violation of the rule must entail individual criminal responsibility. Another possibility to determine if the breach entailed criminal responsibility may be whether the breach is termed as a war crime by the statute of an international tribunal.⁷² Breach of such a rule may become a war crime that falls under the jurisdiction of the international tribunal. This may be the case even if the breach has never been brought before a national or international tribunal.⁷³ Therefore the penal repression of the violation of the international humanitarian law is not limited to the grave breaches. Compensation is the other enforcement mechanism of the rules on international humanitarian law. Art 91 of API stipulates that compensation can be claimed following the breach of the rules under GCs and API. Art 91 of the API states that

A party to the conflict which violates the provisions of the conventions or of this protocol [API] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

⁷⁰ . *Infra note* 114, paragraph 26, p.15

⁷¹ . *Ibid* , paragraph 26, p.15-16

⁷² . Cassese (2003), p. 51

⁷³ . *Ibid*

This provision "...corresponds with the principle, as developed both in state practice and in international decisions that a breach of international law caused by an individual state will serve as grounds for its responsibility."⁷⁴ However in practice compensation for each individual violation has never been enforced.⁷⁵ But the article is intended to refer to liability that the state owes to another state and not to its own nationals. Second sentence of Art 91 evolved from the system of international law of state responsibility.⁷⁶ The state is held accountable for acts of persons in an official capacity and may be demanded to pay compensation.

3.2 International human rights law

Under international human rights treaties states are the duty bearers and they establish monitoring mechanisms through which the obligations are enforced. Such preference to monitoring mechanisms is due to "the need to strike a compromise between state sovereignty and the requirement that states comply with international standards on human rights..."⁷⁷ Child soldiering in international human rights treaties is regulated under the 1989 Convention on the Rights of the Child, the 2000 Optional protocol to the CRC on the involvement of children in armed conflict (hereinafter the Protocol) and the 1999 ILO-convention no.182 concerning the prohibition and immediate action for the elimination of the worst forms of child labor (hereinafter ILO convention).

3.2.1 Art 38 of the CRC

Art 38 of CRC deals with the rights of children in armed conflict. Sub article 2 of the said provision stipulates "states parties shall take all feasible measure to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities." This provides "...a global agreement that persons under 15 should not bear the arms, perpetrate the violence, nor wear the uniform of any combative group in any form of political conflict

⁷⁴ . *Supra note 63*, p.543

⁷⁵ . *Ibid*

⁷⁶ . *Ibid*

⁷⁷ . *Supra note 66*, p. 386

in the world”⁷⁸ The prohibition under the article is again limited to direct participation in hostilities. Since CRC is meant for children protection it would have been more protective and all encompassing if the provision prohibited all kind of participation in hostilities. States are left to determine the measure that they deem feasible to make sure that children below 15 years of age do not take a direct part in hostilities. Art 38 (3) further stipulates “states parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, states parties shall endeavor to give priority to those who are oldest.” Generally Art 38 indicates an absolute prohibition of the recruitment of children below 15 years of age into armed forces. One of the limitations of the CRC is the fact that it only limits the conduct of states while leaving out not-state actors.⁷⁹

The universal acceptance and ratification of the CRC in general and Art 38 in particular provide compelling evidence that the conventional norm on child recruitment have crystallized into customary international law.⁸⁰ And the fact that there is no single reservation to lower the obligation under Art 38 emphasizes that the norm has become customary international law.⁸¹

Accordingly Art 4 of the convention provides that states have duty to implement Art 38 of the CRC by “...undertaking all appropriate legislative, administrative, and other measures...” Art 43 of the CRC established the committee on the rights of the child to monitor compliance by states of the obligations under CRC. And it is in its second session, in 1992, that the committee proposed for further restriction on the children’s participation in armed conflicts then made a proposal for an optional protocol.⁸² Since then the committee has been sized with preparing the protocol until it finally came into force in 2002.

⁷⁸ . *Supra* note 25, p.93

⁷⁹ . *Supra* note 2, p.6

⁸⁰ . *Infra* note 114, paragraph 20, p.14

⁸¹ . *Ibid*

⁸² . Happold (2005), p.35

3.2.2 CRC Optional Protocol

Art 1 of the protocol provides states duty to “...take all feasible measure to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities”. Even if the provision puts 18 years as a minimum age it does not prohibit all forms of participation. The protocol also regulated forced or involuntary recruitment under Art 2. It imposes a duty on states that they shall make sure that “...persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.” Thus minimum age is established for conscription and direct participation in combat. But as per Art 3(1) it only raised the minimum age of voluntary recruitment certainly to be above 15 and left it for state parties to decide on the exact age limit. Failure to make the minimum age for voluntary recruitment at the age of 18 has become one of the major criticisms on the protocol.⁸³

The protocol did regulate armed groups of non-state actors. Under Art 4 of the protocol non-state groups are absolutely prohibited from recruiting and using children below the age of 18 in hostilities under any circumstance. Art 4 (2) imposes a duty on the state party to take all feasible measure to prevent recruitment in violation of Art 4(1) by non-state actors. The measure that the provision stipulates includes legislative measure to prohibit and criminalize the practice by non-state actors. So it is the state that is primarily expected to take measure to ensure compliance by non-state actors in its territory. But “states would not appear to have many means to prevent insurgent groups from recruiting and using child soldiers other than prosecuting and punishing [based on Art 4(2)] rebels who fall into their hands if they have participated in the recruitment or use of child soldiers, but the situation might be different with regard to armed groups allied to the state’s government.”⁸⁴ But still the protocol has taken an important step in regulating armed groups belonging to non-state actors.

3.2.3 ILO convention no.182

⁸³ . *Supra note 6*, p.116

⁸⁴ . *Supra note 82*, p.80

The International Labor Organization, in convention no.182 regarded child soldiering as one of the worst forms of child labor. It basically regulated involuntary recruitment of children into armed forces. The ILO Convention among other things aims to end forced recruitment of children in armed groups. Thus, Art 3(a) puts that ‘forced or compulsory recruitment of children under the age of 18 years for use in armed conflicts is one of the worst forms of child labor. “This is the only ILO standard specifically addressing the question of military recruitment of children”.⁸⁵ Recommendation no 190, concerning convention No.182, encourages state parties to make the recruitment in violation of the convention a criminal offense under their national law.⁸⁶

3.3 Regional instrument

The only regional binding instrument that regulated child soldiering is the African Charter on the Right and welfare of the Child which came into force in 1999. The charter under Art 22(2) provides that “State parties to the present charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.” The charter becomes the first instrument that established a ‘straight 18’ rule banning all recruitment along with direct participation in hostilities.⁸⁷ In addition the fact that the charter opted for “all necessary steps” as opposed to “all feasible measure” makes it stronger in light of obligation that it imposes on parties to the charter.⁸⁸ But here also the article only refers to direct participation and state parties are the only duty bearers under the charter. For state party that has ratified the charter “...the question of distinguishing between voluntary recruitment and forced or compulsory recruitment does not arise for under -18s...”⁸⁹ Yet, it is mostly in armed conflict in African that much of today’s violation of the international law of child soldiering persist. Though its

⁸⁵ . *Supra note 36*, p.113

⁸⁶ . *Supra note 2*, p.7

⁸⁷ . *Supra note 6*, p.116

⁸⁸ . *Supra note 2*, p.6

⁸⁹ . *Supra note 36*, p.113

implementation by the signatories can be criticized, the charter has taken a strong position against this social pandemic.⁹⁰

3.4 International criminal law

The statute of the international criminal court enshrined the treaty provision concerning the crime of child soldiering. The statute defined the mere prohibition under the additional protocols and the CRC as a crime.⁹¹ This part of the thesis will examine what the statute established as a crime that entails individual criminal responsibility.

Art 8 of the ICC statute stipulates war crimes into two categories. The first category contains the “grave breaches” of the Geneva Conventions and the Additional Protocols. The second category of war crimes contains “other serious violations of the laws and customs of war”. Both categories of war crimes under Art 8 cover war crimes that are committed in international and non-international armed conflicts. It is in the second category of war crimes that the ICC statute enshrined the crime concerning child soldiering.

Art 8 (2) (b) (xxvi) of the ICC statute provides “conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities” is a war crime. This is the penal provision for international armed conflicts. Whereas, Art 8(2) (e) (vii) of the ICC statute provides the penal provision for non-international armed conflicts and it reads “conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities”. The two provisions are basically the same. The only difference appears in the expression of the armed groups that are to be involved in international armed conflict and non-international armed conflict. Individuals who in breach of the above provisions recruited or used child soldiers whether in international or internal armed conflicts will be held criminally responsible. Thus both the mental and material element of the crime must be present for any person to be criminally responsible.

⁹⁰ . *Supra note 8*, p.243

⁹¹ . The Rome Statute of the International Criminal court: A Challenge to Impunity (2001) p.120

Concerning the material element of the crime each term of the provisions must be examined. First, what is the required degree of participation to be a war crime? In drawing up the provisions there was a debate among the delegates as to the required degree of participation in the hostilities that will lead to war crime.⁹² The terms ‘using’ and ‘participating’ refers, first and for most, to active participation in combat and equally to other linked military activities. The preparatory committee’s list includes scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints and other direct support functions like acting as bearers to take supplies to the front line, or activities at the front line itself.⁹³ But it does not include activities like ‘food deliveries to an airbase or the use of domestic staff in an officer’s married accommodation’.⁹⁴

Second, what is meant by the phrase “taking direct part in hostilities”? Unlike some other treaty provisions considered above, the phrase ‘taking direct part in hostility’ was considered a phrase that would not allow wider interpretation as opposed to the phrase ‘active participation’ that can embrace support functions also.⁹⁵ In any way the degree to which the use or participation of below 15’s constitutes a war crime is for the judges to decide.⁹⁶

Third, what is meant by conscripting or enlisting? The use of the phrase conscription or enlisting as opposed to recruitment under the above two provisions of the statute was intentional. Conscription indicates “compulsory entry into the armed forces” and enlistment indicates “the generally voluntary act of joining armed forces by enrolment, typically on the “list” of a military body, or by engagement, indicating membership and incorporation in the forces.”⁹⁷ In other words “the use of the phrase ‘conscripting or enlisting’ suggests that both actively recruiting children and passively allowing them to sign up are banned.”⁹⁸

⁹² . Commentary on the Rome statute of the International Criminal Court: Observers’ Notes, Article by Article(1999) p.260

⁹³ . *Ibid*, p.261

⁹⁴ . *Ibid*

⁹⁵ . The International Criminal Court: Element of crimes and Rules of Procedure and Evidence (2001) p.206

⁹⁶ . *Supra note* 91, p.121

⁹⁷ . *Supra note* 92, p.260

⁹⁸ . *Supra note* 90, p.240

Besides it makes it clear that the crime intends to cover active efforts by officers to draw children into their ranks.⁹⁹ Such a phrase catches “...the moment that a person joined the armed forces, whether voluntarily or by some form of coercion.”¹⁰⁰ In other words what is criminalized under the statute includes the formal entry of persons below 15 into armed forces and a physical incorporation in armed forces or “schools” that an armed force operates and that primarily train those groups of persons for the conduct of armed warfare.¹⁰¹ In addition consent given by the person below 15 is not a defense to enlist or conscript and authorizing it is also prohibited.¹⁰²

The choice of the word ‘person’ as opposed to ‘children’ is also deliberate to limit the applicability of the provisions to those below 15 years. It was intended to avoid possible clash with the definition of the child and for the purpose of applicability of the provisions on child recruitment under ICC statute any person under the age of 15 years is a child.¹⁰³

In general the relevant elements of the crime entailing individual criminal responsibility are three. One, it must be shown that “the perpetrator conscripted or enlisted one or more persons into the national armed forces [or in case of non-international armed conflict the armed force or group] or used one or more persons to participate actively in hostilities”, two, “such person or persons were under the age of 15 years”, three, “the perpetrator knew or should have known that such person or persons were under the age of 15 years”.¹⁰⁴

Thus as to the mental element of the crime it is the duty of the prosecutor to prove that the accused “knew or should have known that such person or persons were under the age of 15 years”. This strict requirement of mental element was intended to guarantee protection of children.¹⁰⁵

⁹⁹ . *Supra* note 91, p.120

¹⁰⁰ . *Supra* note 95, p.206

¹⁰¹ . *Supra* note 92, p.260

¹⁰² . *Ibid*, p.207

¹⁰³ . *Supra* note 95, p.206

¹⁰⁴ . *Ibid*, p.205

¹⁰⁵ . *Ibid*, p.207

As a result of the ICC statute enactment, now it is a war crime to conscript or enlist persons below 15 years of age or using them to participate actively in hostilities. Declaring and stipulating this egregious practice as a war crime may have its own contribution to end the sense of impunity felt for long when recruiting and using children in hostilities.

These provisions of the ICC statute set the bottom line for the international community as to what is unacceptable and intolerable concerning recruitment and use of child soldiers. The provisions show there is no room and tolerance for those who violate the standard age limit put under the ICC statute as it is now violation of the core international crimes. Moreover the individual criminal responsibility does not affect the accountability of the state and non-state actors on whose behalf the individual acted.

Art 25(4) of the ICC statute provides that “No provision in this statute relating to individual criminal responsibility shall affect the responsibility of states under international law.” This provision confirms the parallel validity of the draft articles.¹⁰⁶ Hence, violations that lead to individual criminal responsibility could similarly pose the issue of accountability of state or non-state actors as such. Sub Art 2 of the same provision states that a natural person will be made individually responsible for committing a crime that falls within the court’s jurisdiction. The crime of conscripting or enlisting persons under 15 into armed forces or using them to participate actively in hostilities has brought about the first prosecution involving the situation in Democratic Republic of Congo (hereinafter DRC).

3.4.1 The DRC situation

The DRC situation is one of the four “situations and cases” that the ICC is currently dealing with.¹⁰⁷ The DRC conflict was known to have involved child soldiers in large numbers. Based on the estimate made in the year 2000 between 10,000 and 20,000 under 15’s were serving as soldiers within the various forces fighting in the conflict.¹⁰⁸ During the conflict children have been abducted or forcibly recruited for military service by non-state

¹⁰⁶ . *Supra note 92*, p.490

¹⁰⁷ . <http://www.icc-cpi.int/cases.html> , the others are situation in Uganda , Central African Republic and Darfur Sudan.

¹⁰⁸ . *Supra note 82*, p.7

actors involved.¹⁰⁹ “In total, it is estimated that more than 30,000 child soldiers serve among the ranks of the various belligerents in the entire DRC...” forming 40 to 60 per cent of the soldiers who were fighting the war.¹¹⁰ The ICC prosecutor Mr. Luis Moreno-Ocampo is investigating and prosecuting cases against four individuals from DRC and the case *Prosecutor V. Thomas Lubanga Dyilo* is one of them, which involve war crime charges against the accused Lubanga.¹¹¹ The accused was the commander-in-chief of the armed military wing and a founder of the Union des patriots Congolais (UPC), which was established in 2000.¹¹² The prosecutor charge against the accused involves three war crimes, one, enlisting children under the age of 15 years, two, conscripting children under the age of 15 years and three using children under the age of 15 to participate actively in hostilities.¹¹³ This is the only war crimes charge against the accused and the case is at trial stage. The court’s deliberation and decision on the Lubanga case will contribute to the development of the jurisprudence and case law on the prohibition and the crime of child soldiering. As to how the court deals with the provisions of ICC statute discussed above remains to be seen.

¹⁰⁹ . *Ibid* , p.8

¹¹⁰ . *Ibid* , p.119

¹¹¹ . *Supra note* 107

¹¹² . Drumbl (2007) p.1

¹¹³ . http://www.icc-cpi.int/pressrelease_details&id=218&l=en.html

4 Accountability of Natural Persons

States and non-state actors are entities that can only function and operate through natural persons. Thus it is a natural person that will be held criminally responsible under international criminal law. As per Art 25(1) of the ICC statute, the court is established to have jurisdiction over natural persons. Similarly SCSL was established to try the most responsible ones for the crimes committed in Sierra Leone, including crime of child recruitment.

The SCSL is known for being the first international tribunal that decided on the issue of the crime of child soldiering. This part of the thesis will examine the 2004 decision of the court, how the customary nature of the crime was established.

4.1 Crime of child recruitment – The Norman Case¹¹⁴

The Norman case is significant because it answered the question that there is a crime of child recruitment under customary international law by November 1996 entailing individual criminal responsibility. The Sierra Leone conflict was known largely for extensive recruitment and use of child soldiers¹¹⁵ by all state or non-state armed forces involved. In this decade-long Sierra Leone civil war more than 10,000 children have been used in the three major armed forces called the Revolutionary United Front, the Armed Forces Revolutionary Council and the Civil Defence Forces.¹¹⁶ Based on the agreement between the UN and the government of Sierra Leone the SCSL was established in January 2002. It was established to “prosecute persons who bear the greatest responsibility for serious violation of international humanitarian law and Sierra Leonean law committed in

¹¹⁴ . The term ‘the Norman Case’ is used to refer to the particular decision on the 31st of May, 2004 Decision on the preliminary motion based on the lack of jurisdiction (child recruitment) case No.SCSL-2004-14-AR72(E) available at <http://www.sc-sl.org/CDF-appealdecisions.html>

¹¹⁵ . Wells (2004) p.2

¹¹⁶ . Novogrodsky (2006) p. 2

the territory of Sierra Leone since 30 November 1996”.¹¹⁷ The Special court for the first time indicted natural persons for the crime of recruiting child soldiers.¹¹⁸ Based on the defendant’s motion the court decided that there is a crime of child recruitment.

The preliminary motion was raised by the defendant Sam Hinga Norman, who was a leader of the Civil Defence Force a pro-government militia group¹¹⁹. He argued that the SCSL lacks jurisdiction for the crime under Art 4(c) of the statute¹²⁰. The said provision of the statute of the SCSL is found under the category of “other serious violations of international humanitarian law”. According to Art 4(c) the court can prosecute persons bearing the greatest responsibility for “conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.”¹²¹

The court by 3:1 majority decided that there is a crime of conscripting and enlisting of children below 15 years of age in armed forces or using them to participate actively in hostilities under customary international law by November 1996. To determine the question raised by the defendant the court discussed international conventions and customary law.

The court when discussing international conventions pointed that it was not disputed that international humanitarian law is violated by the recruitment of children. Thus, the court highlighted the key provisions under the GCIV, API, APII and CRC i.e. Art 51, Art77, Art 4(3) and Art 38 respectively. The court then, discussed and held that the prohibition of child recruitment has crystallized as customary international law.

To reach at this conclusion, the court looked into state practice and *opinio juris*, the two elements of custom. The court has demonstrated that state practice is widespread. It showed that the GCIV, API and APII are widely ratified treaties. At the same time its huge

¹¹⁷ . Art 1 of the agreement between the United Nations and the government of Sierra Leone on the establishment of a special court for Sierra Leone , available at <http://www.sc-sl.org/documents.html>

¹¹⁸ . *Supra note* 116, p.1.

¹¹⁹ . *Ibid*

¹²⁰ . *Supra note* 114, p.3

¹²¹ . Art 4(c) of the Statute of the special court for Sierra Leone , available at <http://www.sc-sl.org/documents.html>

ratification indicates that CRC has become customary. Particularly the fact that there is no reservation on Art 38 shows that the rule has universal acceptance. As for *opinio juris* the court held that the state practice shows *opinio juris*. The decision quoted that ‘an articulated sense of obligation, without implementing usage, is nothing more than rhetoric. Conversely, state practice, without *opinio juris*, is just habit.’¹²² Therefore all the parties in the Sierra Leone conflict are bound by the international humanitarian law prohibition of child recruitment.¹²³

Then the court considered the main question, whether the prohibition on child recruitment entailed individual criminal responsibility. The court showed that the principle *nullum crimen sine lege* is not violated. To reach at the decision, the court pointed out that the emphases should be on the underlying conduct rather than on the specific description of the crime in substantive criminal law. The court showed that the violation of the rule on child recruitment is serious. This is because, according to APII, the rule is part of the fundamental guarantee. Such inclusion as a fundamental guarantee indicates that the international community agreed that the rule is a benchmark or a minimum standard in armed conflict. In addition the court referred to the Security Council condemnation of the practice as inhumane and abhorrent. Thus the breach of the rule on child recruitment is a breach of important value. Moreover the breach of the rule on child soldiers has a grave consequence for the victims. The court verified this by looking into numerous reports of the different human rights organizations that it has the most atrocious consequence for the children.¹²⁴ Then, does the breach entail individual criminal responsibility?

The court considered other instances of serious violation that entailed individual criminal responsibility. Those are the fundamental prohibition under common Article 3 of the GCs, the outline of fundamental guarantees under Art 4 of the APII, the ICTY, and International Criminal Tribunal for Rwanda (ICTR) in *Akayesu* determinations and the Security Council explicit recognition that serious violation entails individual criminal responsibility.¹²⁵

¹²² . *Supra note* 114, p. 13

¹²³ . *Ibid*, p.15

¹²⁴ . *Ibid*, p.17

¹²⁵ . *Ibid*

The court has also noted that the existence of a provision and state practice showing the intention to criminalize can be taken as a factor to establishing that the rule entails individual criminal responsibility. Crimes against international law are obviously committed by men and the provisions will only be enforced if individuals are punished. Thus the court concluded that a norm need not be expressly stated in an international convention for it to crystallize as a crime under customary international rule. If that is so required then what will be the meaning of customary international rule.¹²⁶

The dissenting opinion differed that the defendant should not be prosecuted for the crime of enlisting since the prohibition did not entail individual criminal responsibility by 1996. He considered recruitment, in the particular case at hand, to refer to enlistment charges alone. Hence according to the dissenting opinion the defendant should not be prosecuted for an offence of enlistment since it has never been prosecuted and has not evolved into customary international law. He argues that the crime of enlisting only came to be prosecuted after its enactment as a war crime by the mid 2002 when the ICC statute came into force. He dissent that by the end of 1996 no offence has evolved or emerged into customary international law which permitted individual criminal responsibility of enlisting i.e. accepting for military service of under 15's.¹²⁷

Justice Robertson argument is based on the matter which the majority has not dealt with. Thus, looking at it from the point of view of the value that the prohibition is protecting, the manner of recruitment does not really matter. Since by the prohibition of recruitment (both conscription and enlistment) of children below 15 years of age children will be protected and public order will be maintained. For the court to be able to exercise this important jurisdiction, then the approach taken by the majority in determining the customary status of the crime of child recruitment appears plausible. Customary international law binds individuals, states, and non-state actors. The existence of customary rule is very important for the international law on child soldiering where there exists different treaty regulation. The customary rule, without prejudice to the treaty duties, will serve as a minimum standard that binds all.

¹²⁶ . *Ibid* , paragraph 38, p.21

¹²⁷ . *Ibid* , paragraph 33 of the dissenting opinion of Justice Robertson, p.26

5 Accountability of states and non-state actors

While it is natural person that will be held criminally responsible for committing a crime, the state or the non-state actor on whose behalf the individual acted might be held accountable for its failure to comply with its obligation under international law of child soldiering. Criminal sentences on individuals alone are unlikely to prevent breaches or ensure compliance. In other words states and non-state actors as such should be accounted for violating their international obligations. States are bound by treaty obligations that they have ratified, thus they could be made accountable for breaching their obligation under a given treaty. The issue of accountability of non-state actors is much more difficult since most of the treaty obligation does not bind them. Moreover it is non-state actors that are often implicated for recruiting child soldiers. International rules are agreed upon to address states with the result that non-state actors are not bound and the beneficiaries of the rule, i.e. children victimized by the practice, have no enforceable rights.¹²⁸ But it was shown that the CRC optional protocol has managed to extend the duty under the protocol to non-state actors. And the same is true with the ICC statute which provided penal provision for both state and non-state actors. It is also shown that the customary rule on child soldiers binds both state and non-state actors. This part of the thesis will discuss and argue for the ways and possibilities to make state and non-state actors accountable. The Security Council resolutions and the draft articles could be the basis to argue for the accountability of states or non state actors as such.

5.1 Accountability under the Security Council Resolutions

For almost a decade now the Security Council has been sized with the issue of children and armed conflict in general and the issue of child soldiering in particular. Generally the

¹²⁸ . *Supra note 2*, p.3

resolutions deal with the impact of armed conflict on children and protection of children in times of war. The resolutions have also taken the issue of child soldiering significantly especially in the resolutions that came later on.

5.1.1 Chapter VII application

The Security Council is the body at the international level that has the capacity to determine and take action under chapter VII of the UN Charter. This chapter provides the enforcement power of the Security Council. According to Art 39 the SC "...shall determine the existence of any threat to the peace, breach of the peace...and shall make recommendations, or decide what measure shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security." The involvement of the UN Security Council on the issue of child soldiering is a big step. This is because the SC considers the matter as a threat to the international peace and security and requiring action, short use of force, under Art 41 of the UN Charter. Art 41 of the UN charter reads "the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." Art 39 and 41 are the basis for the SC resolutions on child soldiering. The Security Council since 1999 has passed six resolutions under the subject children and armed conflict. The following sub-sections will examine each of the resolutions in the light of the measure taken by the SC on states and non-state actors who in breach of international law recruit and use child soldiers.

5.1.2 Resolution 1261(1999)

Resolution 1261(1999)¹²⁹, the first resolution on the subject, generally condemned the recruiting and using of children in armed conflict. The resolution under paragraph 2 provides that the SC "strongly condemns...recruitment and use of children in armed

¹²⁹ . S/RES/1261(1999) 30 August 1999 can be see at <http://www.un.org/Docs/scres/1999/sc99.htm>

conflict in violation of international law. Similarly the SC extended its condemnation to “...attack on...places that usually have a significant presence of children such as schools and hospitals...” The said paragraph thus “...calls on all parties concerned to put an end to such practice.” This paragraph shows that the SC has recognized that the problem exists and that it constitutes a threat to the peace. But the resolution has not made any reference to specific situation or to specific state or non-state actors. The condemnation is thus broad and not targeted on a specific circumstance. As a measure following its condemnation the SC called for an end to the practice broadly to those who recruit and use child soldiers. This may be taken as a springboard for the process of accountability of states and non-state actors. To elaborate this by an example for the LRA attacking school to abduct children was a common practice in the process of recruiting child soldiers. In this way it has abducted up to ten thousand girls and boys from boarding schools, churches and isolated farms.¹³⁰ The same resolution under paragraph 18 the SC reaffirmed its “...readiness to consider appropriate responses whenever buildings or sites which usually have a significant presence of children are specifically targeted in situations of armed conflicts ,in violation of international law”. This may be used to address situations when states or non-state actors attack such venues to recruit and use children into their armed forces.

5.1.3 Resolution 1314 (2000)

Resolution 1314(2000)¹³¹ is the second resolution that the SC has passed on children and armed conflict but there was no particular condemnation or measure taken on those who in breach of international law recruit and use child soldiers. The resolution under paragraph 16(c) urged regional and subsequent organizations and arrangement to undertake initiative to curb the cross-border recruitment and abduction of children. There is no particular situation that was referred under the paragraph. This gives an indication that the SC is determined to make sure that measures are taken to control the practice. Thus it is not so much about making the states and non-state actors involved accountable but restraining the practice with the help of organizations and arrangements.

¹³⁰ . *Supra note 9*, p. 108

¹³¹ . Resolution 1314(2000) 11 august 2000 S/RES/1314 <http://www.un.org/Docs/scres/2000/sc2000.htm>

5.1.4 Resolution 1379 (2001)

Resolution 1379(2001)¹³², the third resolution, is relatively significant in the light of establishing accountability of state and non-state actors for their practice in child soldiering. The resolution demanded the Secretary-General to report the list of states and non-state actors who in violation of the rules applicable to them recruit and use child soldiers. Specifically paragraph 16 of the resolution requests the Secretary-General to report "...a list of parties to armed conflict that recruit or use children in violation of the international obligations applicable to them..." This may be taken as one step ahead of just words of condemnation. But the SC request shows that it wanted to limit itself to situations that are already on its agenda. Then the request adds that the report to include, other armed conflict situations that in the Secretary-General's opinion should be brought to the attention of the SC as per Art 99 of the UN charter. The said article stipulates that "The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." Such a request leads the report to be selective and not to cover all armed conflicts existing around the world.

In its report to the SC the Secretary –General¹³³ annexed the list of violators of the norms and standards. The list included three states and twenty non-state actors and it only presents five of the conflict situations that the SC was sized with. The conflict situations include Somalia, Liberia, DRC, Burundi and Afghanistan. From among the five situations it is in Liberia, DRC and Burundi that the state is implicated. All the other twenty non-state actors listed are found in five of the counties on the list of the Secretary-General report.

The report also has included those other conflict situations that are not on the SC agenda¹³⁴. They include five non–state actors in Colombia, paramilitaries in Northern Ireland, insurgency groups in Republic of Chechnya, Armed groups and the national armed group

¹³² . Resolution 1379(2001) 20 November 2001 S/RES/1379 (2001)

<http://www.un.org/Docs/scres/2001/sc2001.htm>

¹³³ . Secretary –General report to the security council s/2002/1299 November 26,2002 can be found at

<http://www.un.org/children/conflict/english/reports.html>

¹³⁴ . *Supra note* 133, p.8 and 9

in Myanmar, non-state actor (Maoist) in Nepal, several armed groups in Philippines, Non-state actors in Sudan, the LRA in Northern Uganda and Tamil Tigers of Sri Lanka. This report was considered by the Security Council¹³⁵ on its next resolution on children and armed conflict. The resolution has gone one step further by requesting for the monitoring and reporting on the situations on the list.

5.1.5 Resolution 1460(2003)

Resolution 1460(2003)¹³⁶ under paragraph 5 made reference to the list on the Secretary-General's report. The paragraph states that the SC "notes with concern... and calls on the parties identified on this list [the three states and the twenty non-state actors] to provide information on steps they have taken to halt their recruitment or use of children in armed conflict in violation on the international obligation applicable to them..." In addition the SC, under paragraph 6, makes a threat that if the parties on the list have made insufficient progress "...its intention to consider taking appropriate steps to further address this issue, in accordance with the charter of the United Nations and its resolution 1379(2001)..." Thus, if the parties listed do not end their practice or are doing insufficient to end the practice, then further measures are to be followed. In the end of the resolution, under paragraph 16(a) and (c), the SC requested the Secretary-General to look into the progress made by those on the list and in addition to include "specific proposals on ways to ensure monitoring or reporting in a more effective and efficient way within the existing United Nations system on the application of the international norms and standards for the protection of children in situations of armed conflict in all its various aspects;" The monitoring and reporting that the SC is referring to will be limited in application to the situations on the list.

¹³⁵ . Paragraph 9 of the preamble of Resolution 1460(2003) see note 118.

¹³⁶ . Resolution 1460 (2003) 30 January 2003 s/res/1460(2003) found at <http://www.un.org/Docs/scres/2000/sc2003.htm>

The Secretary-General report to the SC on November 2003¹³⁷, basically made its assessment of the progress made by the parties on the list on the November 2002 report. The aim of the assessment of the parties' progress is towards ending recruitment or use of children in armed conflict. As a basis for its assessment it looked into if parties have engaged in dialogue with the Secretary-General in the field, if the parties have made commitments to stop recruiting or using children, if the parties have ended the recruitment or the use of child soldiers, if the parties have developed action plans to demobilize child soldiers and if the parties have began demobilizing the child soldiers.¹³⁸ It is evident that the aim and the basis of assessment intended to end the practice, rather than making the states and non-state actors accountable for their violation. But this is expected since measure under chapter VII does come as a last resort when all other possibilities seem to have failed. In addition the report also put forward the possible monitoring and reporting mechanism for the parties who are on the list.

The “era of application” that the Secretary-General had in mind was monitoring. The proposal to monitor was indorsed by the Security Council in resolution 1460. The SC requested for the “specific proposal on monitoring and reporting.”¹³⁹

What the report proposed was to have a ‘monitoring and reporting mechanism on the conduct of parties to conflict’. In such monitoring operation among others, recruiting and use of child soldiers, egregious violation against children¹⁴⁰, should receive priority attention.¹⁴¹ It proposed a monitoring network comprising the Security Council among

¹³⁷ . Secretary –General’s report to the Security Council 10 November 2003,A/58/546/S/2003/1053 can be found at <http://www.un.org/children/conflict/english/reports.html>

¹³⁸ . *Supra note 137*, p. 8 paragraph 45

¹³⁹ . *Ibid* , p. 15 paragraph 78

¹⁴⁰ . *Ibid* , p. 16 paragraph 81 gives which of the “most egregious violation to be monitored” “...should include: recruiting and use of child soldiers; killing and maiming of children; rape and other grave sexual violence against children; illicit exploitation of natural resources; abduction of children; and denial of humanitarian access to children.”

¹⁴¹ . *Ibid* , p.16

other UN systems.¹⁴² The information that the SC gets from the network of monitoring “should serve as a trigger for action”¹⁴³. Action that the Secretary-General has proposed includes calling for compliance, condemning violations and applying targeted measures.¹⁴⁴ As to what such targeted measures might include may be cross referred with the Secretary-General’s recommendation. The recommendation provides for “...the imposition of travel restriction on leaders and their exclusion from any governance structure and amnesty provision, a ban on export or supply of small arms, a ban on military assistance, and restriction on the flow of financial resources to the parties concerned”¹⁴⁵.

Concrete measure by the SC is to be taken when violation of recruiting or using children persists. The aim of any concrete measure would be to end the impunity for states and non-state actors whose have persistently violated their obligation.¹⁴⁶ Thus designing a monitoring mechanism that must lead to action (targeted measure or concrete measure) is the core of the “era of application”.¹⁴⁷ One of the recommendations is to update the list of parties who are recruiting and using of children annually and “...include all situations where such practice persists”.¹⁴⁸ Continued updating on the list of parties significantly contributes to identify and make states and non-state actors accountable for their violation. The year 2003 marks the beginning of the “naming and shaming”¹⁴⁹ of states and non-state actors known to have recruited and used children in violation of their international obligation.

¹⁴² . *Ibid* , p. 16-18 , it provided the monitoring network to be composed and their role in the process; Security council in paragraph 83-86, United Nations field presence paragraph 87-94, United Nations Human Rights regime paragraph 95-98, the International Criminal court paragraph 99-100, Office of the Special Representative of the Secretary-General for Children and Armed Conflict paragraph 101-102. it also stressed the importance of inclusion of other organs outside the UN system like NGO’s and Civil Society actors

¹⁴³ . *Ibid* , p. 16 paragraph 85

¹⁴⁴ . *Ibid*

¹⁴⁵ . *Ibid* , p 19 , recommendation (g) under paragraph 105

¹⁴⁶ . *Ibid*

¹⁴⁷ . *Ibid* , p. 18 paragraph 103

¹⁴⁸ . *Ibid* , p. 19 recommendation (h) under paragraph 105

¹⁴⁹ . True-Frost (2007) p. 17

5.1.6 Resolution 1539(2004)

Resolution 1539(2004)¹⁵⁰ considered the November 10, 2003 Secretary-General's report. Paragraph one of resolution 1539 began by putting its strong condemnation on the recruitment and use of child soldiers in violation of international obligation applicable to each of the state and non-state actors implicated. In paragraph two the SC requested the Secretary-General "...to devise urgently and preferably within three months, an action plan for a systematic and comprehensive monitoring and reporting mechanism ..." taking account of the proposal in its 2003 report. Here again the Security Council seems to be shying away from taking concrete action on persistent violators.

This resolution makes direct reference for the parties on the list without off course mentioning the names of state and non-state actors on the list. The SC also demanded plans to halt the recruitment and use of child soldiers. Under paragraph 5 the Security Council notes with concern the continued practice by the parties on the list. Then is called upon the parties "...to prepare within three months concrete time-bound action plans to halt recruitment and use of children in violation of the international obligations applicable to them..." Here again the SC continued to make threats on the parties who despite the resolutions and the follow up by the Secretary-General continued to violate their obligation. The SC expressed its intention "...to consider imposing targeted and graduated measures, through country-specific resolutions, such as, *inter alia*, a ban on the export or supply of small arms and light weapons and of other military equipment and on military assistance, against these parties if they refuse to enter into dialogue, fail to develop action plan or fail to meet the commitments included in their action plan, bearing in mind the Secretary-General's report". Such a threat is limited to those parties whose situation is already on the agenda of the SC. As for the other situations of armed conflict that are mentioned in the Secretary-General report, under paragraph 6 of the resolution 1539, the SC expressed its concern and calls on all parties to halt the practice and expressed its intention to consider taking appropriate steps to further address this issue and take action in accordance with the

¹⁵⁰ . Resolution 1539 (2004) 22 April 2004 S/RES/1539(2004) can be found at http://www.un.org/Docs/sc/unsc_resolutions04.html

UN charter and its resolutions. This shows the readiness of the SC to take actions on yet other conflict situations which are not on its agenda. In the end while demanding the next report from the Secretary-General ,under paragraph 15, the SC demanded that the report should include information on compliance and progress in halting the practice of child soldiering , both of the parties on the on SC agenda and those of other situations that the report had included. In addition the SC demanded for information on the progress made with regard to the action plan “...that calls for a systemic and comprehensive monitoring and reporting mechanism;” that the SC demanded from the Secretary-General under paragraph 2 of the same resolution.

5.1.7 Resolution 1612 (2005)

The 2005 Secretary-General report to the SC recommended targeted and concrete measures where insufficient or no progress has been made by the parties on the list.¹⁵¹ It made the same suggestion of proposed measures in previous report. The SC reluctance in taking targeted measure, on the parties on the list¹⁵², can further be seen in resolution 1612(2005). The Security Council expressed that it is seriously concerned with the lack of progress in developing and implementing, concrete and time-bound, action plan to halt the practice that was demanded in resolution 1539(2004) from every party on the list. In addition the SC continued its threat by reaffirming its intention to take country specific measure.¹⁵³ The Report indicated that “the practice of listing offending parties...represents a landmark development for monitoring and reporting”.¹⁵⁴ The report among others focuses on, recruitment or using of child soldiers as the gravest violations especially egregious

¹⁵¹ . Children and Armed conflict ,Report of the secretary-General 9 February 2005 A/59/695-S/2005/72 , p. 13 paragraph 57 can be found at <http://www.un.org/children/conflict/english/reports.html>

¹⁵² . *Ibid* , p.36-39 annexed to the Report; now the list include a total of 31 non-state actors in Burundi ,Cote d’Ivoire , DRC, Somalia and Sudan (situations on SC’s agenda) and a total of 23 non-state actors in Colombia, Myanmar, Nepal, Philippines, Sir Lanka and Uganda (situations not on SC agenda).

¹⁵³ . Resolution 1612(2005) 26 July 2005 S/RES/1612 (2005) can be found at p. 3 paragraph 1,7& 9 http://www.un.org/Docs/sc/unsc_resolutions05.htm

¹⁵⁴ . *Supra note* 151, p.15

violation that demand monitoring.¹⁵⁵ Thus the mechanism must monitor the conduct of all parties to conflict state and non-state actors.¹⁵⁶ Security Council is the key and by far the most important “destination for action” and since it has primary responsibility for peace and security has special responsibility for protection of children and ensuring compliance.¹⁵⁷

Resolution 1612 have become finally successful in creating the monitoring and reporting mechanism and established a working group that will review the reports. This is a positive aspect of the resolution. But it is disappointing that the SC while acknowledging the gravity of the problem refuses to take action. The resolution adds another series of paper threat and is not going to deter the parties from recruiting and using child soldiers.¹⁵⁸

Such monitoring and reporting may serve as the best way to follow up on the progress made by the parties on the list in ending their use of child soldiers. In addition it can be a tool to identify who is not making any effort to end the practice. Thus it may serve as the basis for taking targeted action on those who despite the monitoring continue to violate their obligation under international law. Targeted action on specific situations might have been much better effect to enforce the rules on child soldiering. The resolutions as examined above aim at ending the practice. Looking at it from the point of view of making the states and non-state actors accountable the Security Council resolutions may serve as the basis for taking action. This may be for the simple reason that the SC has taken up the matter as constituting a threat to international peace and security. But the fact that the Security Council wants to limit itself to situations that are on its agenda may make the process less effective. This is because the process will not cover all violations by state and non-state actors around the globe. It is also not difficult to notice that threat to take targeted action is the trend in the resolutions. But the Security Council did not go any step further than threatening to take specific and targeted action on persistent violators.

¹⁵⁵ . *Ibid* , p. 16 paragraph 68

¹⁵⁶ . *Ibid* , p. 17 paragraph 74

¹⁵⁷ . *Ibid* , p. 23-24 paragraph 108 and 110

¹⁵⁸ . *Supra note* 90, p. 252

To sum up violation of the rules on child soldiering has triggered Security Council's involvement. The resolutions in general have been clear in condemning the violation by both state and non-state actors. Moreover the resolutions have managed to name and shame the violators and establish monitoring and reporting with the aim of ending the practice.

5.2 Accountability under the draft articles

The argument that states and non-state actors as such could be accounted for violating the minimum standard on child soldiering will be the subject matter of discussion under the present part of the thesis. It examines and argues for the application of chapter three of the draft articles on state responsibility. The prohibition of the conscription and enlistment of children below 15 years of age into armed forces or using them to participate actively in hostilities is the minimum standard on the international law of child soldiering. This minimum standard forms the basis of the argument that states or non-state actors who acted in breach can be made accountable under the draft articles. The following parts will seek to identify if, how and when the draft articles be applied.

5.2.1 The Notion

To argue for the accountability of states and non-state actors under the draft articles looking at the idea of state responsibility in the context of international law of child soldiering is helpful. To say that there is an international wrongful act of a state two cumulative requirements must be present. Those are when the conduct (act or omission) is attributed to a state under international law and that the conduct constitutes a breach of an international obligation of the state.¹⁵⁹ Basically attribution of conduct to a state concerns that the conduct be either that of conduct of an organ of a state or that of persons or entities exercising the elements of government authority or that of organs placed at the disposal of a state by another state or the like.¹⁶⁰ Under the second requirement the conduct must constitute a breach of an international obligation. According to Art 12 of the draft articles there exist a breach of an international obligation "...when an act of that state is not in

¹⁵⁹ . Art 2 of the draft articles

¹⁶⁰ . Art 4-11 of the draft articles

conformity with what is required of it by that obligation, regardless of its origin or character.” The breach or the violation of the rule on child soldiering is thus an internationally wrongful act. Therefore according to Art 1 of the draft articles violation of the rule on child soldiering entails the international responsibility of that state.

States and non-state actors alike have an absolute obligation not to violate the prohibition of the conscription and enlistment of children below 15 years of age into armed forces or using them to participate actively in hostilities. Violation of this norm becomes an international wrongful act.

The breach of this norm now is a serious violation of the international humanitarian law and has become a war crime under the ICC statute. Besides it also constitutes a norm under international human rights law. And under the Security Council resolutions breach of the norm is regarded as serious and egregious in nature triggering action by the SC. The norm protects and preserves an important value of the international community and it protects international public order. Thus does the violation of the norm constitute a serious breach of obligation under the peremptory norms of general international law (under chapter III of the draft articles)? Then, what is the consequence of the breach of the norm under the draft articles? To address the first question the requirement under Article 40 of the draft article must be fulfilled. First, does the obligation derive from a peremptory norm of general international law? Second, is the breach serious in nature?

5.2.2 Character of the obligation breached

The character of the obligation breached can be examined from the value protected by the norm and arguably its peremptory character.

In terms of the value protected by the norm, the character of the obligation breached can be examined from different angles. It can be examined from the norm’s status as a war crime or as a serious violation of international humanitarian law, as a universal standard under the CRC, as a customary international law and as a norm the breach of which poses a threat to the international peace and security. Such character of the norm may be used in support of the argument that the norm is accepted and recognized by the international community as a norm from which no derogation is permitted.

For the application of chapter III of the draft articles the character of the obligation breached must be concerning an obligation arising under a peremptory norm of general international law.¹⁶¹

5.2.3 The value protected

The prohibition of the conscription and enlistment of children below 15 years of age into armed forces or using them to participate actively in hostilities intends to protect important value of the international community. The kind of obligation referred under Art 40 of the draft articles, arises from substantive rules of conduct and the breach of which has come to be seen as intolerable, because of the threat it presents to the most basic human values.¹⁶²

Similarly the breach of the norm on child soldiering has also come to be intolerable as the violation escalated both by state and non-state actors in armed conflicts around the world.

The breach of the rule at issue is regarded as war crime or a serious violation of international humanitarian law. Under the preamble of the ICC statute war crime particularly the norm at issue is regarded as the most serious crime of concern to the international community as a whole. According to Cassese such crimes that are regarded as serious violations entail responsibility of the state under chapter III of the draft articles.¹⁶³

Besides, the breach of the humanitarian norm under Art 77(2) of the API is regarded as inhumane¹⁶⁴ while Art 4(3) of the APII provides the norm as one of the fundamental guarantees of the protocol. These fundamental guarantees are among the basic rule of humanitarian law. Basic rules of humanitarian law regarded as “intransgressible” in character justifies the treatment of such rules as being peremptory.¹⁶⁵

The rule on child soldiering under the CRC is a universally accepted standard. CRC is the most widely ratified human rights convention. CRC protects the human rights of children and the norm at issue protects children from the effects of warfare. Such universal

¹⁶¹ . Crawford (2002), p. 245

¹⁶² . *Ibid* , p. 246

¹⁶³ . *Supra note* 72, p. 16

¹⁶⁴ . *Supra note* 44, commentary on Art 77 (2) of APII

¹⁶⁵ . *Supra note* 161, p.246

acceptance of the norm indicates that the international community as a whole has acknowledged that the prohibition preserves important value of the international community. It can be argued that the prohibition in the end aims to protect the fundamental human rights of children i.e. their right to life. When the prohibition is violated it is likely that the life of the children will be endangered and in the end their right to life deprived.

It is also important to take the SCSL standing concerning the character of the obligation at issue and the impact of the violation on the victims. The court has noted that the violation is egregious and abhorrent and the prohibition protects important values.

This egregious and intolerable violation has triggered the involvement of the Security Council regarding it as a breach which poses a threat to the international peace and security. Such gross violation has in the past two decades has threatened the most basic human value that the international community agreed to protect.

All these show that the prohibition does exist to protect and preserve important value. Thus those state and non-state actors who breach their obligation under the prohibition must be made accountable.

5.2.4 Art 53 of the VCLT

In order to be able to assess the character of the obligation and the applicability of chapter III of the draft articles it is necessary to examine the peremptory norm under Art 53 of the Vienna Convention on the Law of Treaties (VCLT).

Art 53 of the VCLT provides that "... a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and can be modified only by a subsequent norm of general international law having the same character". Three things must be examined from the provision. First the norm is a norm of general international law. The second is acceptance and recognition of the norm by the international community of states as a whole. Third is the acceptance and recognition that there can be no derogation from the norm.

It has long been established and argued that there are few norms that are regarded as peremptory norms. The obvious list presented is aggression, slavery, genocide, racial

discrimination and apartheid. These peremptory norms have been established based on the practice of both national and international courts and based on the fact that the norms have been prohibited in widely ratified international treaties and conventions admitting of no exception.¹⁶⁶ But being very restrictive and limiting what can be regarded as peremptory norms to those lists above will be to the detriment of the protection of important values that are emerging in the contemporary international law. The approach that is taken in the following paragraph to determine the character of the norm on child soldiering is progressive. The reason for following progressive approach is intended to safeguard the value that the norm protects so that the obligation is owed by state and non-state actors to international community of states. The norm on child soldiering protects overriding interest of the international community and that is what peremptory norms intend to protect. Moreover peremptory norms have increasingly become important in the process of determining the permissible limit for action or omission of states, non-state actors and individuals in different areas.¹⁶⁷ Thus to determine if a norm is peremptory “enquiring into the content of every norm on its merits in light of some predetermined category of identifying a norm’s peremptory character”¹⁶⁸ is crucial. Besides, the fact the norm has or lacks states and courts practice can not be an exclusive factor in identifying peremptory norms.¹⁶⁹ Therefore it is important to make an assessment of the merits of the norm on child soldiering based on the three basis of examination setout above.

Is the norm a norm of general international law? What is meant by general international law? Norms of general international law are norms that create obligation for at least a great majority of states or other subjects of international law.¹⁷⁰ For a norm to be part of general international law at least a great majority of states accept the obligation under the norm.¹⁷¹ Taking the norm under Art 38 of the CRC the international community of states except

¹⁶⁶ . *Ibid*

¹⁶⁷ . Orakhelashvili (2006) in its introduction

¹⁶⁸ . *Ibid* , p.43

¹⁶⁹ . *Ibid*

¹⁷⁰ . Hannikainen (1988), p.208

¹⁷¹ . *Ibid* , p. 209

USA and Somalia have accepted the obligation and no reservation is entered in accepting the obligation under the provision. CRC is regarded as a convention that has universal ratification. This is indicative of the fact that the international community accepts the duty under the norm. The same holds true with the wide ratification of the API and APII. Great majority of states have accepted the obligation under the norm. This also answers in part the second question raised under art 53 of VCLT.

Is the norm accepted and recognized by the international community of states? Looking into Art 53 of VCLT, it provides that the norm must be agreed up on by the international community of states as a whole. Here it could be argued that what is emphasizing is not so much on the necessity of agreement by the whole international community that a certain norm is peremptory. This is because “peremptory norms prevail not because the states involved have so decided but because they are intrinsically superior and can not be dispensed with through standard inter-state transactions”¹⁷². In other words, peremptory norms as opposed to ordinary norms are mandatory and imperative in all circumstances.¹⁷³

It has already been shown that the prohibition under the norm on child soldiering is binding as a compulsory obligation under the CRC, API, APII and ICC statute, whether in internal or international armed conflicts.

Does the norm permit derogation? The derogation referred under Art 53 of the VCLT is a derogation made in an attempt to nullify a peremptory norm *inter se*.¹⁷⁴ What is referred is any attempt by states to replace public order norms or set down the interests protected and to make them inapplicable by agreement among themselves.¹⁷⁵ This is evident from the merit of the rule on child soldiering and the value that the norm is intended to preserve.

The values protected by the rule of peremptory norms are not at the disposal of individual states.¹⁷⁶ Meaning it should be the value that the norm protects what has to be decisive to determine the character of the obligation breached. The link the norm has to community

¹⁷² . *Supra note 167*, p.8

¹⁷³ . *Ibid*

¹⁷⁴ . *Ibid* , p.59

¹⁷⁵ . *Ibid* , p.59 and p.44

¹⁷⁶ . *Ibid* , p.46

interest as opposed to individual interest of state or non-state actors is a factor that should be determinative of the norms character. Therefore the norm intends to benefit a given actor in the interest of the community, there can be no valid derogation from the norm and states or non-state actors can not split the norm into bilateral legal relations.¹⁷⁷

Such progressive approach in identifying the character of the norm at issue as peremptory norm contributes in making states and non-state actors as such accountable for violating the obligation that they owe to the international community.

5.2.5 Intensity of the breach

The second requirement for the application of chapter III of the draft articles is to examine the intensity of the breach involved. Art 40 (2) stipulates that “a breach of such as obligation is serious if it involves a gross or systemic failure by the responsible state to fulfill the obligation”. Thus the breach must be gross or systemic for it to be serious enough to trigger chapter three applications.

A breach of an obligation is serious if it reaches a certain order of magnitude but it is not intended to imply that any violation of these obligations is not serious or is somehow excusable.¹⁷⁸ Chapter three is intended to be applied to those breaches which are more serious or systemic.¹⁷⁹ What must be taken into account is the intensity of the violation and its effect and the violation amounting to an assault to the value that is being protected by the rule.¹⁸⁰

A breach is systemic if it is carried out in an organized and deliberate way and the scope of the violation and the gravity of their consequence for the victims are indicators of the systemic nature of the breach.¹⁸¹ Above all the serious breaches that can be applied under chapter three of the draft articles are those breaches that are likely to be dealt with the

¹⁷⁷ . *Ibid* , p. 47

¹⁷⁸ . *Supra note* 161, p.247

¹⁷⁹ . *Ibid*

¹⁸⁰ . *Ibid*

¹⁸¹ . *Ibid*

Security Council.¹⁸² But when it comes to the SC resolutions discussed above, the resolutions did not make specific reference to states and non-state actors that are implicated to have violated the rule. At least the series of resolutions on the matter indicates how serious the violations are.

If chapter III of the draft article is applied in such a manner, then states and non-state actors will owe the obligation to the international community. This becomes so important in increasing the enforceability of the obligation and the accountability of state and non-state actors as such. This leads to the second question- what is the consequence of the breach of the norm under the draft articles for the states and non-state actors?

If the norm is taken as forming part of the peremptory norm under chapter III of the draft article then the consequence of the breach is what is provided under Art 41 of chapter III of the draft article.

5.2.6 Consequences of the breach for states

Art 41 of the draft articles provides the consequences of a serious breach of the obligation under Art 40. It states;

1. States shall cooperate to bring an end through lawful means any serious breach within the meaning of Art 40.
2. No state shall recognize as lawful a situation created by a serious breach within the meaning of Art 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

Sub Art 1 and 2 prescribe special legal obligation for those states faced with breaches that fall under Art 40.¹⁸³ The special legal obligation include duty to cooperate to bring an end to the violation, duty to abstain from recognizing the violation as lawful and duty to abstain from rendering aid or assistance that may maintain the violation. Thus according to these two sub articles all states are called upon to make appropriate response to the violation.

¹⁸² . *Ibid* , p.248

¹⁸³ . *Ibid* , p.249

Concerning the duty under sub article 2 it applies even to the state responsible for the violation. Meaning the responsible state is also under the obligation not to recognize or sustain the unlawful situation arising from the violation.¹⁸⁴

Sub article 3 provides that the violation entails the legal consequences stipulated under chapter I and II of part two of the draft articles. Thus breach under Art 40 gives rise to an obligation on the responsible state to cease the wrongful act (Art 30(a)), to give guarantee and assurance for non-repetition of the violation (Art 30(b)) and to make reparation (Art 31). The responsible state could be made accountable to make reparation for the injury sustained by the wrongful act. The obligation of the norm on child soldiering is owed to the international community as a whole, thus satisfaction in terms of Art 37(2) may be appropriate given the fact that it can not be made good by restitution or compensation as Art 35 and 36 respectively provide. Art 37 (2) states that “satisfaction may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality.” These are consequences that should be taken as a means of encouraging the state in violation to adhere to its obligation under international law.¹⁸⁵

In addition sub article 3 provides for “...such further consequences that a breach to which this chapter applies may entail under international law” This phrase accordingly allows that international law may recognize additional legal consequences following from violation under Art 40.¹⁸⁶ Therefore states that breached the minimum standard on child soldiering may be accounted for as per the consequences set out under Art 41 of the draft articles.

5.2.7 Consequences of the breach for non-state actors

It has been shown that it is mostly non-state actors that are implicated for acting in violation of the norm on child soldiering. Even this occurrence has led to the inclusion of provisions to criminalize individuals that belong to non-state actors. But there appears to be no rule that can make non-state actors as such accountable for violating the norm. The only possible circumstance that a non-state actor can be made accountable under the draft

¹⁸⁴ . *Ibid* , p. 251

¹⁸⁵ . Than (2003) p.26

¹⁸⁶ . *Supra note* 161, p. 253

articles is if Art 10 can be applied. Art 10 provides that “the conduct of an insurrectional movement which becomes the new government of a state shall be considered an act of that state under international law”. This provision will have limited applicability. First the provision makes reference to insurrectional movement only. This excludes all the other forms of non-state actors. Second the provision will only apply if the insurrectional movement becomes successful in becoming a state. Therefore non-state actors, except when they become successful in forming a state, can not be accounted for violating the norm on child soldiering under the draft articles.

6. Conclusion

It has been shown that the regulation of the international law of child soldiering is taken up under different treaty laws. As a result of which different states may be bound by different treaty obligations. The prohibition of the conscription and enlistment of children below 15 years of age into armed forces or using them to participate actively in hostilities forms what now is regarded as the minimum standard on the international law of child soldiering. Thus violation of this minimum standard should entail accountability of both states and non-state actors under international law.

The egregious and abhorrent nature of the violation of the rules on child soldiering has triggered Security Council's involvement which resulted in series of resolutions. The resolutions condemned, identified violators, and established monitoring and reporting system and a working group to review reports with the aim of ending the practice. The SC has also made threats to take targeted action on violators who are making no progress to end the practice. Since the aim of the SC resolution is to end the practice the council should be able to convert the threats into actions on the persistent violators that it identified so that the aim is fulfilled.

The violation of the rule on child soldiering is intolerable and is a breach of an important value of the international community. Thus not only individuals should be criminal responsible but also the state and non-state actors as such should be made accountable under international law. The violation of such a norm is an internationally wrongful act which forms a serious breach of obligation under peremptory norms of general international law. Arguably chapter III of the draft articles could be made applicable to make a state in breach accountable. But under the draft articles non-state actors, who most of the time are implicated for violation, can only be made accountable if they become a state. Therefore, the accountability of state and non-state actors as such is a matter that triggers concerns if it is possible to enforce the rules with the existing lacuna in the international system.

Bibliography

Literature

Books

Brett, Rachel and Irma Specht. *Young soldiers: why they choose to fight*. Colorado, (Lynne Rienner Publishers) 2004

Briggs, Jimmie. *Innocents lost: when child soldiers go to war*. New York, (Basic Books) 2005

Cassese, Antonio. *International Criminal Law*. Oxford, (Oxford University Press) 2003

Cassese, Antonio. *International Law*. 2nd edition. Oxford, (Oxford University Press) 2005

Commentary on the Rome statute of the International Criminal Court: Observers' Notes, Article by Article. Edited by Otto Triffterer. Germany, (Nomos Verlagsgesellschaft, Baden-Baden) 1999.

Crawford, James. *The International Law Commission's articles on State Responsibility: Introduction, Text and Commentaries*. Cambridge, (Cambridge University Press) 2002

Hannikainen, Lauri. *Peremptory Norms (Jus Cogens) in International law: Historical Development, criteria, Present status*. Helsinki, (Finnish Lawyers' Publishing Company) 1988

Happold, Matthew. *Child soldiers in International Law*. Manchester, (Manchester University Press) 2005

Orakhelashvili, Alexander. *Peremptory Norms in International Law*. Oxford, Oxford University Press, 2006. (Oxford Monographs in International Law)

Than, Claire de and Edwin Shorts, *International Criminal Law and Human Rights*. London, (Sweet and Maxwell) 2003

The Handbook of Humanitarian Law in Armed Conflict. Edited by Dieter Fleck. Oxford, (Oxford University Press) 1995.

The International Criminal Court: Element of crimes and Rules of Procedure and Evidence. Edited by Roy S. Lee. Ardsley, New York, (Transnational Publishers, Inc.) 2001

The Rome Statute of the International Criminal Court: A Challenge to impunity. Edited by Mauro Politi and Giuseppe Nesi. Aldershot, (Ashgate Publishing Limited) 2001

Articles

Becker, Jo. *Child soldiers: changing a culture of violence*. In: Human rights: Selection of individual rights and responsibilities American Bar Association. Vol. 32, No.1 (winter 2005), pp. 16-18

Berry, Jo De. *Child soldiers and the convention on the rights of the child*. In: The annuals of the American academy of political and social science. Vol. 575 (2001), pp. 92-105

Drumbl, Mark A. *Prosecutor v. Thomas Lubanga Dyilo. Decision Sur La Confirmation Des Charges. Case No. ICC-01/04-01/06. AT <[HTTP://WWW.ICC CPI.INT/LIBRARY/CASES/ICC-01-04-01-06-803_FRENCH.PDF](http://www.icc.cpi.int/library/cases/icc-01-04-01-06-803_french.pdf)>. International Criminal Court, Pre-Trial Chamber I, January 29, 2007*. In: American Journal of International Law. (2007)

Geske, Mary B. with Mark Ensalaco. *Three Prints in the Dirt: Child soldiers and human rights*. In: Children's Human rights progress and challenge for children worldwide. Lanham. Boulder. New York. Toronto. Oxford, (Bowman and Littlefield Publishers) 2005. pp. 111-126

Happold, Matthew. *Child soldiers in international law: The legal regulation of children's participation in hostilities*. In: Netherlands International Law review. Vol. XLVII (2000), pp. 27-52

Madubuike-Ekwe, Joseph N. *The international legal standards adopted to stop the participation of children in armed conflicts*. In: Annual Survey of International and Comparative Law. (Spring, 2005)

Meron, Theodor, *Revival of Customary Humanitarian Law*. In: American Journal of International Law. (October, 2005)

Novogrodsky, Noah B. *Litigating child recruitment before the special court for Sierra Leone*. In: San Diego International Law Journal. (Spring, 2006)

True-Frost, Cora. *The Security Council and norm consumption*. In: New York University Journal of International Law and Politics. (Fall, 2007)

Webster, Timothy. *Babies with arms: International Law and Child soldiers*. In: The George Washington International Law review. Vol.39, No.2 (2007), pp. 227-254

Wells, Sarah L. *Crimes against child soldiers in armed conflict situations: Application and limits of international humanitarian law*. In: Tulane Journal of International and Comparative Law. (Spring 2004)

Case law

Prosecutor V. Sam Hinga Norman, Special Court for Sierra Leone, case No.SCSL-2004-14-AR72(E), May 31,2004.

UN Documents

Report of the Secretary-General on Children and Armed Conflict, November 26 2002, S/2002/1299

Report of the Secretary-General on Children and Armed Conflict, November 10 2003, A/58/546/S/2003/1053

Report of the Secretary-General on Children and Armed Conflict, February 9 2005, A/59/695-S/2005/72

U.N. Security Council Resolution 1261(1999), August 30 1999, S/RES/1261(1999)

U.N. Security Council Resolution 1314(2000), August 11 2000, S/RES/1314(2000)

U.N. Security Council Resolution 1379(2001), November 20 2001, S/RES/1379(2001)

U.N. Security Council Resolution 1460(2003), January 30 2003, S/RES/1460(2003)

U.N. Security Council Resolution 1539(2004), April 22 2004, S/RES/1539(2004)

U.N. Security Council Resolution 1612(2005), July 26 2005, S/RES/1612(2005)

Treaties

GCIV, Geneva Convention Relative to the Protection of civilian Persons in Times of War, Geneva 12 August 1949

API, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, 8 June 1977

APII, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the protection of Victims of Non-international Armed Conflicts, 8 June 1977

VCLT, Vienna Convention on the Law of Treaties, Vienna 23 May 1969

CRC, Convention on the Rights of the Child, 20 November 1989

Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict, 25 May 2000

ICC Statute, Statute of the International Criminal Court, Rome 17 July 1998

ILO- Convention no.182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 17 June 1999

International Law Commission's draft articles on Responsibility of States for Internationally wrongful Acts, 10 August 2001

